

EXHIBIT 201

DAVID MCAULEY:

Thank you very much. Welcome, everybody, to the March the 2nd call for the Implementation Oversight Team for the Independent Review Process. We are a small group hoping that nonetheless some more of us will gather during this call. And even though we're small, I would like to press on and have a call and have it on the record so we can ensure that those who can't join us today could listen to the record and find out what happened.

I want to begin by asking if there is anyone on audio who is not present on the Adobe room so that we can have an accurate roll call.

Hearing none, I will then ask, does anybody that's on the call have any updates, changes, etc. to their Statements of Interest?

Again, hearing none, let's dive into the agenda. But let me make one parenthetical comment. We have on the call today Reg Levy of the Registry Stakeholder Group and Minds and Machines. I am taking part as a participant in a Chairing Skills Pilot Program that ICANN is running, and Reg has kindly volunteered to act as a coach. And so her job during this call is to simply watch basically and she and I will have a discussion sometime following the call in that effort toward chairing skills development. So that is, as you all know, this is a closed group but that's Reg's role in this call, and I'm very grateful to her for it. And so now let's press on.

The second item on the agenda following the administration bit is considering our comments. As you all have heard me say in the past, our job is becoming largely operational/advisory with respect to actions like

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standing up the Standing Panel, getting Expressions of Interest out – that’s ICANN’s job but we will help – helping SOs and ACs cull through people who will apply to become members of the Standing Panel, looking at the administrative support for IRP, all of those things. But the rules are our decisional role, and these are really important for us. We’ve had many good and many involved comments, and so we have a bit of a mountain to climb in a relatively short time.

I’m going to ask Bernie if he could speak to the schedule that we should pursue for finishing comments and for doing some upcoming calls in the month of March. I will then mention a little bit about ICANN58.

Bernie, could you also talk about the tool that you’re developing for us to use? And then I will again talk about volunteers for picking up specific issues, and we need to try and get through this quickly so Bernie, could I ask you to comment?

BERNARD TURCOTTE:

Thank you, David. First of all, we are March 2nd and the report on the public consultation has been extended to March 29th. This is the length of our consultation already got extended. We pushed out the report. But we do have to produce a report as per the rules for public consultations. The problem is, we’ve got ICANN58 in Copenhagen next week in the middle of this, and it’s going to take up a bit of time. So there are no meetings scheduled during the Copenhagen meeting obviously, but we have a meeting on Thursday, the 23rd of March and then on the 30th of March, one week later which is a day later. So we only have – after this one – two meetings to provide the input to staff

so we can write this up and post it so that everyone who did take the time to publish comments knows that they were looked at and what we're planning to do with them.

In that context of what we're planning to do with them, you did get the original spreadsheet that sort of was staff's take on where the comments landed. There are different ways to look at that, but it is just to get the team started. Additionally, we've created some forms in Google Docs for each of those categories of comments, which is trying to help people take on one of the comments for the less significant ones and go through them and provide recommendations for this group to look at so that we can approve those and then get them into the report for the comment.

That's about it for me unless there are questions. Thank you.

DAVID MCAULEY:

Thanks, Bernie. And thank you for the tools you've already given us, especially the spreadsheet, the compilation of comments. Those are very valuable, and so I would commend them again for use by members of the team.

Bernie, I do have a question for you. We do have calls, as you mentioned, later in March. In the month of March after ICANN58, are there any other available time slots? And I ask knowing that the time slots themselves are hard to come by with competition among a number of groups for these time slots. Can you speak a little bit to that?

BERNARD TURCOTTE:

Yes sir. Basically we've got until March 19th booked off as that is a Sunday. ICANN58 closes officially on March 16th which is the Thursday, giving a few days for people to get back home and get through the weekend.

Starting on March 20th, that's the week we've got the 23rd schedule at 19:00 on the Thursday, and then the 30th later on. There are still quite a few slots open amazingly. This is exceptional but I think a lot of groups are waiting to see what's going to happen at the Plenary before they start booking slots. So I've got a number of good slots for the weeks of the 20th and the 27th that are still open if we want to schedule additional calls.

DAVID MCAULEY:

Thank you, Bernie. So let's speak a little bit about ICANN58 for a moment. I am going to do my best to get some space. I might be able to get some Verisign space or something else, and hopefully park there for a couple of hours and I will send an invite to those folks on this team who may be in Copenhagen for the meeting to come by and chat with me and talk about the consideration of the rules in any event. And when I do that – hopefully I'll be able to do that – I will come out to the list with a notice of date, time, place, that kind of thing.

And then finally on this #2 of the agenda – and I need to try and slow down. I apologize, Kavouss – it is important that people step up and volunteer to take on an issue presented in the comments. And in this respect, I would commend again the good spreadsheet that Bernie put out and we can re-mail it if needed, where the issues are listed by issue

and then sub-headings under that include comments by various commenters. Some issues just have one commenter. Other issues have many as we'll see. And so we need help. There's a tall mountain to climb. So I'll ask people please to consider stepping up and volunteering. And then based on what Bernie said about the meeting schedule and the schedule that we need to try and meet, obviously we need to try and make progress on the list.

So before we get into the actual substantive discussions, let me try and answer Avri's question in the chat, and simply saying I am going to make myself available – it could either be private or a group meeting – just in case anyone needs any help on considering which issues to pick or anything like that. It's not meant to be a formal moving the ball forward for the group. Sort of an administrative kind of discussion. It sounds to me like that would be appropriate, but if there's any concerns you can let us know on the list.

Having wrapped up #2, I would like to begin the substantive discussions. As we all know, the time within which a claim has to be filed generated a lot of discussion. Becky and Malcolm and I then presented a question to Sidley, our outside Counsel, and Sidley came back and confirmed that there is a problem with the timing, a problem that Malcolm noted. And so Malcolm has kindly volunteered to take the lead on this discussion, and if it's okay with you, Malcolm, I'm now going to turn the floor over to you.

MALCOLM HUTTY: Thank you, David. I circulated an analysis that I did of the public comments received on the mailing list yesterday, and I think that it is worth starting by going through that really because people took time to make public comments and I think it's entirely appropriate that we should do them the respect of spending some time to focus on what it is that they've told us.

With your support, Mr. Chairman, I would propose to walk through this analysis. It may not be perfect. Certainly the headings that I've used are my own and are not the words of the individual commenters. But what I've tried to do is boil down the essence of the arguments and recommendations being made by the commenters into categories. When we put this out for public comment it was just, "Please send us any comments," with nothing really very specific in terms of questions and I've tried to turn this into multiple choice results by picking out the options out of the comments that have been raised themselves by the respondents.

DAVID MCAULEY: Malcolm, can I interrupt just for a moment?

MALCOLM HUTTY: Yes. Go ahead.

DAVID MCAULEY: Kavouss has his hand raised, so my question to you, Malcolm, would be would you like to manage the queue while you're speaking or would you like me to do that?

MALCOLM HUTTY: That's a very good question. Let's take Kavouss's point first because I think I saw him on the mailing list first and I think he had a question about whether we should even be going through these public comments like this. So why don't we take Kavouss now, and then afterwards if we do then carry on to go through this paper, perhaps you would manage the queue while I speak to it.

DAVID MCAULEY: Thank you, Malcolm. And in managing the queue, once I get it I will try to bring up any hands that are raised at a good moment. So thank you and Kavouss, go ahead.

KAVOUSS ARASTEH: Yes. Thank you, Malcolm. And thanks, everybody. My question is that when we start to review the responses at the beginning of the time we received, in the middle of the period, or at the end of the deadline we have started to review the reply received. Because [it] is said earlier, that will give rise to some misunderstanding of the situation. My question is this, and the second question is that all of these things that was put to public comment was agreed in the CCWG with a number of participants starting from 28 up to 45. Now, if we receive a comment of five persons, then that was not correct and proposing differently does this five response override the decision of 45 or not? Because I truly agree with the public comments. I have full respect for the public comments. But those people attending CCWG are also member of the public.

So we cannot be subordinated by very few [or] in number of the replies received. This is a shortcoming in the entire ICANN public comment. We have to have something quite clear. But not because of a very, little amount or less number of the people opposing to what was agreed by the greater number. We abandon what we have agreed and yield to the minority giving the comment and that is a problem. Because I look at some of these statistics and I have problems – 45 people agreed for something and eight people disagreed with that. What we do? We override the 45 people decision by this eight people without listening to the debate?

Why with just 45 [inaudible] for instance or why with just 12 months? There were many, many, many, discussions and all of a sudden somebody from the [inaudible] come, “No, I don’t want 45. I [inaudible].” This is correct? This is a good way to proceed? Just answer [Inaudible]. Thank you.

MALCOLM HUTTY:

David, do you want to answer or shall I?

DAVID MCAULEY:

I will make a brief statement and then If you would please speak to the specifics, Malcolm. And let me apologize to Kavouss a little bit. I have a not so great connection but I did read Kavouss’s mail and I do believe I heard most of the comment.

Let me just note that with respect to timing, our Counsel have indicated that we do have a timing issue that we need to address. And then I

would say that what we're involved in here is addressing comments that the public made. And I think that we need to go through the comments. I think that's exactly what you are doing, what you were in the process of doing, Malcolm, with respect to the timing of the claims. And I think that once we have these discussions on the phone, we will in all likelihood end up coming back out to the list and saying, "As a result of these discussions, here is where we" – that is, the leader of this particular issue – "believe that the IRP IOT team should fall." So I have a feeling that we'll wrap this up on the list and so I would encourage you, Kavouss, to join the list and restate what your concern is but I do think it's an important exercise to go through these comments and that Malcolm is on the right track.

That's my comment. Malcolm, back to you.

MALCOLM HUTTY:

Thank you, David. I would also add that my understanding of the procedure varies from Kavouss's. Kavouss just said that the CCWG as a whole had agreed these Rules of Procedure. Now I'm not sure that that's whether his understanding or mine is the accurate one, but my understanding was that that had not happened, that the CCWG had simply agreed to put these draft Rules of Procedure out for public comment but had not settled on approving these Rules of Procedure yet and that it was actually absolutely envisaged that this review of the public comment would happen and that our recommendation would be required to the CCWG before it would decide how to proceed if at all.

So having said that, I do think that we should go through the comments that have been received and I've tried to provide some structure to this. I've tried to separate these out into the different issues that were covered because there were multiple issues that were said. Some of them are arguments that are being raised in support of a particular position. There were some clear recommendations in some of them. But it is worth picking through.

What we can see, I think, one reason why I think this is particularly worth doing is that when you compare the people who have made particular points, it is not always the same people making the same points or the same groups of people agreeing on the same points. But actually you have a kaleidoscope. While you have a degree of commonality on some issues, the arguments that are being put by persons #1 and #2 on one issue will not be #1 and #2 saying the same thing on the next issue. It'll be #1 and #3 or #1 and #5 on the next issues. That I think in itself shows that people gave real thought and independent thought to this issue before submitting the comments they did.

So working through them – the first question: “Support for the proposal that there should be a 45-day deadline.” How much support did we see in the public comments? In here I would draw attention to ALAC. ALAC stated that, “They specifically recognized the effort put in drafting an updated set of procedures that address the delicate balance between due process and expedited resolution times that will help provide both certainty and [solarity] to applicants in the IRP processes.”

I would read that comment as being a general statement that ALAC is content with our proposal as a whole. It is not a specific support for the 45 days in particular, but I think it's content with it. That comment stands out because it is the closest I could find in any of the comments submitted to anyone expressing support for the 45-day deadline.

There was also support from Mr. Richard Hill for the principle of a fixed time bar. I think this is something that Greg has referred to as the "Principle of Repose" – not a term I was previously familiar with – but the idea that after 12 months after the action, there must be a hard cut-off. Richard Hill wrote in with a support in principle for that. He was the only person that did.

Moving on –

DAVID MCAULEY: Before you move to the next one, Kavouss has his hand raised.

MALCOLM HUTTY: Kavouss, come in please.

KAVOUSS ARASTEH: Yes. No problem. My first question was not answered and I'm not convinced of what Malcolm said but I don't want to raise it now. I will [inaudible] heavily to.

My question is that, suppose that CCWG agreed with each [stage] less than 45 days. You put in a public comment and we have five replies

saying that 400 days but not 45 days. What we do? Do we agree with that? [Inaudible] public comments?

MALCOLM HUTTY:

Well, Kavouss, as the process as I understand it, the very fact of having public comments sends a clear signal that we are supposed to consider that and take into account what is said. If what you are concerned about is the notion of counting heads or simply just saying, "There was only one that said this and it was seven that said the opposite," I don't think that should be decisive. But for myself, I think we should take it into account. But whether we should give greater emphasis to the arguments that have been put by the people that made the points rather than simply counting noses, and that is why I put out this analysis here to attempt to assist us in giving greater attention to what people have said rather than just simply doing a tally. So in that sense, I'm suggesting the same as you, Kavouss.

DAVID MCAULEY:

Malcolm, I also want to mention one reply to Kavouss, and that is the IRP IOT is a creation of Bylaw Section 4-4.3 specifically – and so in that respect, our work is going to be managed by that Bylaw. And so we're not reporting back to the CCWG in that sense. Basically the Board is going to approve the rules or not after public consultation. So it's not quite like in Article 27 of the Bylaws. We're not quite like Work Stream 2. And I think that's important to keep in mind. Anyway, enough said.

Back to you, Malcolm. Thank you.

MALCOLM HUTTY: Thank you, David.

KAVOUSS ARASTEH: I didn't ask for counting the heads. I said that if the time is 45 days and the reply are 450 days, is that [inaudible] present to the Board? This is a practical approach? Because 450 days have a lot of difficulty. There was some logic why we selected 45 or 50 but not 180. It's far from that.

MALCOLM HUTTY: Kavouss, that is something that we will have to consider, how we proceed on the basis of this. But I have actually suggested that the first step in that is to understand what it is that the public comment has said and so if you would kindly bear with me while we conduct this analysis, then we will have to decide as a group how to proceed.

KAVOUSS ARASTEH: [Inaudible] if you allow me to finish my sentence then [come in]. Nevertheless, [inaudible] my intervention. No problem. Go ahead, please.

MALCOLM HUTTY: Okay. Of those that said 45 days is too short, there were eight of them and the kinds of numbers that were put out then, there were put out, three of them – AFNIC, Auerback, and NCSG – had said 108 days. That's six months. Two of them – INTA, a Trade Association, and Richard Hill

had said 90 days. The Registry Stakeholder Group I think that was, said, “Eliminate it altogether.” And ISPCP, .music, and LINX just said, “It’s too short.”

Additionally – and this goes to the reasoning – three respondents specifically picked out the claim that 45 days would be – I used the word “biased” – that’s my word rather than theirs, but it would certainly affect different types of participants differently and therefore would be unfair to some, in the views of those commenters. NCSG specifically said, I remember, that non-contracted parties would have a harder time of complying with 45 days than contracted parties would.

Then we move on to the question of this issue of “repose.” “Should we have a fixed limit of 12 months or some other period that does not relate to the knowledge of the impact but relates only to the time after the action that is being complained about and happened?” And you’ll remember that this is specifically the thing that Sidley has warned is problematic in terms of conflicting with the requirements of the Bylaws.

There was seven respondents that said specifically and in very clear terms that they thought that this was wrong in principle. They were Sullivan, Rosenzweig, the CCG from Delhi, NCSG, .music, the Business Constituency, and LINX. There was a lot of additional reasoning offered in support of the contention that this is wrong in principle. I’ve tried to pull those out so that we can understand that better, and the main arguments being raised were firstly that it would undermine the effectiveness of the IRP at ensuring them mission limits restriction upon ICANN . Those points made by Rosenzweig, NCSG, and LINX, and LINX gave an extended example of how that might happen.

Another one was – and slightly related there – the argument that, “There should be no deadline if ICANN violates its core principles,” and Auerbach raised that point as well as LINX.

Then there was the argument that if something conflicts with the Bylaws, every valid complaint should be heard. That was one raised by Rosenzweig, CCG Delhi, and LINX.

Then possibly the largest point that was made – most popular point raised – was the idea that this fixed limit would not align with the actual reality of how long ICANN policy processes take, that they take years to come to fruition and therefore it might not be possible to bring such a challenge to them within 12 months because the process itself takes much longer than that. That argument was [raised] by Rosenzweig, by the Non-Commercial Stakeholders Group, by [ISPCP], by the Business Constituency, by CCG Delhi, by INTA, by .music, and by LINX.

There were suggestions offered as to how to resolve that. Richard Hill appeared and NCSG clearly stated that they would recommend differentiating between policy type issues and administrative issues. So if ICANN makes merely an administrative issue, then having a fixed deadline would be acceptable but on a policy question where there could be a challenge that this was fundamentally against the core values of ICANN or outside its mission, then they wouldn’t want to see any kind of limit to that at all. That was argued for by NCSG and I think it was argued for by Hill, although another statement in a separate submission by Hill appeared to contradict that.

And then there was also a distinction not between policy and administrative decisions but between policy and facially invalid decisions, and that distinction was offered by the Business Constituency and was also offered by CCG Delhi.

The NCSG also argued that the 12 months, again, would differentially affect different types of IRP claimants and that this would unfairly impact non-contracted parties who would be less able to access it than contracted parties.

Those were the main arguments as to why the repose should be removed altogether as being wrong in principle. There were others that said that 12 months is too short, that either in the alternative wished it removed altogether but if it's not removed altogether, wants it to be longer, or didn't say that they wished it removed altogether but did say that it was too short. Auerbach, Rosenzweig, INTA, the Registry Stakeholder Group, and the Business constituency, all said that. So there you see INTA that recommended a two-year period did not disagree, was not listed amongst those that disagreed with in principle, whereas the Business constituency did disagree with it in principle but offered an new alternative if that's not acceptable [or] it should be three years in their view.

Those were the main points of major principle. There were then some supplementary points that were made on more points of detail.

DAVID MCAULEY:

May I interrupt a second?

MALCOLM HUTTY: Certainly.

DAVID MCAULEY: Here's my question to you – I think you've gone through the gravamen of the concern with respect to the time periods. My request would be that maybe in a follow-up on the list we could take the ancillary issues up with the group, but the reason I'm concerned is just the time of the call and so I thought we ought to try and get to questions if that's okay with you. And if it is okay, Kavouss has his hand raised.

MALCOLM HUTTY: Okay. In terms of how we would move forward, there was actually one thing that comes up in the ancillary that I would suggest is the first threshold question that we would need to address before deciding how to deal with the gravamen and the main issue, and that's whether or not [inaudible].

DAVID MCAULEY: That sounds fine. Before you bring that up, let's ask Kavouss to take the floor with his question.

MALCOLM HUTTY: Kavouss.

KAVOUSS ARASTEH:

Yes. With respect to what time later on we agree at the level of this group and [inaudible], I want to say I have never heard any process without any time limit. [Inaudible] process, you have to prepare your tax [inaudible] you have to pay your taxes, regulations, so on so forth. So those people think that remove the time they are not logical persons. We need to have time. What time would be a good one? This is something we could discuss but we could eliminate as a possibility that removing all the time limits.

That doesn't work. This is something that at least we have to agree before going to the process. Otherwise, we come to the issue that somebody wants no time limit and the lower part, no time limit and upper part, that be a total disappointment. So we need to have a time.

What would be the correct time? After the comment received, full comment received, that is something we should discuss, but we could eliminate the exclusions of no time at all. Thank you.

MALCOLM HUTTY:

Okay. That's slightly pre-empting the threshold question that I was going to raise that two of the constituencies had put in – the Business Constituency and the ISPCP – had both recommended that actually we have a moratorium on this. Not that we necessarily never have a time limit on this, but that from a process point of view that we go ahead with updated supplementary procedures for the time being without any new time limit added, and then review the impact and study the impact and study the issue over a longer period rather than doing it at this time.

The BC does argue that there is no time threshold at the moment and therefore this is a novelty and there is therefore no urgency about introducing it. Actually, I'm not entirely sure that they are correct that there is no threshold at the moment but there we are. But that was what they argued. If we were to go with that, I wondered how we would do so. And it struck me that there were multiple options.

One, which Kavouss would clearly dismiss immediately from what he has just said, would be to simply say, "There shall be no time period," and that would be our recommendation. It struck me that there was another way of implementing this that we could consider, which is to remove any explicit and numerical time bar but instead to say that it will be within the discretion of the IRP to strike out any claim for being too late if, in their opinion, it was so late that a fair hearing could not be achieved and that the IRP's purpose could not be successfully delivered. That would be a second option.

The third and final option I would suggest is that we say, "No, we would not do a moratorium," and that instead we would have to construct a revised time bar that is consistent with the Bylaws as a minimum requirement and that we can defend as being the appropriate threshold in reply to the issues that have been raised by the public comments. That may mean conforming to the public comments' opinions or if we disagree with them, that we can say why we have done so in a way that is convincing – because it's not going to be us that decide whether or not these procedures go ahead. It will be firstly the CCWG and then ultimately the Board – and anything that we say will have to have a convincing explanation as to why we have done it.

So the third option I think would be about constructing that. But I would suggest, David, that the first threshold question we need to decide is whether the group agrees with the Business Constituency that actually this should be put off until a much later date for more detailed study or takes the view that Kavouss does that that needs to be taken off the table immediately and that we go ahead with constructing something that is Bylaws compatible.

DAVID MCAULEY:

Thank you, Malcolm. There are two hands – Becky first and then I raised my hand because I want to speak as a participant rather than the lead.

Becky, the floor is yours.

BECKY BURR:

Thanks. I have a question here because I want to make sure we understand what we're talking about. When you're talking about that there should be no time period, are we talking about repose or a period of time within which you must file?

I think that Kavouss, in my experience, is correct that there is always some outer limit that starts at the time you either know or should know how something is going to affect you. You have a period of three years, two years, whatever the statute of limitations is. So I just want to make sure I understand what we're talking about. Are we talking about the period of time to file after you know or should have known how you're going to be affected or are we talking about the outer repose – "You must file within 12 months of the event" – or something?

MALCOLM HUTTY:

Thank you, Becky. Remember this is not my proposal. This is responding to the inputs raised and I was picking out something that I thought was a threshold issue first. And it's the Business Constituency – and I will read to you their paragraph on this. And they boldened it to make sure we didn't miss it. And they say:

“In the light of these concerns, the Business Constituency recommends that the IRP IOT impose a moratorium on imposing any time limits related to bringing forth an IRP until further studies can be conducted by the ICANN community to assess the potential impacts of such time limits.”

That's why I say this is a threshold issue. So I don't think that's just about the repose. I think that recommendation is that we should have a moratorium on anything and a study period and further study of the impact. Whether or not we accept that recommendation is a separate matter, but I think that they are speaking there not only to repose but to the whole thing. And really we need to decide whether or not we accept that. If we accept that, then we can stop. If we don't accept that, then fine. We can put that aside and say, “Right. Well we've disposed of that.”

DAVID MCAULEY:

Thanks, Malcolm. I'm next and I'm speaking as a participant here, and I have a comment and a question. The comment is, I would personally be opposed to the idea that the Business Constituency is making here. And I think we are engaged in this timing issue and a really difficult balancing

act of trying to make sure that a claimant has a fair chance to bring a claim and that ICANN is protected from constant exposure to old, stale, claims, whatever it might be. I'm not sure I'm using the right terminology. But I think that a time limit which typically ensues in courts and arbitration is a fair thing and we ought to try and nail this down.

My question to you is – and I know there's a lot of comments and there's a lot of words and all, but can we cut through this Gordian knot perhaps by just saying whatever time period we're speaking of – it could be 45 days, it could be one year – whatever we settle on, whatever that number is, that if somebody brings a claim within that time of the time that ICANN took the action or the time from that action causing harm to the claimant, wouldn't we solve this problem perhaps maybe if need be in conjunction with your suggestion that the Panel would have discretion to allow an out of time claim if fundamental fairness required it? Wouldn't that cut through all of this? That was my question. Thank you.

MALCOLM HUTTY:

I need to understand more clearly your proposal, David. Are you saying the later of those two periods, the earlier of those two periods? What exactly are you proposing?

DAVID MCAULEY:

Both of them. In other words, a rule that would say a claimant must bring a claim within X number of days of ICANN taking the action, or that same number of days within which the claimant should have

known of the harm that was caused to him – whichever of those dates is later.

MALCOLM HUTTY: Whichever of those dates is later. Okay.

DAVID MCAULEY: Yes. And then maybe having a paragraph saying the Panel could in extraordinary circumstances dispense with the time limitation if justice or fundamental fairness required it. That’s basically what I’m suggesting. Would that cut through this?

MALCOLM HUTTY: It would cut through a very large proportion of it. By saying, “whichever is the later,” you would satisfy the opposition on the grounds that the 12 months’ repose is wrong in principle if the period after knowledge comes later than that then it would still be valid. So that would satisfy all of that and would deal with a very large bulk of it. It wouldn’t deal with everything. We’d still have to deal with the issue of picking exactly how many days – is it 45 days, 180 days, whatever. You would also have to consider whether even that 12 month figure was the right number. There is in particular the NCSG keeps coming back to the same point that the number, as well as being wrong in principle in their view, is biased in that it is harder for a non-contracted party to adhere to than a contracted party. And we’d have to decide whether we accept that comment. And if we do, then pick an alternative number or maybe we don’t accept it in which case we [deal with] it.

So there would still be that that would need to be considered. But if we did what you said, we would certainly have cut out a big and thorny part of it which is this issue of repose which has got most of the opposition and which is opposed by Sidley.

DAVID MCAULEY:

Thank you, Malcolm Next hand up is Kavouss. Malcom, after Kavouss's question, could you summarize it please? I'm having a very hard time. I think it's my connection. I'm getting much of what Kavouss says but not necessarily all.

Kavouss, you have the floor.

KAVOUSS ARASTEH:

David, I am not in favor of your proposal as supported by Malcolm. What you are saying we would have a starting point deadline and then if somebody bring a claim and that deadline was [hard] to him or her, then the Panel will decide to extend that. That is not correct. I am opposing to that process. What I can do – at least suggest that – I take the approach proposed by Business Constituency but in the reverse direction. We go ahead with whatever time limit that we establish – whether 45 or 60, even lower, 12 months or 18 months in the higher – put it into the trial test of three years. If something comes and show that there is deficiency, we review that after some time.

But you have to start on something. You could not start on moratorium for years and then come [apart] some things that may cause problems for the people that would have difficulty [cases] to come to the Panel

within the three years. So I don't think that neither your proposal nor the BC proposal is acceptable. This is totally negating what we have done during the [months] of the first Work Stream. So we have to have some time limit. Whatever time limit we could agree based on initial proposal and comment received. But no public comment or moratorium public comment or what you say, provisional deadline and then correct it by the Panel according to the claim of the people is not working. It's impractical. I cannot agree with that. Thank you.

DAVID MCAULEY:

Thank you very much, Kavouss. I could hear that. So back to you now.

MALCOLM HUTTY:

You could hear that. Okay. The only thing I would add to that is that the last part of Kavouss's recommendation that whatever we do should be subject to a review after a defined period to see whether it's working or not was also one of the ancillary points that was made. It was made by ALAC.

I think the group as a whole have to take a view here. David's proposal would be welcomed by the great bulk of those that replied to the public comments insofar as it would be welcomed by them. It would certainly simplify how we go forward. The difficulty that I see with going forward with what we have at the moment as Kavouss suggests, apart from the fact that we clearly have substantial and well-reasoned opposition to it from a number of parties, is the opposition from Sidley. Sidley warn us that this is inconsistent with the Bylaws. So I think we could expect that if we do go ahead with this, It will not be accepted at a later stage in the

process, whether the CCWG doesn't accept it in the face of the legal advice to the contrary or maybe the Board would say that they couldn't accept it given that it's been advised as being incompatible with the Bylaws.

I think we would have to do something to that, and so I respectfully disagree with Kavouss's recommendation on that. But I note that there's – and I don't think this should be just me, David, and Kavouss – I would be very keen to hear others.

I see that Becky is speaking in the chat: "I would be willing to dispense with an absolute repose but very uncomfortable without the statute of limitations commencing from a, 'knows,' or, 'should have known,' standard. Six months from the time you know or should have known that you have/will be harmed plus David's 'fundamental fairness' caveat." Becky seems to be therefore clarifying and really supporting David's proposed way forward.

When I say that I think that this would deal with most of the comments in the chat, I'm trying to act neutrally as Chair in that, but certainly it's clear that my comments were included in that and I would be comfortable with that as a way forward as well. I think that would provide a good way forward for myself.

Who else is on the call that hasn't given a view yet? Can we have some more views from anyone that hasn't –

DAVID MCAULEY: Malcolm, I will keep my eye out for hands up in response to your request, but another way I think we can wrap this – because I would like to tee up the next issue – another way to wrap this is, we inevitably will have to work on the list. And so my request to you will be that you come out on list and summarize the discussion whenever you can and summarize the discussion and invite people to comment on the list, including ICANN Legal and Jones Day- I know we have reps from both on the call – so please feel free to weigh in, and ask people to comment on the list and then we’ll go from there. And I think that we will inevitably have to work on the list as well. So does that sound like a fair way to wrap this up?

MALCOLM HUTTY: That sounds great.

DAVID MCAULEY: And Malcolm, personally I’m happy to work with you on trying to come up with a format so that we might come up with a format that speaks to instigating discussion and allowing folks to know that we’re moving towards resolution here. So I’ll be in touch with you the next day or so to try to figure out how we might be able to do that.

MALCOLM HUTTY: Yes. And I just briefly note, Becky, your comment on the chat has been noted for the minutes and it also is reflected by one of the public comments as well about how it relates to [CEP] I’m trying to pick out...

Yes, it was the Registry Stakeholder Group that made that point as well.
So that's duly noted.

DAVID MCAULEY:

Thank you very much, Malcolm.

I would like to move on to the next substantive discussion which deals with parties and joinder and consolidation, those kinds of matters. I have volunteered to take that up, take the leads on that particular issue and I believe that everybody on the list has seen some materials that I sent forward earlier this week.

Bernie just reminded us that we're running out of time on this call so I would like to tee this issue up and then what I intend to do is come out on the list just like I asked Malcolm to, to re-tee up this discussion and ask for input and try and move this forward.

I used the comments by Fletcher to act as a catalyst for what I was going to say, and I'll get to that in just a minute, but there are two hands up. So first Kavouss, you have the floor. I'm asking commenters now to please be brief. Thank you. Kavouss?

KAVOUSS ARASTEH:

Thank you. If you adjust the time I have no problem. But if you have new approach, that should go again to public comment. [If you are talking] new approach [inaudible] it should go to the public comment because [inaudible] the time. [Inaudible] or combine two process. I know my [inaudible] it would work successfully until [inaudible] matter. But I am not in favor of doing something totally brand new. Thank you.

DAVID MCAULEY: Thank you, Kavouss. Liz, you have the floor.

LIZ LE: hi David. Yes, I missed the comment, the proposal that you made. Is it possible for you to put that in writing in the chat on the proposal about timing?

DAVID MCAULEY: I'm not sure I follow, Liz. Could you state that one more time?

LIZ LE: I stepped away and I think you made a proposal about timing on the issue of time bar, and I'm wondering if you can put that in writing in the chat?

DAVID MCAULEY: Yes. I probably won't be able to put it in chat during this call, but the suggestion I just made to Malcolm in the discussion I will try and recapture or actually Malcolm will probably do it in his summary. But if it's inadequate, I will make sure it gets on the list.

MALCOLM HUTTY: Right now, though, Becky's made something in the chat that I think summarizes what David's point is, so I think if you read what Becky Burr [2], the comments from 13:42 onwards I think that is what David

suggested. So you can see it now and we will confirm that on the mailing list.

DAVID MCAULEY: Thank you, Malcolm. Liz, I take it... Will that address what you want?

LIZ LE: Yes. Thank you.

DAVID MCAULEY: Thank you very much.

Getting back to the joinder issue, let me just speak to it. We really don't need to put it on the screen right now. I'm using Fletcher as a catalyst – they're certainly not the only part that talked about joinder and parties – for instance, the Non-Commercial Stakeholders Group made a similar comment. But Fletcher basically pointed to the fact that the Applicant Guidebook from the 2012 round of new gTLDs basically did not provide an appeal to people who lost before an expert panel. Those were the panels that heard legal rights objections, string confusion objections, and community objections. But now the Bylaw explicitly says that expert panel decisions can be brought to IRP.

And so Fletcher is making the point that we in the rules need to be clearer and explicit about parties who won before the expert panel, therefore they're not likely to bring a claim. Parties that lost are likely to bring a claim. And in doing that, Fletcher's question is – what about the parties that won? How are they going to be heard?

And so while we're in this particular call reaching the top of the hour I can't get into detail. I will in the list. That's really the issue, and I think they raised an important issue. Before I say more, Liz, you have your hand again so let me ask you to take the floor.

LIZ LE: I'm sorry. That's an old hand.

DAVID MCAULEY: I'm sorry.

So Fletcher suggested three safeguards: 1) that we should have a rule that provides actual notice to all the original parties before the expert panel, 2) that we should provide a mandatory right to intervene to all the parties – they can decline it but they would have a right to do it, and 3) require the IRP panel to hear from everybody that was involved below before they give any interim relief.

Frankly, I think these are sensible provisions. They gave us draft language. I've gone through it. Some of it doesn't match up quite to the Bylaws, and so my intent is to take this issue along with challenges to consensus policy – which I sort of joined because Fletcher joined them – and I'm going to come to the list, much like Malcolm is going to do. Malcolm's coming to the list in the next week or so will be a summary of our discussion. Mine will have to be more because we haven't had a chance to discuss this yet. But it will recognize that we are in a time crunch and we have to have a hybrid way of operating, taking some issues up on the phone and taking other issues up on the list. And so I'm

looking forward to doing that but now that we have a minute left let me wrap that and ask if anybody has any other business to bring up on this call. I don't see any hands... Kavouss, you have a hand up. You have the floor.

KAVOUSS ARASTEH:

David, at this last moment, you propose a revolutionary action saying that those who have lost the case bring it back to the IRP. This would result in sort of instability in the entire process. [Inaudible] someone wins, someone lost. I'm finished. And now from 2012 in 2017 you [want] that the people they lost bring back the case. What to do with that? Why we have to do that? Why there is such a retroactive application? I'm not in favor of all of these new things that you propose. There is no logic behind that. Maybe you have mobilized two people to agree with you, but I'm one that is opposing to that. It is not legitimate that if somebody lost bring, back the case. This is instability in the whole process. Somebody win and somebody may go ahead with the project and now all of a sudden you bring it back to the IRP and then that would reverse the decision so what happened to that investment? What happened to that process? This is totally de-stability of the whole process. Please kindly be careful what you're proposing. Thank you.

DAVID MCAULEY:

Thank you, Kavouss. We have to wrap but just a brief response. The Bylaw Section 4.3N requires that the Rules of Procedure ensure fundamental fairness and due process. And then it says, "Shall at a minimum address the following elements." One of those is issues

relating to joinder intervention. I actually think we're within the scope of what we need to do but I take your point and will mention it in my summary and trying to move this issue forward.

We are out of time and I want to respect everybody's time. So I will say thank you to everybody. Thanks especially to Malcolm for leading us on the timing issue, and thank you to all for participating. Please look for action items on the list and please engage on the list. And I hope everyone has a good day and thank you all for participating.

That's the end of this call. Thanks very much.

[END OF TRANSCRIPTION]

EXHIBIT 202

IRP-IOT MEETING

IOS MEETING

Tuesday, October 9, 2018 – 19:00-20:00

>> BERNARD TURNCOTTE: David, we have 5 formal members. That's enough to go ahead.

You have a are hard stop at the top of the hour. I do as well.

>> DAVID McAULEY: Anyone in the group have changes to the SOIs they want to note? I don't see any hands. I don't hear anything. I think we can proceed on.

If you're not speaking mute the phone as well.

Excuse me.

Welcome to this good group of people many I need a sip of water. I'll be a second.

Thank you, excuse me for that.

But, as you saw from the e-mail I sent yesterday to agenda the hope is to get two thing done interim rules of procedure then turn to repose and get those done in fairly quick order so we can present them to the board.

Then as the group returns to the group look at adding more members to the group. The first part is to try to get to interim rules of procedure. So, you saw the materials that Bernie sent around. And with the exception of rule 4, time for filing, these rules are pretty much where we have arrived after all of our work to date, excuse me. In order to go through the call today, I'd like to mention, and this is going to be an important call of record, as will Thursdays, my plan is to actually read the rules. I'll try to do it reasonably quickly. But also noting that our captioning is really the way that we are going the keep a record here in addition to the audio record.

Is to read the rules but I don't read the definitions. I'll simply list the terms that are defined. And I won't be reading footnotes.

With respect to rule 4, when I read that, I'll read it as it appears now, but I will also state my recollection that we have agreed to a safe harbor of sorts. Which I will describe when we get to rule 4.

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And when we get to sending language to the list, I will be happy to take on the role of providing that language.

As I read the rules, if anyone has a request of change to any rule, certainly raise your hand and mention it and once the discussion of that is done, I would like to that person to send to the list a sort of written encapsulation of what was agreed showing changes from where we are now on the list or call from Thursday. In that respect, when we get to rules 7 and 8 to joinder and discovery, I myself will have comments which I will be mentioning in my personal capacity, not as leader of the IOT.

So the goal here for the first part of this is to arrive at interim rules we can send to the board. So I plan, in just a few minutes to start reading. I'm going to ask first if anyone has any comments on this approach or anything they want to say as we dive into this.

Also, I want to remind as Bernie put in the chat, this is a 60 minute call there's a hard stop at the top of the hour for a number of us.

And I see, I'm going to go take a look, I don't see any hands. Okay, let's begin and go through the rules many by the way, I'm reading from what is known as the clean copy.

And just I'll take one second.

Number 1 is definitions. Within that group we have definitions for the following terms: A claimant is defined. Covered actions, disputes, emergency panelist is a defined term. Iana. The international center for dispute resolution. The ICDR, ICANN of course.

Independent review process is a defined term. IRP panel. IRP panel decision. ICDR rules. Procedures officer is a defined term. Purposes of the IRP is a defined term. And standing panel.

I don't see any hands. That's just a compilation of what is there.

Number -- compilation of what is there. Number 2, IDCR will apply the interim supplementary procedures in addition to IDCR rules. In all cases submitted to the IDCR in connection with article 4 section 4.3 of ICANN by I laws after the date the up rules go into effect. In the event there's any inconsistency between the interim supplemental procedures and the IRDC rules these limit supplemental rules will govern. The interim of the any amendment of them should apply in the independent review is commenced IRPs commenced prior to the adoption of implementary procedures the effect of the time such IRPs were commenced. In the event any of the subsequently amended the

rule surrounding the application of those amendments will be defined there in. So, for rule number 2, it's on the floor and open for any comments or concerns.

I'm going go on mutagen just for a second.

Okay, thanks. I don't see any hands.

So we will proceed on.

To rule number 3, composition of independent review panel. The IRP will comprise three panelist selected from the selecting panel unless a standing panel is not in place when the IRP is initiated. The claimant should select one panelist from the standing panel and the two panelists will select a third from the standing panel. The will not take effect unless and until the standing panel signs a notice of standing panel appointment affirming it's able to serve and independent of IRCD rules. In addition to disposing relationships to the parties to the dispute IRP panel members must dispose of material relationships to ICANN or ICANN supporting organization or advisory committee. In event that the relevant IRP is niche rated or in place but does not have capacity due to other IRP commitments the claimant and ICANN should from outside the standing panel and the two panelist should select the thirist panelist in the event the two parties select the panelist cannot agree on the third panelist the IRCD rules should apply to the panelist. In the event the panelist re-sign are incapable of performing the duties of the panelist and it becomes vacant a substitute should be appointed pursuant to section 3 of the interim supplemental procedures. That's now on the floor and open for comment.

I'm looking at Chad. I see Avri will not be hear for the next meeting. I'm sorry to hear that but Avri please comment on list as you wish. And thank you robin for the information about the SOI. I don't see hands.

Yes go ahead Bernie.

>> BERNARD TURCOTTE: I notice you're having trouble with your voice if you want me to read I can.

>> DAVID McaULEY: Let me do number 5 and you take 5 A, etc.

>> BERNARD TURCOTTE: Just doing this to help out, that's fine.

>> DAVID McaULEY: I'm sorry, Bernie I didn't catch all that what was that?

>> BERNARD TURCOTTE: Yes, perfect.

>> DAVID McAULEY: Okay thanks.

Let me go ahead and read time for filing. Rule number 4 is the next one up. An independent review is commenced with a claimant files a written file of dispute a claimant should file a written statement of dispute no more than 120 days after the claimant becomes materially aware of the effect or in-effect of arise to a dispute. The may not be filed 12 months from the date of such action or inaction in order for an IRP to be deemed to be timely filed all fees should be paid to ICDR within 3 business days as measured by the ICDR in filing with request with ICDR.

I mentioned at the top that I would note that we have discussed and agreed, not the actual words but we agreed to the concept of a safe harbor here and if I'm not mistaken the concept of a safe harbor is while these interim -- while these interim rules are applicable, the second part of this two part timing limitation, that is the 12 month limitation, would note apply so that no ones prejudiced while we are trying to sort out what we call the issue of repose.

And so, that is my understanding of where we are on this rule. And I see Malcolm's hand is up. I'll give the hand to Malcolm and -- so Malcolm please take over.

>> MALCOLM HUTTY: Thank you David. Your handling this meeting in an especially formal manner so I feel it's important I respond accordingly with a formal statement on this point. I'm always on record of having said there's not time for filing is inconsistent with the bylaws we are in dispute about this and decided to adopt the interim procedures in time resolve this dispute without holding what up what ICANN insure us is an urgent need for the bylaws in an interim basis. So I am okay with that. But only on the understanding that I want understood for the record want written into the record that in no way [indiscernible] resolve at all from the disagreement or the dispute as to the compatibility from this clause with the bylaws or it's probe tee. Thank you

>> DAVID McAULEY: Thank you Malcolm. So noted. I'm trying to be formal and I appreciate how you made your statement.

I put my hand up as a participant to note that while I mentioned the one safe harbor we discussed, I would like to ask if we need another safe harbor and I'm particularly interested in the views of other members of this group. And that safe harbor would be that in the public comments. And this would be, I'm speaking now with respect to the 120 day limitation because I believe we will put out an interim rule whether it's a rule that states a 12 month limitation or that would be under a safe harbor. If you go back to 120 day limitation that's not under a safe harbor. I wonder, what do we think in this group about

public comments that say, in measuring that 120 days we should put in some kind of hold while people are pursuing CEP? So, I'm asking that as a question. And hoping that some people resume have views.

And if not, I can -- I would be happy to float language to list that -- that we can look at.

But I'm interested, I see Sam your hand is up. I'll ask you to take the floor.

>> SAM EISNER: Thanks David. That idea of tolling when a CEP is in process, is already part of our current process, so we can try to find the language, I don't know if it's in the CEP documentation. So we already do have language with that. And I think that we you know from the ICANN side, we support that as well.

That that time period, if 120 days, so long as your CET is commenced in the 120 days that the time period to file the IRP is extended we wouldn't have any issues with that from the ICANN side. And we can try to color out the language that we already have on that.

>> DAVID MCAULEY: Thank you Sam, I need the lower my hand. Thank you Sam, I appreciate that. I don't recall that language and I do recall that we have on our plate, after we get through the rules and repose, we do have a month o amongst other things to come up with CEP rules. So if you can look up the language or put something on list that may mention that I think it would be good the mentions that in the rule.

So, I -- Sam I'm taking that's an old hand or new hand?

>> SAM EISNER: Old hand.

>> DAVID MCAULEY: Thank you. Let's move on, Bernie can you go ahead with rule 5? D.

>> BERNARD TURCOTTE: Sure. Rule 5 conduct of in the independent review.

It is in the best interest of ICANN and of the ICANN community for IRP matters to be resolved expeditiously and that reasonably low cost while ensuring fundamental fairness and due process consistent with the purposes of the IRP. The IRP panel should consider accessibility and fairness and efficiency. Both as to time and cost in its conduct of the IRP.

In the event that an emergency panelist has been designated to add adjudicate a request for interim relief pursuant to the bylaws article 4 section 4.3 [p], the emergency panelist shall comply with the rules applicable to IRP panel. With such modifications as appropriate.

And I guess I'm going right -- or not?

>> DAVID McAULEY: Before -- are you going do 5? Before you do that, let's see if there's any comments or concerns with what you read in 5. I don't see hands or hear anyone. So Bernie if you are going to take all of 5, you're welcome to continue. Or if you want to bounce 5 A and B between us let me know. I think I'm okay lights do 5 A. Nature of IRP proceedings. The IRP panel should conduct its proceedings by electronic means to the extent feasible. The hearings should be permitted as set forth in the these terms supplementary procedures. Where necessary, the IRP panel may conduct hearings via telephone or video conference or similar technologies. The IRP panel should conduct its proceedings where the assumption that in-person hearings shall not be permitted. For the purposes of the interim supplementary procedures an in-person hearing is any IRP proceedings held face-to-face with participants physically present in the same location. The presumption against in-person hearings may only be rebutted in varied circumstances. The IRP determines that an in-person hearing has demonstrated that an in-person hearing is necessary for a fair resolution of the claim, 2 that an in-person hearing is necessary to further the purposes of the IRP and 3, considerations of fairness and furtherance of the IRP out weigh the time and financial expense of an in-person hearing. In no circumstances shall in-person agency be permitted for the purpose of producing new arguments or evidence that were not previously presented to the IRP panel. All hearings should be limited to argument only. Unless the IRP panel determines that the party seeking to present witness testimony has demonstrated that such the is 1, necessary for fair resolution of the claim, 2, necessary to further the purposes of the IRP. And 3, considerations of fairness and furtherance of the purposes of the IRP out weigh the time and financial expense of witness testimony and can cross-examination.

All evidence including witness statements must be submitted in writing, 15 days in advance of any hearing.

With due regard to ICANN bylaw article 4 section 4.3 S the IRP panel retains responsibility for determining the timetable for the IRP proceeding. Any violation of the IRP panels timetable may result in the assessment of cost pursuant to section 10 of those in term supplementary procedures. That concludes 5 A David over to you.

>> DAVID McAULEY: Thanks Bernie I put my hand up as a participant here. I have one minor comment in second paragraph in page 5 third line. That sentence rotates reads hearings should be and, etc. and technologies there's a closed parentheses that we need to eliminate there's no open parentheses. I mention I now but for similar changes, where we are just correcting typos and things like that, I don't

think we need the mentions them to phone unless anyone thinks we should. I wanted to make that point by pointing out that one small typo. That's my only comment as participant, thank you Bernie.

And so I don't see anyone else's hands or voices. So Bernie go ahead and press on.

>> BERNARD TURCOTTE: Thank you. 5 B translation. As required by ICANN bylaws article 4 section 4.31 or L, I'm uncertainly all IRP proceedings should be administered in English as the primary working language with provision of translation when needed it shall include written documents and transcripts and interpretation of oral proceedings. IRP panel should have direct discretion to determine 1, when the claimant has a need for translation services, 2 what documents and or hearings that need relates to and 3, what language the document hearing or other matter or event shoe shall be translated into.

A claimant not determined to have a need for translation services must submit all materials in English with the exception of the request for translation services if the request includes claimants certification to the IRP panel. That's submitting the request in English would be unduly burdensome some in determining whether a claimant needs translation the IRP should the spoken written and English. And to the extent the claimant is represented in proceeds by an attorney other agent that representatives proficiency in spoken and written English the IRP panel should only consider requests from translation from to English and other 5 official languages of the United Nations. IE French, Russian, or Spanish.

In determining when translation of a document hearing or other matter or event shall be ordered, the IRP panel shall consider the claimants proficiency in English as well as the other requested language from among Arabic, Chinese, French, Russian or Spanish. The IRP panel shall confirm all material proportions of the record of the proceeding are available in English.

In considering requests for translation the IRP panel shall consider the materiality of the particular document hearing or other matter or event requested to be translated as well as the cost and delaying occurred by translation pursuant to ICER article 18 on translation. And the need to insure the medical fairness and translation of ICANN bylaws article 4, 4373 and 4. And otherwise ordered by the IRP panel, cost of need based translation as determined by the IRP panel shall be covered by ICANN as administrative cost and shall be coordinated through ICANN serve could provider. Even with a determination of need based translation if ICANN or the claimant coordinates the translation of any documents to its legal, such legislation of the legal cost and not an administrative cost born by ICANN. And in the event that either the claimant or retains a translator for the hearing or other matter, as such retention is not pursuant to determination need based translation by the IRP panel, the cost of such translation should not be charged as administrative cost to be covered by ICANN. David, over to you.

>> DAVID McAULEY: Thank you Bernie that was quite a lot.

That one is now open and on the floor. So comments? Questions about it are certainly welcome. I see Malcolm hand up please, go ahead.

>> MALCOLM HUTTY: Thank you I had two things. Firstly the authoritative language for the decision. I don't see, this is already new language that the currently not considered I don't see it stated where that the authoritative decisions shall be in English for the purposes of future reference. It says that the English will be the primary working language. But that's not the same as the authoritative text of the decision.

So I think that should be added.

My second is, the final sentence, if ICANN retains translator, even if it hasn't been by the claimant that will be a cost that is not in the administered cost and can be assigned to the claimant, that doesn't seem right.

For example, if ICANN picks a panelist that requires translation, claimants could end up picking up the crux of that. This would be a significant hurdle in the way of per say claimants.

So I would say claimants should only be exposed to the cost of translation if they request it.

>> DAVID McAULEY: Thank you Malcolm. And the third point.

>> MALCOLM HUTTY: Those were my only points.

>> DAVID McAULEY: So with respect to the authoritative decision point, I see -- before I start commenting I see Sam's hand is up. Go ahead Sam.

>> SAM EISNER: This is Sam Eisner for the record. Malcolm if there was a need for translation at the panel level, that would, I think that would be covered by the administrative cost of the hearing. So the cost that we would envision the claimant to be responsible for would be for example, you could say that someone would -- if they wish to control the translation of their briefing document or something because of the way it's translated might be important for the statement of their legal argument. That would be something that the claimant would be responsible for. But other translation for moving the process along would be considered administrative. That's where the administrative cost comes in. Because ICANN there's already a requirement for ICANN to be responsible for administrative costs. So

my sense is we don't need to add anything to cover that. So you can, if you want the read the rules again with that in mind, let me know. And see if you want the add anything else.

>> MALCOLM HUTTY: Can we just have clarification of what you were thinking of a circumstances in which ICANN would retain a translator at its own request, not at the claimants request, at which that would not be considered an administrative cost?

>> SAMANTHA EISNER: So, there could be a possibility that ICANN, separate from the administrative cost in the proceeding, if ICANN needed to provide a translated version of its briefing papers, that because that is a -- because the statement of it, and the way that claims are presented, might be really essential to how ICANN is stating it's case. That would be something that wouldn't be an administrative cost, that would be a legal cost.

>> MALCOLM HUTTY: I don't understand this point. Could you please give me some examples to why this -- give some example that would give some reason as to why a claimants, the circumstances in which a claimant would be properly exposed to a translation that ICANN is doing for its purpose bus not because the claimant asked for it.

>> SAM EISNER: The claimant is responsible for cost if ICANN made the translation?

>> MALCOLM HUTTY: If these are legal costs rather than administrative costs, then the claimants particularly exposed to having the cost shifted on to them vendor.

>> SAM EISNER: , I imagine if they are choosing -- if the claimant for example chose to control the translation of it, as opposed to using the translation service that would be made universally available, then that would be something that the claimant would then assume as a legal cost.

It doesn't mean they have to use their own translation service to do that. But if they wanted to control how the translation was prepared and presented, within the IRP, then that would be their own legal cost. They don't have to do it that way.

>> DAVID McaULEY: Can I interrupt for a second? Malcolm can I make a at the same time? It's David speaking for the record. Malcolm when you stated your concern about this part of the translation you mentioned it stemed from the last sentence.

And the last sentence owns with the words the cost of such translation shall not be charged as administrative costs to be covered by ICANN. Is it possible if that language was simply to expand it and

say the cost of such translation would not be charged as administrative costs to be covered by ICANN if the translation was requested by the claimant and if the translation was requested by ICANN it wouldn't apply under here any way. Something like that. Is that what you're getting at.

>> MALCOLM HUTTY: It's broadly what I'm getting at but it's much simpler and more restrained edit that would achieve it. The sentence begins additionally in the event that either the claimant or ICANN retains a translator. If we delete ICANN, yeah.

Okay.

>> DAVID McAULEY: Uh-huh.

>> MALCOLM HUTTY: Then wouldn't that cover it?

>> DAVID McAULEY: Sam what do you think?

>> SAM EISNER: So there is the ability and the reason it makes sense to remove it now, although I think this is something that we should talk about, do we remove part of this if we are having issues moving it forward? So we can get interim set done. Or do we do more revision of it as we are working on the final set. There's the provision for ICANN to gain cost shifting in the event of, I forget the language in the bylaws in the event of some bad faith from the claimant.

So there's benefit in both ICANN and the claimant understanding which parts of the add man strive costs and which parts are the legal costs that are aligned to the proceeding.

And so, just as a claimant would have a legal cost, if it were to choose to move forward, I think we are understanding each other on that part, there's also the possibility that ICANN would absorb cost that are not truly administrative costs in there. You know if ICANN wanted specific control over how a translation was done, it would be the same as a claimant. So I don't think that we should remove ICANN from that, either.

>> MALCOLM HUTTY: Sam I have no problem with what you just said there.

Yeah.

My only concern is that limited to ICANN incurring translation costs other than, for the benefit of the claimants. If ICANN has other purpose why it needs translation done, that should not form part of the legal costs that is essentially exposed to whether the claimants exposed to ICANN's operating costs.

Only things done for the translation done for the to meet the needs of the claimant should be potentially chargeable to the claimants and should be only chargeable with the claimants consent.

If the claimant requests translation, absolutely for that to be something they are potentially exposed to cost of that, that's perfectly reasonable. I have no objection there.

>> SAM EISNER: I think the legal cost shifting itself is kind of a broader conversation because into bylaws it can go either way. So I think that if there's that need, it's not actually ICANN's operating cost, it's the cost of defense just as there's a cost of the claimant bringing that. So I think you know if there's consent, the consent kind of goes all the way around, I would think. I'm not sure we want go to consent place on that.

>> DAVID McaULEY: Well it's David speaking again, what I'd like to -- what I'm hoping to achieve is to get a rule done. So I think from what I hear but I don't know this I think it's possible you Malcolm and you Sam might actually be largely in agreement.

But, that it would take some work to find the expression of that agreement. So I'm wondering if I can ask you two to work on this offline and come back on list? Is that -- and Malcolm's offered, Malcolm mentioned one possible edit is to simply remove the words "or ICANN" maybe the way that could work Sam is you say that wouldn't work for this reason or that reason. Would you two be willing to work on this offline and present it on Thursday?

>> MALCOLM HUTTY: Absolutely David very happy to.

>> SAM EISNER: Me too.

>> DAVID McaULEY: That's an action item for you guys. I think it sounds to me you might be very closely in agreement, but the expression of it is hard.

With that done, let me ask Malcolm the authoritative decision, the language of that should be specified. If I'm not mistaken that was your other comment. If that is the case my suggestion would be that would be in English.

>> MALCOLM HUTTY: Yes.

>> DAVID McaULEY: So that's an action item for Bernie could you make a note of that? That I'll take -- that's something I'll take on. But I'm not able to make notes right now. If you would mention that to me.

So if there's no other hands, I see Malcolm and Sam you still have hands up. Unless those are new, I'll move on.

Excuse me.

And so it's my turn to read, we will move on to written statements, number 6 we have 23 more minutes remaining. A claimant's, this is written statement section 6, the dispute claims that give rise to a particular dispute but such claims are independent or alternative claims. The initial written submissions of the parliamentary shall not exceed 25 pages double spaced in 12 font in available evidence of the claimants claims or claims should be part of the initial written submission. The evidence is not included when calculating the page limit. The parties may submit expert evidence in writing and that's one right to reply the IRP panel may request additional from the review, the board the supporting or other parties.

In addition, the IRP partner panel may grant a request for additional who is intervening as a claimant or who is participating as an amicus on the compelling bases for a request. In the event the IRP panel such additional written submissions shall not exceed 15 pages, double spaced in 12 point font any dispute from process decision expert panel that is claimed to be articles of incorporation or bylaws as specified bylaw section 4.3 BIII B 3 any person or group entity previously identified in contingent set regarding the issue under consideration within such party panel shall receive notice from ICANN the independent review process has commenced. ICANN shall provide notice by electronic notice within two business days calculated at ICANN's personal place of business in receiving notice from IDCR that commenced that's rule 6.

Comments or questions welcome?

And I see Kate Wallace has her hand up.

>> KATE WALLACE: Thanks David this is Kate Wallace from Jones Day for the record. This is thoughts from an observer from the last sentence of the provision about the notice that ICANN shall provide notice by electronic offer for consideration that we reflect on the fact this is mandatory language and in some instances it might be difficult to comply with. Instead perhaps we can consider I suppose it would be more of a reasonableness standard. Something like did he ever to provide notice or under take reasonable efforts to provide notice. By electronic message. Which would allow for circumstances when perhaps notice couldn't be effect waited for reasons of contact information not being perfect or otherwise.

>> DAVID McAULEY: Thank you Kate. Let me react to that as a participant and not as the lead. And that is, two things, one is I would carbon you to send language, suggested language to the list on or before the Thursday call to address that. And I take it that the point that you're making is to address instances where the notice cannot be effect waited. And I think that's fair. But when you use a word liken did he ever and again I'm speaking as a participant, I think it should be noted that but for inability to get done, maybe it's a technical glitch, I don't know. That would be my suggestion. That it be to are given where it's simply impossible to achieve. But if you kindly come up with the language and submit it, would you be willing to do that.

>> KATE WALLACE: Sure I'd be happy to do that.

>> DAVID McAULEY: Okay thank you. Any further comments or questions on rule 7?

Seeing none, and hearing none, let's move on Bernie you're back up with rule 7.

>> BERNARD TURCOTTE: All right, rule 7 consolidation intervention and participation as an amicus.

The procedures officer shall be appointed from the standing panel to consider any requests for a consolidation, intervention and or participation as an amicus. Requests for consolidation and intervention and or participation as an amicus are committed to the reasonable discretion of the properties officer. In the event that no standing panel is in place when the procedure officer must be selected, a panelist maybe appointed by the ICDR pursuant to the national arbitration rules related to the appointment of panels for consolidation.

In the event that requests for consolidation or intervention the restrictions on written states set forth in section 6 shall apply to all claimants collectively for 25 pages exclusive of evidence and not individually unless otherwise modified by the IRB panel and it's discretion consistent with the purposes of the IRP.

Consolidation. Consolidation of disputes may be appropriate when the procedures officer concludes that there's a sufficient common nucleus of operative fact among multiple IRPs such that joint resolution of the disputes would foster a more just and efficient resolution of the disputes than addressing each dispute individually. If disputes are consolidated each existing dispute shall no longer be subject to further subject consideration. The procedures officer may in its discretion order briefing to consider the probe tee of the consolidation of the disputes.

Intervention, any person or entity qualified to be a claimant pursuant to standing requirements set forth in bylaws may in IRP with admissions to the policy after p officer as provided below. The person, group

or entity participated in an you understand lying proceeding an ICANN bylaws section 43 B 3 AI 3 intervention is appropriate to be so the when the perspective participant does not already have pending related dispute and the potential claims of the prospective participants from the common combing louse of operative facts based on such briefing has the procedures officer made order at its discretion. In addition, the supporting organization which developed a consensus policy involved when a dispute challenges a material provision or provisions of an existing consensus policy in hole or in part shall have a right to intervene as a claimant to such challenge. Supporting organizations rights in this respect shall be exercisable through the chair of the supporting objection.

Any person group or entity who intervenes as a claimant pursuant to this sections will become a claimant in the existing process and have all of the rights and responsibilities of the other claimants in that matter and be bound to the outcome to the same extent as any other claimant.

All motions to intervene or for consolidation shall be directed to the IRP panel within 15 days of the initiation of the independent review process. All requests to intervene or for consolidation must contain the same information as the written statement of the dispute and must be companied by the appropriate filing fee.

The IRP panel may accept for review by the procedures officer any motion to intervene or for consolidation after 15 days in cases where it deems that the purposes of the IRP are furthered by accepting such a motion. The IRP panel shall direct that all materials relayed to the dispute be made available to entities that have intervened or had their claims consolidated unless the claimant or ICANN objects that such disclosure will harm such confidentiality, personal data or trade secrets in which case the IRP panel shall rule on objection and provide such information as is consistent with purposes of the IRP and the appropriate preservation of confidentiality as recognized in article 4 of the bylaws.

Participation as an amicus any person or group or entity that has a material interest to the relevant to the dispute but does not satisfy the standing requirements for the claimants set forth in the bylaws may participate as a amicus before the IRP panel. Subject to the limitations set forth below. A person, group or tenant tee that participate paid in an underlying proceeding and process for ICANN bylaws we no that one, shall be deemed to have material interest relevant to the dispute and may participate as an amicus before the IRP panel.

All requests to participate as an amicus must contain the same information as the written statement that out in section 6 specified the interest of the amicus and must be companied by the appropriate filing fee. If the procedures officer determines in his or her discretion that the proposed amicus has a

material interest relevant to dispute, he or she shall allow participation by the amicus curia. Any person participating as a amicus curia may submit to the IRP panel written briefing on the dispute or on such discrete panel questions as the IRP panel may request briefing in the discretion of the IRP panel and subject to such deadlines and page limits and other procedural rules as the IRP panel may specify in its discretion. The IRP panel shall determine in its discretion what materials related to the dispute to make available to a person participating as an amicus curia.

Over to you David.

>> DAVID McAULEY: Bernie you got the short extra when it came to sections to read. So thank you very much for that.

I had my hand up because I want to speak as a participant here.

And I do have concern about this and what I believe is that on joinder intervention, whatever we are going the call it it's essential that a person or entity have a right to join an IRP if they feel that a significant -- if they claim that a significant interest they have relates to the subject of the IRP.

And that adjudicating the IRP in their absence would impair or impede their ability to protect that.

And in addition when there's a question of law or fact that the IRP is going the decide that is common to all that is are similarly situated.

And especially given the finality of these kinds of proceedings it's my view that intervention, whatever term we are using needs to capture that.

So I'm putting that on, I would be happy to provide specific language with respect to this concept tomorrow on list. And we talk about it on Thursday. But that's what I wanted to mention as a participant with respect to this particular rule.

So I'm note you.

>> NIELS TEN OEVER: Go to put my hand down and ask others if they want to comment on what I said or anything else that Bernie read in this rule 7.

>> I just went on mute for a second.

I wanted to ask you to elaborate, as to what about the text, I mean understood the point you were making and I feel I agree with it.

But I wasn't clear what about the text gave rise to a concern that that wasn't be satisfied in the text.

Is it that the role of the procedures officer that you're concerned about? Or what is it?

>> DAVID McAULEY: If you for the question. I didn't think it was clear that that would be a matter of right for someone that makes that claim.

You know the IRP panel can adjudicate it and say okay thank you for your claim but no.

But I think that we have to be clear what we are stating. I didn't think it was clear. And when I thought about this, I mentioned this a couple of months ago I didn't put it in the terms I just did, I just put it much more generally. But when I thought about it I looked at U.S. federal rules of procedure in this respect and those rules are not atypical from rules you will find in a fair number of countries around the world.

So I relied in part on that. So it's just a matter of clarity. So what I would do in language that I would put on the list is I would hope I would be would offer to make it more clear.

So, Malcolm you're welcome to reply or anyone else to the comment on this. If not, Malcolm is your hand still -- do you still want to comment?

>> Sorry, no. I look forward to hearing from you.

>> DAVID McAULEY: So it's my turn to read I go exchange of information rule number 8. I don't see any hands. By the way, it's now 8 minutes before the hour. Let's get through this. And then may be summary dismissal then we will call it quits. But there's by in large we are through the meat of it and there's only several pages left. So on Thursday we may not have a full call but we will discuss some administrative stuff I'll put in email. Reading number 8, exchange of information. IRP panel should be guided by considerations of accessibility and fairness and efficiency a as to both time and cost in its consideration of request for exchange of information on the motion of either party and upon finding of the IRP panel that such exchange of information is necessary to further the purposes of the IRP, the IRP panel may order a party to produce to the other party and to the IRP panel if the moving party requests documents or electronically stored information in the party custody and control that the panels are likely to be relevant to the material to the resolution of claims and or defenses in the dispute and are

not subject to attorney privilege and work product doctrine and otherwise protected from applicable law.

Where such methods or exchange of information are allowed all parties granted the equivalent rights or exchange of information.

Motion or exchange of documents should contain specific document and classes of documents or other information sought to subject of dispute along with a explanation of why documents are likely to be relevant and material to the resolution of dispute. Depositions and interrogatories to dispute will not be permitted. In the party expert opinion such opinion must be provided in writing to the other party must have the right of apply to such opinion with a expert opinion of its own.

So, I will say that concludes the reading of that. I'm going to put my hand up as a participant not as lead and ask if anyone else has comments. I don't see any other. And so I will comment as participant. This is in part related to the joinder I just mentioned. And what I suggest and what I think we need is to tighten the rule to ensure that an IRP panel cannot disclose materials or information amongst joined parties that will compromise competitive confidentiality. I think it's possible to gain the system through intervention. But I think we should tighten up the rule.

Make sure that can't happen.

And again, I'll provide language probably by tomorrow that would clarify this and we can discuss it on Thursday.

Or on list.

Does anyone have any comment to that? Or anything else about rule number 8? Gnat seeing or hearing any, I'll ask you Bernie to go through rule number 9, then we will call it quits.

>> BERNARD TURCOTTE: Yes sir, rule 9, summary dismissal IRP panel may summary dismiss any request for independent review where the claimant has not demonstrated it's been materially effected by a dispute. To be materially effected by a dispute the claimant must suffer injury or harm that is causally connected to the violation an IRP panel may also sum rarely dismiss a request for independent review that lacks substance or is frivolous or review.

>> DAVID McAULEY: So rule number 9 is now open for comments or questions? I don't see any hands or hear anything. Before we finish the call, let me just harken back to one thing that Bernie read under

rule number 7. And it was paragraph, the second paragraph, he read it directly but that paragraph currently reads in the event that requests for consolidation or intervention comma the restrictions on written statements set forth in 6 shall apply. I believe it's missing two words, are granted. I think that the request for consolidation or intervention are granted the unwritten statements shall apply if nobody objects that we will make a note to that as well. We are getting to wind up the call fairly early. By it's a fair break point after number 9 and before we get into interim measures of protection. Anyone have any comment or question or concern they would like to express at the point?

If not I'd like to say two things, one, thank you all for attending. And please I encourage you all to be on the call on Thursday. I recognize Avri may not be able to be. But I encourage us all to be on the call and, also, on list. And to those going to ICANN 63, I look forward to seeing you all there. Thank you for your participation. I believe we are done. Thank you Bernie. I think we can call it off.

EXHIBIT 203

TAF_IRP-IOT #18-6Apr17

DAVID MCAULEY: I would like to welcome everybody to the IRP call for April the 6th. Thank you for being here and hopefully a couple of other folks might gather.

Number one on the agenda is admin business. If there's anybody who's participating on this call who's on the phone but not in the Adobe room, would they please identify themselves now?

Okay. Hearing none, if there's anybody in the group that has an update to their Statement of Interest that they should mention, would they please do that now?

Okay. Seeing none, we can get to the agenda item number two which is a brief agenda item on the status of the timing issue. As you may recall from last week's call –

Let me ask who just joined on the phone.

KATE WALLACE: Hi. This is Kate Wallace from Jones Day.

DAVID MCAULEY: Hi, Kate. Thank you.

We're on agenda item number two. Last week on the call we discussed the timing issue as we have done on the last two calls and we've made good progress, but there is still an issue over what we term "repose" that's not yet resolved and we decided in the last call that a small group – Malcolm Huddy, Sam Eisner, and myself – would get together on the

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phone or on the list to try and move this issue forward. So this is just a status to the rest of the group.

The three of us have met on the list – not yet on a phone call – and we have a phone call scheduled next Wednesday. We have briefly discussed it and we are prepared to discuss the issue next Wednesday, so we should have more information about this in next week’s call. I just wanted to let everybody in the group know the status of that. It’s not been forgotten. It’s moving forward.

The next item on the agenda – unless anyone has a question about that – the next item on the agenda is the draft Expression of Interest document that Sam kindly sent to us before last week’s call. What I’d like to do is get into this. ICANN has kindly asked us our thoughts on this document prior to them releasing it to the general public for people to go ahead and submit applications to be on the Standing Panel, and we can get into the document itself.

Last week and again this week I suggested that we first address the issue that Sam mentioned that ICANN was proposing, that at least for the initial appointment of panelists we entertain the idea of staggered panels, that is, that while some panelists would be appointed for five years as contemplated in the Bylaws, some would be appointed for three years. The purpose of this as I understand it – I’ll give the floor to Sam in just a minute – but the purpose as I understand it is to ensure that once the Standing Panel gets off the ground and starts moving forward, there’s never the potential for complete loss of a panel and a completely new panel coming in the losing experience and the insights

into ICANN. This was brought up I think in Footnote 3 of the draft Expression of Interest document.

My suggestion is we take up the staggered panel issue first. I personally would support it, but I'd like to ask Sam if she would like to make any comments about that issue.

SAMANTHA EISNER:

Thanks, David. This is Sam Eisner from ICANN Legal. We identified this as we were drafting it just because when we get to that initial composition of the group, we put everyone on a five-year term then we'll always be facing the situation of re-comprising the entire panel potentially. There's no term limit on how many terms a panelist can seek, but we'd run the risk of having their five-year term and contract come up and maybe having to reseal the entire panel every five years.

So the proposal for the three-year and five-year was really just kind of an example. It's not anything that's carved in stone. We wanted to just give some examples of how we thought it could play out. Clearly we're open to other ways to do it.

You'll also see in the note that just as we were thinking it through from an operational standpoint, there are obligations both for ICANN and the community on the continued participation of selection of panelists. And so we thought that only having two cycles during which panelists were selected might be easier to manage than having three cycles, which is why we didn't recommend like having a one, three, and five, year thing put in. But we're clearly open to any sort of design that the IOT thinks makes sense, too. And then if this is something the IOT's comfortable

with, we would work with the IOT to develop a rationale for why some of the initial terms would be separate from that five-year term set out in the Bylaws.

DAVID MCAULEY:

Thank you, Sam. I have put my hand up as a participant and so I'd like to make a comment or two and then ask a question.

My comment is, I agree with Avri that this is an excellent idea. I think it's a great idea. And I personally would support dividing – let's assume we're going to have seven panelists to start – that we would divide it four and three, and the three would be for the three-year term and the four would be for the five-year term. That would be my personal suggestion. Thank you for this idea.

My question is, the Bylaw says they'll be appointed for a five-year term so does this raise the issue of do we need a Bylaws change and should this group at some point consider what in the United States Congress they call a "Technical Amendments" kind of change. That is, not a substantive... not a major Bylaws change but a Bylaws change that would deal with administrative matters that come up in implementation? I'm just floating that idea and I guess the question to you is, do you think the Bylaws would allow for a staggered term like this? Thank you.

SAMANTHA EISNER:

David, is that to me?

DAVID MCAULEY:

Yes. I'm sorry, Sam. I was asking what you thought about that.

SAMANTHA EISNER:

I think the Bylaws are clear. They say for a five-year term. As we've been in the initiation process there have been things that we've handled on an initial set of things and I think we have a way to distinguish this. I think, as I said before, we want to have some documentation about why a decision was reached to have some not on a five-year term at least initially.

In terms of amending the Bylaws, I think if we were to go through the process of amending the Bylaws – and the IRT is part of the fundamental Bylaws – we're looking at a six to nine-month process to get the Bylaws amended for a staggering that we actually only need to avail ourselves of once, right? Because once the first initial term is over, then everything else would happen on the five-year term. I don't want to give advice that says we can ignore the Bylaws at all, but I think there's some practical solutions that we need to consider. Maybe one of the ways to do it, we could stagger the time frames in which we start the panelists. That's the other way to make sure that every person who gets seated has a five-year term but then we risk not having a full composition of panelists for a one to two-year period after we start seating the panelists. So I think it's a matter of weighing efficiency over a well-documented decision of why we would create initial terms from the outset.

DAVID MCAULEY: Thanks, Sam, for your practical advice and for those suggestions. Next in the queue is Kavouss.

Kavouss, go ahead please.

KAVOUSS ARASTEH: Hello. Do you hear me please?

DAVID MCAULEY: Yes. We can hear you.

KAVOUSS ARASTEH: David, I think when Sam speaks, she speaks far from microphone. I have difficulty to understand what she is talking about. I full understand yours, the way you are talking, the way you are separating the syllables, the way you... but I don't understand half of what she said, number one.

Number two, in the chat or in the text, there are some colloquial expressions. Boots [chap] or boots – talk English but not local language. Could the people talk normal, standard, professional, [BBC] English but not something with colloquial or something nobody understands except American?

I have difficulty. I did not understand half of the things that's said by some. I apologize her. I hope it is not interpreted as in any way meant to have any significance but I don't understand. That is that. I have the right to say I don't understand. Please some speak clearly, separate

syllables from one to the other, and explain that what you want to talk about.

And also I have comment on David. David, I don't understand "Technical Amendment" in the American law and so on so forth. Amendment is amendment. There is no technical. There is no [inaudible] and so on so forth. Change of Bylaw, fundamental Bylaw, requires certain action. However, in the CCWG we may come to the conclusion that the [inaudible] need to change the Bylaw either standard or fundamental. We don't need to go through the process for change of the Bylaw. We need as a consequential changes due to the work of Work Stream 2. [That is] CCWG agrees with that and go to the ICANN and approve that and publish. That's all. We don't need after the public comments. We don't need to go to those process of the community and so on so forth. Who is in favor, who is against. This is a very, very, [serious]. Otherwise, I don't [inaudible] change the Bylaw. That is that.

We have to [inaudible] up and we have to pay for that. Please make it quite clear. Speak clearly. Don't use colloquial language. Don't use national or local language. Use international English please. Thank you.

DAVID MCAULEY:

Kavouss, thank you. I think you're right. I did use a colloquialism when I spoke about Technical Amendments so I regret that. And you and Sam are both right. This involves fundamental Bylaw and so that is that, and we should put my thought aside on the Technical Amendments. Let's just forget about that if possible.

I agree with you. You make a good point. We should all try and avoid colloquialisms going forward. That now being said, does anybody else want to comment on the staggered appointment or the staggering of the panelists' terms at this time?

Seeing no hands, I would like to move on to some comments on the draft Expression of Interest. I have some comments so I'm going to raise my hand as a participant. And I have a few comments, Sam, that I'd like to mention to you. I have some minor comments that I'm not going to mention on the phone. I'll put them on the list for the entire IOT Team. But they're minor in the nature of drafting, maybe a question or two.

The questions that I think are maybe a little bit more than that are, ICANN uses the expression "required or highly preferred skills" and "required or highly preferred experience." And I think that's a good expression because it includes "preferred." But in that, in some respects it goes a little bit beyond the qualifications that are in the Bylaws 4.3J. For instance, in the Skills section it says a "demonstrated ability" in one section, a "demonstrated awareness" in another section. And I guess my suggestion would be that it should say "ability" or "awareness" without the word "demonstrated," because "demonstrated" seems to narrow the pool to people that have done this in some way that can be demonstrated and I'm not so sure that that's a proper narrowing. In other words, it might discourage people that want to apply to become an arbitrator that have not yet much service as an arbitrator. Does that make sense? I'm just curious what your reaction is to that comment or that question.

LIZ LE: Hi, David. I think we're in agreement with that and it was just a linguistic suggestion that I think what you're saying makes sense and we'll go ahead and make that revision to the Expression.

DAVID MCAULEY: Okay. Thank you. Liz and Sam, I also had a question – the second bullet under “Required or Highly Preferred Experience” talks about extensive experience working with multinational organizations. My question is of the same nature – isn't that a bit beyond what we really need? To me that would be a desirable qualification but not one that if it was lacking would be disqualifying. And I'm just curious what you think.

LIZ LE: I see what your point is and I think it's something that we can definitely take out I think because it's something that definitely is desirable. I don't think it's a required experience and if it seems to create some kind of impression that it would be required on interested members, then let's definitely we can back that out.

DAVID MCAULEY: Thank you, Liz. I don't necessarily think it needs to be backed out but maybe stated more as a preference.

Having said that, I have one or two other comments and I'm going to leave my hand up but I'm going to ask Kavouss to take the floor while I go through my notes to my other questions. And I won't go through too many, but Kavouss, you have the floor right now.

KAVOUSS ARASTEH:

First of all, I'm sorry to Avri that [inaudible] that I don't understand boot strap. I don't understand that, believe me. Boot strap I don't understand. What we do – strap the boot or your boots for the strap above [inaudible]. I don't understand. Put it in different language.

Now, coming to you, David, you are going to oversimplify the quality [inaudible] of the panelists by saying that there's no need to say demonstrate [inaudible] ability. Who knows what is ability? This should be demonstrated by everyone. This word we have discussed extensively in Work Stream 1 and it was put expressly as to demonstrate. Otherwise, there are many areas we did not put demonstrate. It is as normal standard word saying that to have the ability [inaudible] but demonstrate is something that you have to show. You have to have [evidence].

And therefore, the high [inaudible] we also trying to simplify that. I think you are going to adjust something to something else in order to facilitate or simplify this task. I am not in agreement with that. I have serious difficulty in saying this is very important element because we are talking of IRT. We are talking of panelists. Something which decides on the fate of a issue before going to court.

So I do not support any change or any interpretation or any simplification of any of these words until we go to the total process. So no interpretation, no [inaudible], and no particular consequential changes and so on so forth. I disagree with that and I put [what] disagreement [formally]. Thank you.

DAVID MCAULEY:

Thank you, Kavouss. I'm not sure I agree with you on this one. The Bylaws require ICANN to come up with a draft Expression document, and ICANN has kindly asked us our thoughts on it and so it seems to me – this is not a statement of the Bylaws. This is simply a document for Expressions of Interest – and so it seems to me that we ought to respond to ICANN and give our thoughts but I have to additional thoughts/questions for Sam and Liz.

One is, the Compensation section looks like properly panelists will be paid as cases are heard. My question is – and I don't know the answer. I don't know how these panels operate internationally – is there a retainer payment to panelists just to join a panel and to be willing to serve? I'm just curious what your thoughts are on that.

SAMANTHA EISNER:

Thanks, David. This is something that we've discussed a bit with the ICDR as we were previously trying to put together a Standing Panel. Our thought is there has to be some level of retainer that would give us some assurance of availability as well as, now that we're having terms, to it could all kind of be tied into kind of a contractual basis of that they'd agree to make themselves available across the number of years. And so I think the only way this process will eventually work is through the use of retainers so that we don't keep running into availability problems once we have a Standing Panel.

DAVID MCAULEY:

Okay. Thank you. The only other thing I was going to suggest now rather than on the list is, it seems to me – and maybe I missed it but I don't think I saw it – is a question to prospective panelists, an invitation to them, to say why they want to serve on the panel and what value they would bring to the panel, and that might flush out from them what their understanding of ICANN is and what their interests are. In other words, sort of a subjective statement from them as to why are you applying for this? And I'm wondering what your reaction is to this as well as the reactions of anybody else in the group.

SAMANTHA EISNER:

From the ICANN standpoint I think that's a great suggestion. I think it's always helpful to understand motivations and interests and understanding of why someone's stepping into this space. So we'd be fully supportive of that.

DAVID MCAULEY:

Thanks, Sam. I will commit to come to the list with the other things I have that I don't think are significant enough to raise on a telephone call, to do that by tomorrow or Saturday. And then I'm guessing – and I would invite anyone else on the team that has comments on this to please make their comments either now or on the list so that, Sam and Liz, I guess that you would revise the document or finish it off or whatever you think is appropriate and so can you talk a little bit about what your plans are once you get the final comments from us. And I might be a little too aggressive because there's some folks that may be interested who aren't on the call right now. But let's say I come out with

my comments tomorrow or Saturday and invite others on the list to comment by next Wednesday. What do you expect would happen then, Sam and Liz, following the finality of our comments?

SAMANTHA EISNER:

Thanks, David. We would update the document based on inputs received, and having an outside time frame within which the IOT can provide inputs would be really helpful. We would then turn the document, we'd send it back to the IOT probably for a short period of confirmation that we took on the changes and then we would then put the Expression of Interest up. I don't know that we've talked internally about how long we want to keep it up for. There is a possibility that we would, depending on whether or not we're receiving the adequate number of responses or responses to gather a large enough pool from, that we would have to expand it, we would also be working with our Coms team on appropriate mechanisms to push it out. We'd also ask the IOT at that point to... We'd give you guys notice of when it came up and ask you for help to circulate it to your communities or interested people to try to get more Expressions in.

And then at that point we'd have to see how many Expressions were received and how long each one is, and then we'd go through a process of vetting applications and ranking them, etc. There likely would be some interview component of that to make sure that the prospective panelists are worthy of the position and that we can actually talk to them just like you would in selecting people for anything else.

But we won't really have a timeframe for how long that process is until we see how many Expressions we receive and the timeframe in which we receive it because if it's hitting around the Johannesburg meeting maybe we need to push it up a little bit more, etc. So that's kind of the general scope of where we see it. Of course, out at the end of that process ICANN would be returning to the SOs and ACs along with the IOT when we'd probably, if this group is still together, we'd look to you to help us push out to the SOs and ACs the list of the candidates that meet the requirement level to then facilitate the community conversation on selecting the final panelists from that list.

DAVID MCAULEY:

Okay. Thanks, Sam. If you do consider the questions like to a panelist, "Why would you want to do this and what value do you bring?" you might consider a word cap on that kind of thing because if there are a lot of applications, the SOs and ACs are going to have to go through this with a view towards nominating members so it might be nice to see what discipline people can bring to making statements like that.

The IOT through me has been making presentations to SOs and ACs about their upcoming role in all of this. As the IOT, I believe that we would be very happy to ask SOs and ACs to take on the Expression of Interest and push it out themselves in order to widen that field. So unless there's any objection to that, that would be my expectation.

I see Kavouss – Kavouss, is that a new hand?

KAVOUSS ARASTEH:

Yes. David, you mentioned something that I supported that asking in one way or the other what is the intention or your intention to be member of the panel and how you think that you could contribute to development to the issue or to the responsibility and what happened to that. That is I think good way. And second I don't understand you said that asking SO/AC. What is SO/AC? They are not involved in that [inaudible] mean in that first selection of seven people by three people by each of the seven? Or what you want? Why you want to involve SO and AC in this matter?

DAVID MCAULEY:

Thank you, Kavouss. What I'm speaking about is first of all, the question I asked about why do people want to join I think that Liz and Sam have said they will consider putting that question into the Expression of Interest in some form or fashion, so I think that's handled for now.

With respect to involvement of SOs and ACs, they have a role not in picking any three panelists to hear any specific case but they do have a role in nominating the Standing Panel under the Bylaws. At ICANN58 I mentioned to a couple of SOs that this is coming their way and we've written – remember the letters that we sent, Kavouss – we've written to SOs and ACs saying this is coming your way, and I hope to make such a presentation to the GAC sometime in the near future and have mentioned that to Thomas. And so they have a role in nominating Standing Panelists. That's really what I was speaking about but they also have a role in taking efforts to make sure there are well-qualified candidates and I think they can help disseminate the Expression of

Interest just like anyone could. There's no prohibition on it. That's basically what I'm getting at. Does that answer your question?

KAVOUSS ARASTEH:

To some extent yes, but not totally. I would think that at least this group should ask the SO/ACs what is the procedures or policies by which we select these three selections or three people for the panelists. We ask them what are [the] procedures. I don't think that there is any procedure [inaudible] SO/AC. Could you ask them what is their procedure? How do you select that? I hope that it would not become political selections or commercial selections. It becomes really the professional selection. No matter whether they are from one region or two regions, no matter whether the distribution among all or distribution among one sector, so we have to ask them what is the procedures or how do you imagine or how do you consider the process by which you select these people. Or we could propose them something.

DAVID MCAULEY:

Okay. I think that's a fair request. I frankly think that what we should do first and what we've been doing is telling them, advising them, that they have a role under the Bylaws in nominating the panel and we have been doing that and will continue to do that, but asking them what their procedures are may spur them to develop some objective procedures. They know themselves better than we do.

I participate in the ccNSO and I can tell you that they are aware of this and are looking at it in the Guidelines review work they do. It's a good suggestion. Thank you.

Anybody else have any comments on the Expression of Interest right now?

Avri, your hand's up so you have the floor.

AVRI DORIA:

Yes. Thank you. I will try to be very careful in how I speak. I am confused by this last interchange about trying to do some apriori. And by that I mean a process that we decide on before the process occurs that determines that the choice of a nominee by a Supporting Organization or an Advisory Committee i.e. an SO or an AC, how that can [be] controlled for the absence of accusation of political.

Each of the SOs and ACs will pick on its own criteria. Looked at outside by someone who thinks that body is innately commercial or is innately political will be colored as political. So I think that this notion that we are trying to determine in some prior way how a group will make its decisions [inaudible] and problematic. Thank you.

DAVID MCAULEY:

Thanks, Avri. I think you make a decent point and I have a response but first I see that Sam has her hand up so Sam, I'll give you the floor and then I'll comment on Avri's comment. Thank you.

Sam?

SAMANTHA EISNER:

Thanks, David. I think there's some intermediate position between what we heard Kavouss say and Avri's position. I agree that there could be some issue with having a fully established process from the outset, but if you look at the text around the appointments and the SO and AC roles within it this is different from how, for example, the SOs and ACs are involved in selecting reviewers to the specific reviews. The Bylaws themselves don't call for each SO and AC to develop their own nominations for that, and so there could be some benefit in facilitating among the SOs and ACs some agreement on some common principles around how the final slate will be reached and are there types of diversity among the panelists that would be desired? Are there any other kinds of principles that could be established so that when the slate comes from ICANN after ICANN's viewed the qualifications and rated them against the qualifications that could help the SOs and ACs as they're doing their collective work to nominate the slate of proposed panel members to make sure that there's a slate that actually serves ICANN. So maybe there's some middle ground here.

DAVID MCAULEY:

Thank you, Sam.

Kavouss, you have the floor.

KAVOUSS ARASTEH:

Let me explain my difficulty. Some SO and AC, as I heard several times, may in this process take into account the diversity as the first element.

They look into the geographic diversity, cultural diversity, age diversity, language diversity, and any other that I don't want to mention, but forget about the competency and real qualifications and abilities and knowledge about dealing with this very important issue. So [they measure] the secondary qualifications competence, and so on so forth, to the primary as age diversity, language diversity, cultural diversity, geographical diversity, disability diversity, and I don't want to say. That I want to avoid. This is not the case that unless we say that the most important element is competency and qualifications. We should go together with any of those [that] would not be one of the elements is the most important element of that.

I'm sorry if I have not properly mentioned at the first intervention. That is the risk that some SO/AC may go that far. I have heard already. There are people they want to be popular with the others and they try to go to the geographical diversity [inaudible] which I don't believe that [is] the case. If you have competent people, no matter all of them coming from one region. Not exactly one but at least but we should not sacrifice that because of the geographical diversification or age or language or culture or [whatever] so on so forth. I hope perhaps I have explained now what is my anxiety and problem. Thank you.

DAVID MCAULEY:

Thank you, Kavouss. I'll comment now as a participant. What I meant to say is that I think the IOT has a role in helping the SOs and the ACs go through this because the Bylaws give them obligations but the Bylaws are not detailed in this respect. In other words, there's some room for them to work.

These are short. I'm going to read the two Bylaw provisions I'm speaking of. They appear under 4.3J2 B and C. And what B says is: "ICANN shall issue a call for Expressions of Interest from potential panelists and work with SOs and ACs and the Board to identify and solicit applications from well-qualified candidates and to conduct an initial review and vetting of applications."

The next Bylaw section is Subsection C. It says: "The SOs and ACs shall nominate a slate of proposed panel members from the well-qualified candidates identified," in what I just read.

And then there's another final section. It says: "The nominations are subject to Board confirmation which won't be unreasonably withheld."

In that – and when I went through our slide presentation that I think we've all taken a look at that I was using at ICANN58 – I think we agreed that we will assist the SOs and the ACs as they need. We won't take over their role. This is their job to nominate panelists. But we are going to be the experts on the procedures and on the rules and we should, and I think we will, assist. Anyway, that's the position that I think is correct right now and I think that the SOs and ACs will design the way they pick the panelists in accordance with the way they normally work. And I know the ccNSO is doing that.

I also participate in the Registry Stakeholder Group. I don't think it's really turned its attention to how it will work within the GNSO on this, but I'm sure they will at some point soon.

That's the end of my comment on this. Does anybody else have a comment they want to make in this respect?

I see Sam put in the sections I was just reading. I apologize for the redundancy.

If there's nothing else on this – and by the way, on the Expression of Interest document, as I said I'll come out to the list by Saturday – but I encourage others in this group to please take a look at the Expression document, give it some thought, and if you have some suggestions or comments for edits, please let them be known on list and let's get all those done by the close of next Wednesday just prior to our next call.

Moving on on the agenda, the next issue is what's called the "joinder" issue, and I actually sent an e-mail to the list on the joinder issue. I'm trying to remember the date I sent it. I believe it was on March the 29th, but I sent a note to list and this e-mail that I sent will also play in agenda item number five – "Working Methods" – but that's the next agenda item. On the joinder issue, I summarized briefly some of the comments that had come in on joinder. Joinder, of course, means when a claimant brings a claim against ICANN at IRP, are there other parties that can join in the same IRP that have an interest and can take part as a party in the IRP or by presenting a brief to the IRP commonly known as amicus brief. I don't think that's a colloquialism but basically a friend of the court brief. So there's two levels – somebody participating as an actual party in the dispute and another that might want to say, "I don't want to be a party but I would like to send a brief to the panel letting them know our thoughts on this important subject."

So on this issue of joinder, I actually made some suggestions in the hope that we could address this on list and come to a resolution because there were some good comments, most specifically from the Non-

Commercial Stakeholder Group and from a law firm that Kathy Kleiman is a partner in. I'll briefly discuss the six things that I mentioned and then I will mention a couple of comments from Greg Shatan and see if anybody has any thoughts on these.

The suggestions that I made are that we come up with rules that allow everybody that was a party at the underlying proceeding – the Expert Panel basically such as a string confusion objection. Those kind of panels – everybody that was a party there would get notice and an opportunity to be a party at the IRP if the loser below brings an IRP, that all parties have a right to intervene or file an amicus brief, and that if they become parties, they have the rights of a party under this kind of conflict, that all parties have a right to be heard in any petition for interim relief. Some IRP panels can grant interim relief such as a recommendation ICANN stand fast and not do anything and all parties would have an opportunity to participate in that. The suggestion that all parties enjoy equivalent rights and obligations with respect to pleadings and other documents and obligations in an IRP. A recommendation that interested parties be able to petition the panel to intervene either as parties or [amici] if they weren't involved below. That would be at the discretion of the panel. And that whoever comes in as a joining party be given a reasonable amount of time within which to submit their documents, etc. I suggested 30 days.

Greg Shatan in an e-mail basically thought that these were okay and agreed with them, I believe. But he felt that we should limit the parties that could come in by right as to being those parties who were parties below in the Expert Panel hearing below, and the same with respect to amicus briefs – friends of the court briefs. He also suggested that the

time limit, where I suggested 30 days, be 45 days simply because I was just being too aggressive on the timeline.

I would encourage everybody to look at that mail of March the 29th and Greg's response to it, but I'm hoping that we might be able to discuss and close the joinder issue based on this mail.

Kavouss, you have your hand up so you have the floor.

Kavouss, you may be on mute.

KAVOUSS ARASTEH:

Sorry. I was on mute. I'm sorry. I apologize.

I have a question of clarification nature. Does the initial or main party and the joinder have the same status in application of various parts of the process or they have different status, different [inaudible]? Someone who joined as a joinder has the same rights and the same priorities or same status as the main party or not? This is my question.

DAVID MCAULEY:

That's a good question. Under my suggestion that is what I was implying but I didn't state that explicitly so that's a good point to make explicit. In my suggestion, when a claimant brings a claim against ICANN at IRP they are a party to that. And if anybody joins as a matter of right or if anybody joins as a matter of discretion of the panel and joins as a party, they would have all the rights of the party and the original claimant would have those same rights simply because it's already a party. That's my assessment.

Go ahead. If you have a follow-up please go ahead.

KAVOUSS ARASTEH:

The follow-up question – if the joinder has...would it be a possibility [inaudible] that the joinder say something which contradicts with the main complainant or main party or they should coordinate with each other and not conflicting each other views and asking two different questions, two different process and inconsistent or incoherent with each other or that should be one of the conditions that it should be coherent, they should be consistent, and they should not contradict in application of the process.

DAVID MCAULEY:

I did not envision that and believe that would be very difficult to arrange. I need to think about that, Kavouss. But the way I drew this up, my recommendation was that they would be a party completely independent. They would make whatever case they wanted to make and the panel always has the ability to manage what people are presenting as arguments and claims. But I'd need time to think about that. That was not something I included so I can't fully answer your question right now.

Sam, you have the floor. Your hand is up.

SAMANTHA EISNER:

Thanks, David. We have a few points I think we want to raise from the ICANN side. First, I think it's important... There's no fundamental opposition to the idea of allowing proper people to join into the IRPs. I

think there's a lot of argument and support that that helps bring us to a just and fair resolution of items that are appropriately brought at the IRPs. I think it's important that the rules surrounding that make sure that the focus of the arguments brought by those who are seeking to join or who are joining are focused on the question at issue in the IRP and don't make the panel go into resolving a dispute between the two parties. That's not within the competence of the IRP Panel. That's not why we have it there. So everything has to be focused on was there a violation of ICANN's Bylaws and Articles? And so there has to be some guidance [to] people who are joining that that's what they need to tailor their submissions to.

Within this of right versus interested parties issue, issue, I think that that's where a lot of details need to be worked out. So in this area of Expert Panel discriminations, for example, it's very easy to understand who are the competing parties within that, who are the competing applicants if it's within the New gTLD Program, etc. So that's a very easy way to identify the pool, give notice, and have something running from that.

In terms of interested parties, there probably needs to be some other work at defining what that means if it's not from a defined pool of people. If they had the same rights as everyone else, should they also have to demonstrate harm? What other things would they have to demonstrate? And what types of briefings would have to happen if someone were to go to the discretion of the panel to allow them to come in? What types of opportunities to be heard just on that intervention would have to happen and how does that impact the whole timeline? Because as you know, we do have stated within the

Bylaws itself a preference that the IRPs conclude within six months, and so any opportunities you give to move the panel's focus from the substantive issues at hand to more procedural issues of who should be there, risk that timeline.

Also, in terms of interim relief, it's not clear that extending... We haven't really looked at how the 30-day rule that David suggested would impact that but I think the longer you make that such as the 45-day limit suggested by Greg, the more you impair people's ability to actually seek interim relief and the more you create the possibility for fights of, "I wasn't appropriately allowed to participate in that interim relief." I think we need clearer rules, particularly around that interim relief section, and then just as a whole on timeframes and what are workable timeframes for people to submit briefings and would there be reason for parties external to ICANN to have, for example, a longer timeframe to respond than ICANN would because ICANN often can't control when it gets an IRP or not. Those are just some questions to think about.

DAVID MCAULEY:

Sam, those are excellent questions to think about. I don't take notes when I'm chairing a meeting. Is there any chance you could come to the list and summarize these points? I could always listen to the call but it might be helpful if you come out on the list and repeat these. Would you be willing to do that?

SAMANTHA EISNER:

Yes. We can have them circulated, maybe not this afternoon but probably by tomorrow.

DAVID MCAULEY:

That's fine. I think that would be helpful, especially since there are some folks who are not on the call right now. Those are very helpful comments and thank you for that. I think it would give us all food for thought.

Does anybody else want to comment on this joinder issue at this time? Okay. I don't see anything.

Let's move to agenda item number five, and it has to do with our working methods. That relates, in a sense, to the joinder issue that we just discussed because, as I mentioned, on the try and encourage us to do more of the working on the list and to sort of recast how we handle meetings and list. And so in my expectation, the joinder issue was the first attempt at this although I did subsequently come out – we won't get to it today – I did subsequently come out with another e-mail last week in which I tried to segment issues that might be a little bit easier to take on and so that might be another example.

What I'm looking at today is an e-mail that I sent to the list earlier today about this. I don't know if people have had time to take a look at it. What that e-mail is basically doing is say, "Let's turn things around here and move our substantive and deliberative conversations to list on a discrete basis – comment by comment." We have a lot of thoughtful comments from people and we need to give them fair treatment, and my hope is we can give them fair treatment in a fairly quick way and move this process along. This is an important part of the new IRP and we want to get it in place.

And so I'm hoping that we can move to the list. That way people can think and reply in their own good time, and that what we'll do is turn meetings into sessions that will address things that have been mentioned on list. We would sort of have the meeting regimen where we would discourage people from bringing anything up new in the meeting. We don't do things in one instance and so if someone has a new thought they could mention it briefly but put it on the list so that we could discuss it next time and get it done and dusted.

I would encourage you to look at my e-mail this morning. I think the staff can help us in this. They can take whatever we put on the list and sort of organize it for us when we do get together on the phone call. We might be able to move to biweekly calls instead of weekly calls. So what I'm asking is, if anybody has a comment on this. I see a red X from Avri so I think that means, Avri, you're not supporting this? Do you want to comment on that? You don't have to but I'm asking if you want to.

AVRI DORIA:

No. Yes. I might as well comment. I think requiring that everything be discussed on the list prior to a phone call and that if you're in a phone call and you hear an argument and at that point you understand your opposition or your comment to something that it not be allowed because it wasn't first discussed on the list, is an incredible problem and will hurt the discussion.

I certainly see "recommend." I certainly see "requesting." But making it a barrier that people have to do everything on a list before they can discuss it would seem to me extremely exclusionary to those who may

not feel comfortable typing arguments out long hand on a list or what have you. We have multiple methods of communication because different people communicate in different ways. So I would argue strongly against that. Thank you.

DAVID MCAULEY:

Thank you, Avri. Before we go to Kavouss let me ask you a clarifying question. I think you make a decent point. I guess what I'm trying to do is make the calls different and would you be as concerned if someone who had a new thought on a call could make that but the Chair – me – would be a little bit more assertive in trying to move things along as well. In other words, let the point be made but trying to move things along as well. I'm not stating that well, but I'm curious what your reaction would be to what I just said.

AVRI DORIA:

I certainly support a Chair trying to move things along. There is all kinds of ways of doing that, of having people speak only once or twice on a subject as opposed to frequently, as keeping people to a certain time limit, but I think if there's a new concept, a new idea, that occurs to someone on a list there should be an ability for them to bring it in and to be able to clarify it if someone asks a clarifying question. Thank you.

DAVID MCAULEY:

Thanks, Avri. That gives me something to work with on trying to tweak my suggestion and Kavouss, your hand's up. You have the floor.

KAVOUSS ARASTEH:

Yes. David, first of all, with respect to [Avri], that point that we have to consider and comment. There are many documents from here and there. Would it be possible that someone put them together as in one single document on which we could comment, otherwise [this is a] different element and we may have a difficulty to find that. So it is possible that whatever you want to receive comments on that, put them together in a single document? That is one.

Second, the issue I raised that if you said that the question four about joinder, if the main complainant and the joinder are completely independent so they might raise questions and issues to the panel which could [take] the panel into the problems because they are contradicting each other's views and the panel does not know which [they should] have to go and I don't have any answers to this. So it need to be discussed or to be examined or rethought of in order to see whether that possibility exists. That's the one contradicting the other and put the panel into the problem. Thank you.

DAVID MCAULEY:

Thank you, Kavouss. Again, food for thought for me on tweaking these suggestions.

The next item on our agenda is consensus policy where I was... there are a couple parties, again the NCSG and the law firm that Kathy Kleiman is in talking about when consensus policies are debated at an IRP that some allowance be made for making sure that the initiator of the policy have a stake in this but it's too involved to get into now. We just have a minute left and so I'm going to invite any final comments if anybody has

any. Otherwise, we're going to close the call down and proceed on list which I hope to encourage more of.

Does anybody have anything final?

Seeing none and hearing none, I would like to say thanks, everybody. I thought it was a productive call and I'm very much appreciative of people participating. Off we go. We'll see you on the list and on the next call. Thanks very much.

[END OF TRANSCRIPTION]

EXHIBIT 204

CCWG-IRP-IOT MEETING

CCWG-IRP-IOT MEETING

Thursday, September 7, 2017 - 19:00 to 20:00

>> DAVID McAULEY: Hello, everyone this is David McAuley. Welcome to the can we get the recording started.

Thank you. Welcome to those on the call we're again a small group such as our lot. We're a small group to begin with based on the way the group was constructed by the CCWG. But pressing forward we do have a quorum and I'd like to do the administrative part. The first item of the agenda. Let me ask, in addition to the people shown in the adobe connect room, is there anyone on the phone and not in adobe. If so, please let yourself be known now. Not hearing any. I'm going to ask the folks on the call if anyone has a change in their statement of interest that they need to mention to the group. Not hearing any there either. Let me just move on. Before we get to agenda item number two, let me just say it is, as you can see from my recent e mail, my hope we can start driving a good number of issues to first reading. There's been a lot of discussion. We've done a lot of chatting about these issues, and I think we're in good shape to move them to first reading after which my hope is getting to second reading would be proforma exercise. It's my intent over the coming weeks to try to continue this process. And I would appreciate any help. If anyone wants to pick up issues from the signup sheet, feel free to do so.

We'll move now to agenda item number two. Simply an update with SO/AC in shape to get functions under the bylaws with respect to nominating a standing panel. Sam has graciously volunteers to let us know where we stand.

Note: The following is the output resulting from the RTT (Real-Time Transcription also known as CART) of a teleconference call and/or session conducted into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.

>> SAMANTHA EISNER: Sure. This is Sam from ICANN legal. We've been in coordination with colleagues here to try to stage some communication through that secretary the different SOs and ACs to start getting information out particularly through the leaders SO/AC and making some calls to action including invitations to webinars the likely do some information outreach first so it's clear what it is we're asking people to help us with in terms of getting community input on the places that on the document we share with the IOT where we need community input on how they want that process to go and or how long a process should take within the flow chart we provided, and then that would be moving towards a webinar and we're trying to get a lot of activity on this done before OBIDOB before we start getting the standing panel call of expression of interest out sooner rather than later.

>> DAVID McAULEY: Thanks, Sam. It's David here. Did you say the communication process with the various SO/AC is already under way? It's happening now?

>> SAMANTHA EISNER: So we're we're getting guidance from policy colleagues on what all we've shared a lot of documentation with them. We're getting guidance on which part to share when. We have clear and concise communication and helping us form a call to action we're seeking. So it's pretty clear and laid out for the community leader to bring to their government. It hasn't there has not been outreach yet but we're actively working on that with our policy colleagues and within the next couple of weeks I would hope that we've had outreach to SO/AC if not sooner.

>> DAVID McAULEY: Please be aware that the IOT is willing to assist. I know that we can probably gather up folks that would be willing to assist. I certainly would be if there's any need for something like that. And I also participate in the registry stakeholder group and we have

just been discussing that we started discussing that within that group to bubble up to GNSO. So thank you for that update, Sam. Does anybody have any [Indiscernible] you're welcome. Does anybody have any questions or comments with respect to that agenda item update Sam just gave?

Seeing or hearing none, I'll move on to next agenda. That's joinder issues. You've seen the mail. The brief background is that this is a discussion of joinder issues really in the context of people bringing appeals from expert panel decisions. The discussions in this group will affect what we do with the challenges to consensus policy. I think that point has been made a number of times. When we get challenges consensus policy it should go fairly. In the joinder issue, I described about challenges from expert panels below there's been a series of e mails and discussions in the past and I made a proposal Liz had made comments from the perspective of ICANN legal and organization with concerns about it and sum of all that work in the mail I sent out last Friday I tried I think it was last Friday. I'm losing track. In any event I tried to pull together a proposal for joinder language and it's on the screen and I think you have scrolling capability, and this is my suggestion for where we go, and I'd like to read it just to make sure that everybody gets a grasp of it. So what I'm doing is suggesting only those persons or entity participating in the under lying proceedings receive notice from a claimant, this is the expert panel challenge instance, of the full notice of IRP and the request for IRP including copies of all related file documents. And they receive that contemporaneous with the climate serving the document on ICANN. The second point I'm suggesting all such partying have a right to intervene in the IRP. The timing and aspect intervention shall be managed pursuant to the applicable rule of ICDR except otherwise indicated here. The manner should be up to the procedure officer who may allow such intervention through granting IRP party status or by

allowing such partying to file amicus by briefs. An amicus may be subject to applicable cost fees expense subpoenas and deposits provision of the IRP as deemed reasonable by the procedures officer. Number three. No interim relief that would be materially affected an interest of any such amicus to the IRP can be made without allowing such amicus an opportunity to be heard on the request relief in the manner as determined by the procedures officer.

So that was my stab at trying to throw out together the thoughts on joinder. I'm happy to hear comments, challenges, concerns, et cetera, now. And so I would invite anyone to make a comment. And I don't see a rush to the adobe cube or phone, so what I'm going to say is that absent any such thing I'm going to consider that this Sam, I see your hand. I'll get there in a minute. This would get to first reading. And one thing I'll state in the background whatever language we come up with here is not is probably not going to be the language of the rule. Our final report which will have a section on what we think should happen to the rules in light of the public comment it will have another section dealing with recommendation with respect to bylaws the language of the rules will be drawn up by due to the instruction of final report. Anyway, Sam, you have your hand up. So you have the floor.

>> SAMANTHA EISNER: Thanks. So you know I think this does pair back in issues we raised previously. I think there's still one things I reflect on when I read is that I don't anticipate for someone to achieve party status someone must have appropriate standing to assert a claim in an IRP and so I'm wondering if we have that reflected anywhere because otherwise it's it seems to expand the IRP if we allow people to join as party without having a requirement of standing that's important for the initial claimant.

>> DAVID McAULEY: I guess where I'm coming from Sam is is that the value with respect to people who were parties at the expert panel decision. And the bylaw provides for appeals from those decisions. And so

>> SAMANTHA EISNER: Well, the bylaw allows for those to believe that there was a that ICANN violated its bylaw and article in accepting the expert opinion to take that manner to IRP it's not necessarily an appeal.

>> DAVID McAULEY: Okay. I appreciate that distinction. But still it would seem to me that if a person an entity that was a party at the expert panel proceeding felt ICANN was making a mistake by accepting the judgment. I think that's reflected here. I'm open to suggestion of change. The one thing I'd like to say we're at the point anyone has concern can offer specific language not necessarily here in the call in the next day or two. Offer specific language we can look at because the whole point I think we're getting to or I'm wanting to get to is to drive things to a successfully first reading. Get them done and dusted.

And so Sam, the invitation to you I'm sorry.

>> SAMANTHA EISNER: Yeah, we can a proposal around that.

>> DAVID McAULEY: Okay. Please do it pretty quickly. I'd like to get this one done now. Having said that, I would like to ask if anyone else has a comment about any other provision of this, any understanding that my drive is to get this to first reading with a view to considering the language Sam will send forward. I don't see anything Sam, your hand is still up. Is that new?

Okay. Thanks. So then good this one is resolved. With the resolution, here we haven't achieved first reading what we have done is made a point of discussion. Sam has lingering

concerns about standing and she will offer specific language in fairly short order with that language comes in, I will try and incorporate it into what I've proposed or note that I think there's an issue we need to discuss on the next call. If we do if I'm able to get into language, I'll put it to the list and say, okay, here's the latest draft for first reading, and hopefully we would confirm that in the next call and be plenty time on the list to take a look at it. That would be that's the treatment there. And Brenda, if I could ask you to go to the next slide, which would be on the next issue. I believe it's trying to get the first reading on the issue that described as other ongoing monitoring.

Okay. Next one. We have an issue about ongoing monitoring I think it was mentioned the issue in public comment. It's a good idea about making sure the community reviews IRP and the standing panel not go off into the sunset on their own. And the background here is that Avri took the lead on this and you can see from my e mail she made a suggestion I'd like to read it quickly. I may snip along the way but basically Avri suggestion was this after the IOT finishes its current work, it will terminate as implied in the bylaw Section 4.3. Two Section 4.3(n) needs to be amended once rules of procedure are approved to remove subsection (i).

Three, a new section should be added in bylaw Section 4.4 on reviews. That would be a Subsection (c) that says in cooperation with a review team chosen by the SO and AC and comprised of the members of the global Internet community the IRP shall periodically review the rules of procedure. They should conduct no less frequently than five years. Based on feasibility determined by the rule. Each five-year cycle computed by the moment of reception by the board from the previous rules of procedure review.

I then came out in an e mail in made just suggested a couple of changes first. I said after the IOT finishes current work, work items terminate as implied and it wasn't we terminate after the after the rules. In any event Section 4.3(n) should be amended to remove Section (i) once IOT terminated and then three review IOP under bylaw Section 4.6BF it's an ATRT review. And different from Avri came back last Friday and said not a dime ditch moment but you speaking to me you switch responsibility from the review to AT to RT from one in cooperation review chosen by SO/AC and comprised of members of the community et cetera.

And Avri said this seems a larger change I think that's a good comment. I tried to take advantage of provision that was existing but I think Avri is right and I'm happy to go with Avri's final suggestion in other words going back to first one. Avri, you have the floor.

>> AVRI DORIA: Thank you. This is Avri and it's funny in thinking about this after I sent my note, you know, in what I said there were two points. One is the ATRT overload, but it looks like it's been assigned to them. You're right when I thought about that more perhaps that's you know, that's kind of done and lye with it. And then but then I would recommend another amendment to that, in addition, the idea of it being mandatory, is that that they should do it in cooperation with the panel or some such wording so that's okay it already belongs to ATRT let them keep it. But you know still include that important element of discussion. Now I think it's fine going back to the original language that I proposed but I came ready to basically find a space in the middle and that's what I had thought of. Thanks.

>> DAVID McAULEY: Thank you, Avri, David here.

Let me just state the parenthetically I mentioned before the also recommendation about the bylaw. This is one of those sections that will be a recommendation about the bylaw become

the Alac comment it should be periodic review it's not a rule of procedure. We're talking about something slip into final report suggesting the board look to amend the bylaws to state something different than they say right now. With that background, I would what I'll do similar to the joinder issue, we'll get new language and I'll do that and I'll send to list, and Avri, I'll try to take advantage of middle ground you suggest. If I have any difficulty doing it, I may go back to original proposal, but I'll put it out in list with a firm desire that we'll close this one out next call at first reading. Not closing out totally, I'm talking about first reading. Sam, you have hand up. Take the floor.

>> SAMANTHA EISNER: Thanks. This is Sam. I just want to ask a question about the IOT conclusion. So really I I don't really have a clear desire on how this goes. I just wanted to flag one things IOT is charged with is if there is a tender for new provider. So I think one of the things we'd want to consider is the f the idea is s from the IOT removed from the bylaws consider if there's anything we would recommend get put in the section on tenders for new providers, and maybe this is something we could also build into that review cycle as it's going on you know also issue the like ongoing training with standing panel maybe that's some of the specific items that's called out in future reviews. I just want to flag IOT mentioned couple places to the extent there might be a for the community in those to take on some of the action in the future that we think about how that is reflected in any proposed changes to the bylaws that would be recommended out of the group. I don't necessarily think it changes spirit of proposal I think it's a drafting flag maybe.

>> DAVID McAULEY: Thanks. It's David. I have noticed those as well. And there are different things. The tender is one, drawing up rules for drawing up rules for appeals is another, possible conflict additional conflict of interest criteria. There's a fair number salted within

4.3. So that's one reason in when Avri made a proposal and what I envision doing in the future is couching the termination language in terms of when the IOT work is done rather than when the rules are done. Because there's a lot of work. And so I don't envision termination date would be necessarily soon. Although I do agree with discussions we had earlier once the work is the IOT shouldn't simply go on indefinitely. But there is a fair amount of work to do. I agree with you. So I hope that my words the way I worded it took account of that. I'll make sure I look at it as I draft up something new for us. Thank you for that comment.

Does anybody else have anything else they want to say on that issue on monitoring review, et cetera? Hearing and seeing none. Let's move on to the issue of standing. Materially affected. And that's Brenda if you could get us to the next e mail. This deals with an e mail I sent August 15th and on the standing material affected I had a couple of suggestions. First of all, I should note that one public comment Carl Arobec suggested that the material affected was too restrictive and wanted standing to be a much broader I thought his comment was beyond what the bylaws provided for. I didn't hear and don't sense a demand within the IOT to recommend the bylaws be amended to enlarge standing. So there's that was that's how that would be treated but with respect to specific language, the major concern for the comments were the possibility of imminent harm and how would someone be able to make a claim or bring a bring a proceeding to the IRP if there were imminent harm. Imminent harm potential. So I suggested that we revise the definition of claimant in Section 1 of the updated rules. To take into account the strict provisions of the bylaw Section 4.3(p). It deals with imminent harm. If I have that bylaw. (p) says claimant may request interim relief. It may include respective relief or declaratory conjunctive relief.

So the element of imminent harm is contemplated and that's why I suggested revising the definition of claimant in that manner. Two, I said make corresponding change in Section 9 of the updated rules as required. Section 9 of updated rules deals with summary dismissals. And I recommended against changing the rules the rule of Section 11. D of the updated supplementary rules and that dealt with contract claims coming with respect to the naming contract. So that's what I'm suggesting and hoping to get the first reading and I'm opening the floor right now for anyone that has a comment suggestion, et cetera, with respect to dusting off the standing material in this manner.

I don't see any hands or hear anything. I'm going to assume we can get to the first reading. I'll confirm on the list in the next day or so. Bernie?

>> BERNARD TURNCOTTE: Yes, it was a previous point. Just a process note I got my PCST hat on here from a budget point of view. The IOT is covered just to be cleared until the end of June 2018. If there is a thought that you are going to stretch beyond that the budget cycle starts pretty soon planning for next year and so it if this is the case you should work on earlier rather than later to avoid surprises. Thank you.

>> DAVID McAULEY: Thanks. That's a good point. We do have budget left and it is my belief that what we will be doing most immediately seeking some budget impact is a request to take what we come up as a final report on the rules I'm talking about the rule section now. And turn that into revised updated supplementary procedures. And so if and so I do believe we will be at that point hopefully within the next two months. I'm going to drive this to the conclusion in the next two months. And so I have no I don't really have any concern that that element of the budget the rules part the drafting will be done and finished before any concern arises

before exceeding the fiscal year. With respect to the next fiscal year I think we will be in existence. We morph into a bylaws creation under 4.3. As Sam and I were discussing there are additional things to do. I'm not sure what that would involve. I do need to give that thought. If I come up with budget thought I'll bring to IOT. At this point, I'm happy to invite anyone with budget ideas or thoughts for what our work might entail beyond finishing off the rules I certainly welcome some input. But I take your point Bernie. The only thing I ask you to do is when you know is to give us a heads up as to what the timeline is for budget input for going beyond June 2018.

And so moving to the next agenda items, I thought I'd start an initial discussion of an issue we have on signup sheet as described as other payment of fees. And so this stems from comment that Greg was involved with the IPC. I believe Greg submitted this comment for IPC. But I what I want to do is I thought we would be moving fairly quickly. We have 30 minutes left and we may finish early. But I wanted to start you know moving another issue forward. That's why I wanted to have this background. Brenda, if I could ask you to go back to the comment to the one that was on the screen just a minute ago. What I've done is I've just start of cut and pasted some language from the IPC comment. This just as a that part of their comment that deals with the cost. It's not even all of it. I can only say this is in part what they are asking or IPC has suggested. And principally they want to include language within the supplementary rule Section 15. Nothing in the IRP supplementary procedure is intended to supersede ICDR rules Article 20(7) and Article 21(8). Including the right to request an interim order allocating cost arising from a party's failure to avoid unnecessary delay and expense in the arbitration.

And before I go on with the IPC language let me just read article 20(7) from the rules. They are brief. The parties shall make every effort to avoid unnecessary delay and expense in the

arbitration. The arbitral tribunal may allocate costs and draw adverse inferences and take steps necessary to protect the efficiency and integrity of the arbitration. And then moving on to ICDC Rule 21 (8) of course I just lost it. No, there it is.

In resolving any dispute about prehearing exchanges of information, the tribunal requires a requesting party to justify the time and expense the request may involve and make conditions for granting such a request part or all of the cost by the party seeking the information. The tribunal also allocates the cost of providing information among the parties either in an interim order or in an award.

And then at the bottom of the one pager I put that I asked Brenda to put up on the screen the IPC said since IRP15 includes language regarding the treatment of costs of the IRP it would be beneficial no conflict exists in this regard. Additional language to the effect is nothing to supersede would be beneficial in removing any possible doubt. I tend to agree with this personally. And it would be my expectation I've taken this issue on to lead it would be my intent to move this issue forward along the lines as suggested by the IPC, so having said that and having just introduced this issue, I'm happy to open the floor to anyone who has comments about it or any concern and so the floor is open.

I see Bernie your hand is back up.

>> BERNARD TURCOTTE: Whoops.

>> DAVID McAULEY: Sam, you have a hand up?

>> SAMANTHA EISNER: Hi, this is Sam. We haven't really analyzed this yet but I know it looking at this we're going to go back and take a look at this in terms of the cost aspect and the cost

shipping aspect layed out in 4.6 are the bylaws specified the types of cost that are appropriate to be allocated and also look at the more closely the different sections that are called out from the ICDR to make sure that either were comfortable or expect more express more clearly if we're not.

>> DAVID McAULEY: Could I ask if you please do that well before the next call you know like two or three days at least before the next call. The next call by the way is two weeks from now.

>> SAMANTHA EISNER: Yes. Thanks.

>> DAVID McAULEY: Thank you. Do I see or hear anyone else that would like to make a comment along these lines?

Sam, I take it that's an old hand? If no one else has a comment on that, then we can move to AOB and perhaps wrap this particular call up early. Under AOB, the first thing I'll mention one other thing I think I'll come to the list with in the next week or two thoughts on the proper of engagement. The new test we've taken on as the CEP subgroup disband. And so I looked at it and I've got thoughts on it and put them on paper and come out and send something along so we can start that discussion too. I'm sure I'll pick off another issue too. Bernie, could I ask you to just mention what our call schedule is. I think we have two more calls. Just remind us.

>> BERNIE TURCOTTE: Certainly. Let me pull those up.

>> DAVID McAULEY: I'm sorry I think I took

>> BERNIE TURCOTTE: No, not at all. Our next call is Thursday, 21st September 1900, so that's in two weeks and then we have secured a date on Thursday, October 5th 1900. Those are all

the calls I have currently schedule. There is a slot there are a lot of slots available in October currently should there be a need and there is quite a few slots at the end of September also should we feel the need. Thank you.

>> DAVID McAULEY: Thanks, Bernie. So we are well near the end. I want to thank everybody for attending and open the floor for any comments with respect to this work, other work we're facing in the future, or suggestions and if not, I'd invite you all to look at the issues list to see if there's an issue we want to pick up. There's not many left. I'm hoping we can move things fairly quickly the first reading and beyond. So let me thank everyone and say that as far as I can tell, this call is now ended. Thank you for your attendance and we can now stop the recording.

EXHIBIT 205

IRP-IOT MEETING

IRP-IOT MEETING

Thursday, October 11, 2018 – 19:00-20:00

>> DAVID MCAULEY: Thank you for that. And welcome to Kavouss who just joined us. We are a light group again but I believe we have enough the more forward. This is two calls in quick succession. I'm grateful to the folks that have been able to make it. And let me restate, in just a second, what I hope to -- that we can pursue in the call. First, even though the time is short between calls, let me ask if anybody has any statement of interest change that they want to note.

Not hearing anything or seeing any hands we can press on.

A brief agenda to -- for this call, I think would go the lines of that Bernie and I would continue reading the interim rules just as we were doing the other day. So that we have within the two calls a complete reading on if what the interim rules state. And then after that, to address suggested tweaks that we mentioned in the call on Tuesday. And addressing any that might come up today.

3, to then talk about how to start approaching the issue of repose. It's my assumption that what we will do with the interim rules is we won't be able to finish them on this call because of tweaks and allowing several days or such for people that are not on the call to way in.

But, taking into account that they already have some time. And so to finish those on list and perhaps to given the issue of repose, at least in respect of how to address it. How we plan to address going forward and finally any administrative matters.

So unless anyone wants to make a comment or have a question in the interim, we are going to get started with the reading of the rules.

And I will take advantage of Bernie's kind offer from the other day, which is continuing and mention that we are up to rule 10. And ask Bernie to go ahead and take rule 10 then I'll read and he and I will alternate.

>> BERNARD TURCOTTE: Glad to help out David.

All right.

>> DAVID MCAULEY: Thank you.

>> BERNARD TURCOTTE: All right let's fines ourselves where we are.

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Interim measures of protection. Rule 10.

A claimant may request interim relief from IRP panel or if an IRP panel is not yet in place from the standing panel. Interim relief may include perspective relief interlocutory relief of declaratory and injunctive relief and may include a stay of the challenged ICANN action or decision in order to maintain the status quo until such time as the opinion of the IRP panel is considered by ICANN as it's described in ICANN bylaws article 4 section 4.3 oiv.

And emergency panelist shall be selected from the standing panel to adjunct requests for interim relief. ICANN rules relating to appointment of panelists for emergency relief. Interim relief may only be provided if the emergency MANAL panelist determines that the claimant has established all of the following factors 1, harm from which there will be no adequate remedy in the absence of such relief.

2, either A, likelihood of success on the merits or B, systemic serious questions related on the merits and B, a balance of hardships tipping to relief.

Interim relief may be granted on Ex Parte basis in circumstances that the emergency panelist deems exigent. And any party whose arguments were not considered prior to the granting of such interim relief may submit any opposition to such interim relief, and the emergency panelist must consider all such arguments as soon as reasonably possible David over to you.

>> DAVID McAULEY: Thank you Bernie, so that rule 10 is the floor if anyone has a comment, question, concern, please go ahead and speak up now.

And not seeing any hands or hearing any, let's press on to rule 11 standard of review. Which I will read through. I'm taking one quick look again.

Each -- 11 standard of review. Each IRP panel should conduct an objective de novo examination of dispute. With respect to covered actions the IRP panel shall make finding of fact to determine when covered action constituted an action or I believe action B all business puts shall be decided in compliance with ICANN's articles and bylaws.

>> C, for claims arising out of the board's exercise of fiduciary duties the IRP panel shall not replace the board's reasonable judgment with its own.

D, with respect to claims that ICANN has not enforced its contractual rights with the respect to IANA naming function contract, the standard of review shall be naming function contract, where the alleged breach has resulted in material harm to the claimant.

IRPs initiated through mechanism contemplated at article 4, section 4.3 aiv of ICANN's bylaws shall be subject.

End of rule 11.

That is now on the floor. And before I ask for questions or comments, Brenda can I ask if you are having any luck trying to get Kavouss back into the meeting?

Brenda may be off trying to get Kavouss.

>> BERNARD TURCOTTE: I believe if she's not answering, these what she's doing.

>> DAVID McAULEY: Let's hope that works out.

So on rule 11 are there any comments, concerns, questions? And not seeing hands or hearing any, we can go to rule 12 Bernie. Over to you.

>> BERNARD TURCOTTE: All right, rule 12, I were panel decisions. IRP panel decisions should be made by simple majority of IRP panel. If any IRP panel member refuse to sign the panel shall endeavor to provide a written statement for the reason of for absence such signature.

End of rule 12.

>> DAVID McAULEY: Thank you Bernie. Any comments, concerns, questions there? A very short rule.

Brenda are you back? I see you say in chat that Kavouss' line did not pick up. Are you back with us?

>> BRENDA BREWER: Yes I'm here.

>> DAVID McAULEY: Can I ask you to keep trying on a reasonable basis?

>> BRENDA BREWER: Termly.

>> DAVID McAULEY: Thank you for all efforts to get him back to us.

>> BRENDA BREWER: He hasn't joined at all. He had not responded to the invite. But as a courtesy I do try the call out to him, just in case.

>> DAVID MCAULEY: Thank you I saw him in Adobe for a while. That was me dialing out to him. I had to enter his name.

When you see the little green arrow next to someone's telephone, that means they are being dialed out to. But I will try again.

>> DAVID MCAULEY: Thank you very much.

So then we will move on to rule 13.

Form and effect of IRP panel decision. A IRP panel decision shall be made in writing promptly by the IRP panel based on the documentation and supporting materials and arguments submitted by the parties.

C, subject to article 4 section 4.3 of ICANN's bylaws all IRP panel shall remain public and shall reflect the well reasoned application of the how to dispute was resolved in compliance with ICANN's articles and bylaws, as understood by the light and prior to IRP panel and normals of applicable law. Period, end of rule 13.

Comments? Questions? Concerns?

And I see Kavouss is in with a green arrow. So thank you Brenda for continuing to try.

>> BRENDA BREWER: You're welcome.

>> DAVID MCAULEY: Any concerns with that rule? I don't see any hands or hear any comments.

>> BERNARD TURCOTTE: Date Ed David? I have my hand up.

>> DAVID MCAULEY: Sorry, I didn't see it.

>> BERNARD TURCOTTE: No problem. That's because I'm such a small guy in this.

I was thinking when you were reading this, that may be we could address Malcolm's issue from the last meeting about insuring that the decisions are posted in English. Maybe it would be a better place to put that in here?

>> DAVID McAULEY: Thanks Bernie, and yes I forgot to do that tweak. I think I took that on. And I think that's a fair comment unless Malcolm has any concerns. I can add in the here. I'll put it on list. Some language that says, probably under 13 A that it would be in English.

And so, thank you, thank you for that Bernie. By the way, that reminds me that compliments to Bernie for decisions, action items and request from the call. That works very well, that this whole process is working very well. So Bernie if you could mention that whole thing just to remind me.

So we are over to rule 14 then it's up to you Bernie then on rule 14.

>> BERNARD TURCOTTE: Yes sir.

Appeal of IRP panel decisions.

An IRP panel decision maybe appealed to the full standing panel sitting within 60 days of issuance of such a decision. En banc standing panel will be reviewed such appealed IRP panel decision based on a clear error of judgment or application of an incorrect legal standard. And the en banc the procedures officer with the respect of procedures consolidation. End of rule 14.

>> DAVID McAULEY: Thank you Bernie. And same, requests or comments. Please speak up now. I don't see hands and I don't hear anything. So we will read on to rule 15. I'm looking one more time.

Okay, rule 15. Costs.

The IRP panel shall fix costs in its IRP panel decision. Except as otherwise provided in article 4, section 4.3 eii of ICANN's bylaws each party on an IRP proceeding shall bear it's own legal expenses, except with the ICANN shall bear all costs associated with the community IRP and as defined in the article 4 section 4.3 d. The ICANN's bylaws. Including the costs of legal council. And technical experts. And in the event it identifies a losing parties claim or defense as frivolous or abusive. End of rule 15 and that's the end of the reading of the rules right now. Concerns or comments about that particular rule would be entertained now.

And I'm looking for hands and or listening and I don't hear or see anything.

So, Brenda I take it you're not having any luck getting in touch with Kavouss.

>> BRENDA BREWER: Correct David, thank you.

>> DAVID McAULEY: Thank you, and thank you for trying.

So we have gotten through the rules. We have some tweaks, we have not identified any on this call with the exception of the one Bernie mentioned with putting the language of decision that Malcolm mentioned Tuesday into I think it was section 13 that we justified.

So Bernie if you would note that in the DAIR report, I will take a swot at that.

Then we new move on to, as I mentioned in the agenda too, the suggested tweak coming out of Tuesday's call. Malcolm's hand is up, go ahead Malcolm and take the floor.

>> MEGHAN HEALLY: I was going to offer language now, for the record if you would like for English copy thing, but I don't have to if you don't like.

>> DAVID McAULEY: Please go ahead and Bernie if you would take notes.

>> MALCOLM HUTTY: The decision of the IRP panel should be posted in English. If the decision is translated into other languages, the English language version should be the authoritative text.

>> DAVID McAULEY: Thanks Malcolm. Where would that appear?

>> That appears in article 13 under form of the decision, it's form and effect of the decision is the article tags of article 13. And you pointed out, that's the recommend precise place to put it. 13 D. You subparagraph under that.

>> DAVID McAULEY: Thank you.

So does anyone -- Malcolm, did you want the say something else?

>> I said you're welcome.

>> DAVID McAULEY: Okay thank you. Any concerns or comments with the suggested tweak that Malcolm just offered?

And I don't see any hands. Malcolm I take it that's your old hand. And not hearing any, so Bernie you kindly make a note of that, you can offer that tweak as discussed.

And so, on the moving to tweaked language.

In the interim between Tuesday's call and today's call, we very kindly got a comment from Kate, thank you very much Kate. And then also I sent an email to the list several hours ago about provisions that I said I would take.

And so I'd like to start with mine first because I'd like to go in the order of them as they appear in the rules.

And I offered a safe harbor language with respect to the 12 month time limitation in rule 4 time for filing. I'll read it here and then ask if anyone has any comments.

What I wrote and suggested was the following.

During the dependency of the supplementary procedures as interim supplementary procedures no claimant is time barred are few a written statement due solely to passage of the 12 months period of the second part of the immediately preceding sentence being understood that the IRP implementation of this aspect of such sentence for treatment in the supplementary treatment of the procedures to follow in due course.

Anyone have comments or concerns or questions? Sam your hand is up go ahead.

>> SAM EISNER: Thanks David. So I think we have, I know from ICANN side we have some concern, if you go back to some of the principles we put forth in how the IRP, the interim rules would work, it was to not make major changes to what was posted to public comment if they were still under significant deliberation by the IOT. And so the -- with change that you proposed to caveat that has been proposed that actually makes a significant change.

I think that there's some room to tie back dates for period of time to when the new about bylaws went into effect. What away we don't want to do through this is to create the ability for someone who had a claim that was right before the bylaws went into effect but didn't take advantage of an IRP under the old by laws to now still have the opportunity to come forward. So I think we can do something to time back to possibly account 1st, 2016 for a shored period of time. I think maybe October, and then tether it back to 120 day window.

We've through the footnote that we've offered we identified that if the repose period looks different in the final set of rules ICANN would agree to putting in whatever transitional language would need to be put in to not time our people who could have filed under a of repose.

So we agreed that we are not going to prejudice people who have something that came up under the -- who may have been able to file if the period of time was longer, if there was agreement that the period of time should be longer. That was our commitment, we put it in here, we stand by that.

But I think that the language that you've offered is -- it opens up far too much for -- to allow people to go back really far and isn't the fact that it's not even tethered to the current form of the bylaws creates some concern for us.

>> DAVID McAULEY: Thanks Sam, it's David speaking. I put my hand up because I'm going to be speaking at a participant and not as the lead. I was -- I should have mentioned that when I started speaking about this. Because I offer that language as a participant, not as a lead. That's the way I was speaking about it on Tuesday's call. Let me make that part clear.

I guess I have two comments. One is I didn't -- you're right, you picked up on the fact there maybe claims from the old by laws, etc. Didn't actually I didn't even think on if of that. Much to the extent that creates an issue, I would suggest that you come to the list with language -- come to the list with language on that.

But then the second point I would make is what I'm trying to do is simply say that is to create a recognition that the IOT is discussing repose. That we have not decided to repose yet. And I thought that I was being consistent with what you had offered, you know whenever you first offered it, that while we were deciding the issue someone wouldn't be prejudiced on the second aspect of the time bar rule.

It strikes me that we will probably finish in my opinion, my estimation, I think, we will probably firm the repose rule insofar as sending something to the board prior to the end of the year. Prior to getting reconstituted or bulked up IRP. I think that's reasonable. We have spoken about it so much that I sort of harken back to the email Malcolm sent in the middle of August. There's three possible ways we can move forward on this. So this may not have any really any impact at all you understand the new bylaws. Having said all that, I would ask you to come to listed with language that sort of builds on are on just completely does away with what I did and make the statement. Actually put words there that we can parse. So that's my comment. Thank you very much. And I will then back as lead, I'll recognize Malcolm. Your hand is up, go ahead.

>> MALCOLM HUTTY: Thank you. I was going to note that Sam just said that ICANN is committed to make sure that people weren't prejudiced by this rule, if the rule is subsequently changed in the final -- in the final rules.

That's great. So why don't we keep it simple and just say that.

Just say that this -- that whether there should be a concept of repose is still under review. And that in the event that it is changed, we will introduce transitional language to insure that nobody was continued to be prejudiced by the temporary adoption of this rule?

>> DAVID MCAULEY: Sorry I was on mute trying to talk through mute.

Thank you Malcolm your Sam your hand is up. First let me make a comment. I wasn't able to look at chat while I was speaking. I think what you're doing is providing language which is fine. But I'll ask you to after the call whatever that language might be put it on list as well.

So anyway, Sam go ahead, your hand is up.

>> SAM EISNER: Thanks David. So just to -- I wanted to level set a bit. Because in the document that were forwarded I don't believe it came up while in what is projected the screen but in the documents that were forwarded you will note that there are very few footnotes in that document but one of the footnotes that suggest persist in the final version is a footnote that I have put the text into the chat on.

And it -- it states that the repose issue was still in effect. And I reflects ICANN's commitment to create transitional language so other people wouldn't be prejudiced.

So the language is already out on the list is can I put it back into the chat. So if the group would be comfortable with that moving forward, you know let us know. But I think it actually, it -- Malcolm was actually basically outlining what this actually says. So I think he noted in chat that it works for him as well. So that might be a way that we can move forward.

>> DAVID MCAULEY: Thanks Sam --

>> DAVID MCAULEY: Thanks Sam when I created the suggested tweak I didn't bring forward the footnotes. Perhaps I should have but I didn't. So you're right to note that.

Malcolm your hand is up. Is that a new hand?

>> MALCOLM HUTTY: Apologies that was the old hand.

>> DAVID McAULEY: So if it works for Sam and it works formal come I think it's going to work for me and I will guess everyone else on the call, unless I see other hands.

I don't. That sounds like a deal.

So if I could, I think it's a deal. I'll have to look at the record. Bernie I'll look to you to sort of capture what is deal was. I've not been able to follow all of the chat while this was going on. So thank you both.

>> BERNARD TURCOTTE: David.

>> DAVID McAULEY: Yes?

>> BERNARD TURCOTTE: I guess my understanding of what we have just agreed to is basically that the text in the footnote that is currently in the document covers the concerns and therefore we don't have to change anything versus the draft we have been looking at, is that correct Sam?

>> SAM EISNER: That's my understanding.

>> BERNARD TURCOTTE: Thank you.

>> DAVID McAULEY: I make take it that's what the understanding the footnote would be added back, or never went away, I made a mitt ache in putting the footnotes. That's what you're saying is that right?

>> BERNARD TURCOTTE: That's correct.

>> DAVID McAULEY: Before getting to rule 7 I think Kate's suggested tweak is next. It had to do with rule 6.

And Kate you're welcome to read it if you want. Otherwise I will be happy to read it. I will let you decide.

>> KATE WALLACE: Hi David, thanks. This is Kate for the record. I'm trying to find where I have the language. If you have it in front of you that might be the easiest.

>> DAVID McAULEY: Thank you I have a language in front of me.

So, Kate made a suggestion, this is with respect to the last paragraph in rule number 6.

The title of rule number 6 is written statements. So here's -- I will read through it and I will note when I get to language that Kate has suggested that we add.

For any dispute resulting from a decision of process specific expert panel -- sorry, for -- let me start again.

For any dispute resulting from a decision of a project specific panel that is claimed to be inconsistent with ICANN's articles of bylaws with articles 4.3 B triple IA 3 any purpose entity personally identified within a contention set with the claimant regarding the issue within such expert panel proceeding shall -- and Kate suggests adding the word reasonably after shall.

Shall reasonably notice from ICANN that the reprocess has commenced, ICANN shall. And Kate suggests adding the next four records. ICANN shall under take reasonable efforts to provide notice by two business days calculated at ICANN's principle place of business with notice IRP has commenced period, end of tweak. Do I hear any comments or concerns or questions?

I don't see any hands.

Or hear any.

Thank you Kate. And moving forward then let's move to rule 7.

Consolidated intervention, etc.

And I -- consolidation and intervention., etc. I suggested tweak to this yesterday and I put -- I will read this.

I'm starting with the first paragraph of rule 7. I will skip certainly portions if they are not indicated and mention that. Starting at the first paragraph a procedures officer shall be appointed any request of consolidation intervention and participation as an amicus. And this is where I said verbiage except where otherwise stated here in -- that's the end of my addition and intervention and as amicus as reasonable discretion, etc.

I then moved over to add a paragraph in the section dealing with intervention.

And I added after the paragraph that begins in addition the supporting organizations which developed a consensus policy, etc., etc.

And before the paragraph that begins any person or group or entity that intervenes as a claimant pursuant to this section will become a claimant, etc., etc.

What I added is the following in addition any person group entity should be a claimant that person group entity is significant interest to subjects of independent review process and adjudicating the group or entities absence might impair the person's group and ability to protect such interests or two any question of law or fact similar situated as group or entity is likely to arise in the independent review process.

The next change I made was in the very paragraph after the next one that begins any person, group or entity that intervenes with the pursuant will become an claimant. In the next paragraph I at the next. Pursuant to rule 8 exchange of information below the IRP panel should direct et cetera, et cetera.

Then the other change I made is in rule 8, exchange of information, I'll read them together since they seem to be related to me. Then I'll get to the hands.

Well no, before I get to rule 8, let me recognize the hands that are up. I see Bernie, Malcolm and Sam. Bernie I'll ask you to tell us who was first.

>> BERNARD TURCOTTE: The order looks like Malcolm then Sam.

>> DAVID McAULEY: Malcolm go ahead.

>> MALCOLM HUTTY: Okay I'm speaking really relation to rule 7. Thank you for these suggestions David. I support them. In relation to rule 8 I have a view on that thank you.

>> DAVID McAULEY: Thank you. Sam?

>> SAM EISNER: Thanks David. This is Sam Eisner for the record. So the places where you interlined small additions we are fine with those.

But we do have -- I have some concerns about the second section that the full paragraph that was added that said in addition any group, person group or entity should have a right as a claimant.

You might want to move to a amicus status.

But one of the things that we had talked about, many times as we were going over this, was the fact that claimant has a very specific definition under the bylaws. And only those people who are not just

impacted by the action but impacted because they allege that ICANN us violated it's article or by bylaws those are the only people that qualify as a claimant. And having just a significant interest related to it, doesn't actually require that someone have an IRP claim against ICANN. It does recognize that they have an interest in what's going on. And I think we don't have any concern with allowing those people to be mart of a proceeding. But giving them claimant status, gives them certain rights under the bylaws that actually opens up the IRP to be used in ways that are not anticipated to if they don't meet the requirement that they are alleging a violation that ICANN violated the bylaws. We could see people that actually support the action that ICANN took. Who would have the interest and would qualify under this paragraph. But they wouldn't meet the status of claimant. So they would be forced to make statements as to what ICANN did in violation of its bylaws but they actually wouldn't believe ICANN violated the bylaws. Let's take the common example right announcement if they were a competing a captain that benefit from ICANN's decision they are actually not going to say ICANN violated the bylaws in taking that decision. Where the claimant is taking that position.

So we are requiring people to take positions that they would not take by this.

So I think we could move that down either to amicus. So I think we put some things into the amicus section that covered this type of interest in a proceeding. And I'd say this is one of the things that we should bookmark and put more attention to before we get to a final set of rules.

If there's a wish to change the scope of who can participate in an IRP.

>> DAVID McAULEY: Thanks -- before I go to you Malcolm Bernie you initially had your hand up, is their something you want to say?

>> BERNARD TURCOTTE: No thank you.

>> DAVID McAULEY: Malcolm you have your hand backup, go ahead.

>> Thank you, Sam makes a fair point. But it's quite limited in its nature. It just points out that some people might not want to be a claimant they might only want to be an am I can cuss that may be a fair point to their claim. This can be easily resolved and better honor your proposal by leaving your proposal intact. But where it says to intervene as a claimant. To say to intervene as an am cuss or claimant in parentheses as appropriate to their position. Close parentheses. And then continue.

That would leave it the options if option to the person to intervene as an amicus and they would also be entitled to intervene as a claimant if they had a claim.

>> DAVID McAULEY: Thanks Malcolm.

So, I didn't put my hand up by I'm speaking now as a participant. As the person that suggested this. I hear you Sam and I would be willing to look at language, it's possible Malcolm just provided it.

But if it was moved to an amicus thing I would like to look at the language you come up with. You can tell between this and rule 8, where I'm coming from is a cot testify situation. Where members of contracted party houses or others who have contracts with ICANN or others that have contracts that effected by ICANN have to be able to prohibit their interest in competitive situations. That use language largely followed U.S. federal rules of board. But those rules are fairly -- I think, at least in common law countries fairly routinely accepted that someone has an interest can defend themselves they can't look pore the defendant to make sure argument for them.

So I think that Malcolm may have just given the language but Sam if you take a swat what you want to do with this, and put it on list, I will certainly take a look at it.

>> SAM EISNER: I have a new hand.

>> DAVID McAULEY: Sorry, go ahead. I didn't see it.

>> SAM EISNER: This is actually an issue that we discussed even as we were developing the bylaws themselves with Sidley. This is where the IP differs from regular litigation because an IRP has a very limited standing rules. The IRP has a very narrow aspect to it.

And so, we can look at the language and we can try to make some recommendations, I understand where Malcolm is coming from with the choice of the amicus versus claimant. I think it's very important that if we have a right for someone to come in as a claimant, language such as significant interest here doesn't align with the standing requirements of the bylaws which require an allegation of material harm.

And so, that's -- that might be where we make some changes to that.

But if we have -- I understand on the whole that this is an issue that we need to make more progress on for -- as the IOT before we have a final set of rules. If we are not able to completely satisfy, because I think there's definitely room to put in some language to account for a bit broader of representation than is currently within these rules. I hear that, I see that, I think we can do something quickly on the I went rules to get there.

But will there be a point that we can agree that we could get a set of interim rules in place so that we have something, because from our standpoint, from the ICANN Org side, we are getting very nervous that we are on the precipice of having IRPs filed for which we don't have an adequate set of procedures to meet the bylaws. So we have that pressure. And so your hearing from me kind of -- the dual pressures. I want to work with IOT, I want to help get this right. I want to help these items be reflected appropriately in the rules. But I also think it's essential forever the protection of the organization and everything that this group has worked so hard to do so far to get a set of rules in place quickly. I'm wondering where that balance is. I will come back on list with some proposals of how to integrate some of these ideas into the set of interim rules. But I also would ask that there be some commitment to getting it even more right in a final set of rules. If we can move to that.

>> DAVID McAULEY: Thanks Sam, Malcolm you have your hand backup, go ahead.

>> MALCOLM HUTTY: Yes I wanted to get a quick clarification to for Sam so she knows we are not as far apart as maybe she might think we are. I'm not suggesting -- mostly for you David, for me I'm not suggesting for a moment that we should allow this language in this paragraph to change who is qualified to be claimant.

All this paragraph is intending to say, is that if you are otherwise qualified to be a claimant. If you additionally satisfy the situation described in this paragraph you should be able to intervene as a claimant as of right. Rather than wait for another case.

Similarly if you -- even if you don't qualify as a claimant, but you satisfy the conditions in this paragraph you should be allowed to intervene as an amicus and it shouldn't be merely discretionary. That's the aim. Not the change the definition of who qualifies as a claimant. That should be untouched by this language.

>> DAVID McAULEY: Thanks Malcolm. And I will also make a comment as a participant, Sam, I think that I can live with what Malcolm has just said. I think he's right in what he's saying and I think it's quite possible that we could crack this nut with amicus status as long as it's not discretionary it is a matter of right and as long as amicus can protect the language in did.

And I notice too Bernie gave us a time check, we are running out of time for this call. That gets to point that I agree with you Sam we have the finish this and get through this.

That's one reason why Bernie and I scheduled two calls for this. Get the interim rules out. We recognize that the time has come the get interim rules out and we have to move to repose, etc. I feel the

pressures myself. So what I'd like to do is discussion on this one and ask you Sam to come back with your amicus language. I would mention to you, that I think I agree with what Malcolm just said I think that would work but I want to look at the language. I would like to move on to rule 8 now unless there's any other comment. Malcolm is that a new hand or old hand?

Must be an old hand.

So if I don't see any other hands, then let's move on to rule 8 I'll mention what I tweak with respect to rule 8 it's in the second paragraph of rule 8 down near the end and this is one sentence incredibly long sentence. I'll read it then I'll mention the parenthetical I suggested added at the end.

On the motion of either party and upon finding by the IRP panel that such exchange of information is necessary to further the purposes of the IRP. The IRP panel may order a party to produce to the other party and IRP panel that the moving party request documents are electronically stored information in the other parties controlled custody or control that the panel determines a reasonably likely to be relevant to the material of the resolution of the claims or defenses in the dispute and are not subjected to attorney-client privilege, work product doctrine or otherwise protected by disclosure by adequate law this is what I'm suggesting to add including limitation to disclosure of competitors to disclosing group or entity to any competency sensitive information of any kind. Period.

So, the floor is open on that for implants, questions, concerns.

I don't see or hear any.

We are basically coming up to the end of this call. So let me try to wrap things up this way. There's some suggested tweaks identified here that I will ask come to list many but I think by in large we as a group have gone through the rules pretty comprehensively. And we will finish the topic on list I believe. And hopefully we can did that beginning with ICANN 63. I will be back on list early in the week with whatever administrative things I think I need to attend to. And I'll certainly look for your language Sam and take a look at it. I want to thank everybody for being here. Once we get the rules done we will turn to repose and I will encourage everyone to consider the public comments. The only mail I can recall is Malcolm's mail from the middle of August. Three possible ways forward. I suggest reading that again.

And then, I have been requested to give some comments along with others at ICANN 63. I sent those slides around, if you have any concerns let us know. Two hands as we wrap up. Sam why don't you go first.

>> SAM EISNER: So I wanted to raise two items. First, I wanted to give a heads up to the group that in anticipation of the IOT being able to complete the set of interim rules we are putting on to the floor's agenda for their meeting at the end of Barcelona the board's consideration of the interim rules to get the rule because there's a step for board approval.

We will coordinate with appropriate committees. And all given that the rules are not yet finalized but the board is waiting to see that.

And I -- on a personal note I wanted to note by thanks for how we have really worked together as a group to get to the interim set of rules. We are really appreciative from the ICANN side, having a set of rules in place I think will be of benefit to everyone and I know we still have more work to do.

In terms of the rules, there was one other action item that I was aware of which Malcolm and I remember charged with going and looking at language on translation. So Malcolm I don't know if you want to report on what we agreed upon. I think we have one change that we agreed we would take out the and ICANN. Or I forget which one but we have a place we agreed that we would take on out some language but otherwise we wouldn't reflect any additional language in there although Malcolm and I agreed that there's a need to continue looking at we are doing the final set of rules to see if there's any caveats we need to include the appropriately reflect the times when ICANN is choosing to make translation available to the community particularly those that aren't used in the IRP, so that there's better understanding around the community and we agree that those are not things that are appropriately charged to either party as administrative or legal costs and those are things that are really sunk in operational costs with ICANN but we will make sure that concept of a choice to make translations that are really for the benefit of the community and not for essentially for use in the IRP are not things that will be appropriately charged to the parties as IRP related cost.

So Malcolm if you can correct whatever I said that might have been wrong in there, please go ahead.

>> MALCOLM HUTTY: No that was fine other than I thought we agreed to leave the text unchanged with no amendments pending that discussion.

>> SAM EISNER: Better.

>> MALCOLM HUTTY: Essentially David we got to the position where now I think Sam and I are completely on the same pages to what we want this to achieve. And well Sam's view for now is that it may be doesn't need any change at all. And I'm content that we come back to this, to check back and to confirm that when we come to the time rules that need to hold up the emergency rules. Provided we

can come back to that and confirm that. And that the language is actually achieving what I now believe we thought seeking to achieve then I'm happy to defer it now.

>> DAVID McAULEY: Thank you Sam and Malcolm. Is there anything you two think should be written down and put on list so people are aware of it or is it you guys are status quo and we do not need to come to a new -- sorry hold on just a second.

That we may not need to come up with something to put on list.

>> David as a courtesy to those not on the attending the meeting I'd be happy to come out with my own statement and I'm happy to defer this and these are the reasons I'm happy to defer.

>> DAVID McAULEY: You might run it past Sam.

>> Absolutely. It was a point I raised and I'm essentially retracting it for now. So it's probably better, most proper coming from me. But it's that I was concerned to take out my own point.

>> DAVID McAULEY: Thank you both. And it's probably a good idea to let the group know because we are going to if I happen issue this on list. And we will finish it pretty quickly I believe. I think we pretty much gotten through this in pretty good shape. So thanks everyone for your attention on that. I think we can go ahead and wrap up the call. Anyone has any final comments Malcolm you have a hand up, is that old or new.

Old, so if anyone has any comments, please let them make them now. Otherwise what I will say is what I'm going to say in my next email is please pay attention to the list you will see things coming up out, not much but things comes out to put it in shape it can be given to board as per what Sam just told us. So my thanks to Bernie for arranging and Brenda for helping us and all attending in the last three days. I'm very appreciative. Having said all that this is the end to the call for those going to Barcelona I'm looking forward to seeing you there. And I'm thankful to all for your contributions. That's all for me. I say goodbye buy.

We can stop the recording.

EXHIBIT 206

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>> DAVID McAULEY: Morning, everyone. This is David McAuley speaking. It's a small group, unfortunately, but I do think we have a quorum with which we can press ahead.

So I would like to thank the folks who are here on the phone for gathering. Hopefully a few more may join us, but I would like to get started and ask the recording be started.

>> This meeting is now being recorded.

>> KAVOUSS ARASTEH: David?

>> DAVID McAULEY: Yes, thank you. Kavouss, yes, would you like to make a comment?

>> KAVOUSS ARASTEH: Yes, I am sorry, I am just coming out of a meeting. I am just on audio. I am not connected to the Internet. I will be on audio listening to you and may be online asking to comment. I apologize for that.

>> DAVID McAULEY: Thank you, Kavouss, and we are glad you are here.

So the recording has been started, and prior to talking about the size of the group or anything like that, let me just ask if there's anybody else besides Kavouss who is on the audio bridge only and not in the adobe room, although I do see your

name in the adobe, Kavouss. Anybody else in that status?

Hearing none, for those of us who have gathered, if anyone has an update or a change in their Statement of Interest, I would ask that they please make a note of it now.

Seeing no hands and hearing nothing, I think we can press on to our agenda. Bernie, I just want to double-check with you, but in my opinion we have enough of a group to press on. There is a five by five rule, that you have five minutes gathered by five minutes past the hour. I think we have met that. Regretfully it's not more, but I think we should press on and do the best we can given our size. What do you think, Bernie? Am I violating any rule in that respect?

>> BERNARD TURCOTTE: How could you violate rules? No problem. Let's carry on.

>> DAVID McAULEY: Bless you, Bernie.

So let's move forward and go to item 2. This is the status of the timing issue and input from ICANN legal. I see that Sam is on the call, and I also note that Liz sent an email to the list with further thoughts on the timing issue. I think that email came in yesterday, and I have given it a look. I hope that everybody in the group has given it a look. I am sorry that Malcolm has not joined us. He is taking a leave for moving this issue forward, but let me ask Sam if you would like to make any comments on the timing issue from the ICANN perspective, or should we simply take into account the email from Liz?

Sam, do you want to make a comment in that respect?

>> SAMANTHA EISNER: Thanks, David. This is Sam Eisner for the record.

I think the email that Liz forwarded pretty much says it. We would be open to answering any questions people would have, but I think at this point we can let the email stand for itself.

>> DAVID McAULEY: Okay. So Sam, thank you for that, and thanks for being on the call early your time.

So my encouragement to our group is to make sure you take a good look at Liz's mail, and then I will separately ask Malcolm if he would be interested or if he has any wish to make a further statement in light of these comments or how else he might envision being a lead on this issue to try and move it forward. So I think that's sufficient for now. Unless anybody has a comment or wants to say anything about the issue, I plan to move to the next agenda item. Is there anybody that would like to comment?

Not hearing or seeing any hands, not hearing anyone or seeing any hands, let's move on to the status of -- if there's any update from Sam on the ICANN legal/policy teams with respect to steps that we might plan to help supporting organizations and

advisory committees undertake their role with respect to getting the standing panel put together. Sam, do you have any comments in that regard?

>> SAMANTHA EISNER: Yes, thank you. So we are doing a couple of things right now. We are coordinating with the Policy team to make sure we have outreach to each of the SOs and ACs to identify what they have in place already, if they already have tools, if they've already considered how they do that.

Also, one of the things we are working on internally is a proposed at least a draft flow of how we could see this going so we understand the different points in the process and we can see where we would expect a community to come in and the different decision points. Because as we discussed on the last call that I was able to attend, one of the things that we had all agreed with that was really important to understand the timeframe overall. And so we are working to chart that out, and we will be using that as part of our discussions as we are doing outreach to the different SOs and ACs. Because we are concerned, as other people from the IOT were concerned, about having a good timeline before we put the expression of interest out so we can let the candidates themselves know about how much time the process would take. So we are working on all those different fronts, and hopefully within a couple weeks we'll have some further update.

>> DAVID McAULEY: Seem to have a hard time getting off the mute button here. Thank you, Sam, for those comments.

Let me just mention one or two things about this. I participate in the ccNSO Guideline Review Committee, and recently I wrote to them there was -- the chair of the ccNSO, Katrina Sasaki, asked me to bring up to the ccNSO guideline folks what all was involved in IRP, and I sent them a memo. So I may send you a copy of that memo, Sam, and I will send a copy to the IOT team too, just for informational purposes, to see what I was suggesting to the ccNSO are things that they need to be aware of or coming down the pike, some of which they will be involved in but not all of which. So just so that in the interest of full disclosure, since I was telling them, I may just go ahead and copy it along here.

And so I know that as we remember, this group has written to the advisory committees and the supporting objections advising them of their role in the standing panel establishment, and that was, I don't know, some months ago. And then at ICANN58, I briefed some SOs -- well, the GNSO and one or two other organizations about it, and so there was -- there is a growing awareness and, I guess, a growing interest in finding out what this means. So these steps are important, and so

thanks, Sam, for that, and hopefully we can help along the way if needed.

If there is anybody who would like to comment on this item, please make yourself known now, or else we will move to the next agenda item.

>> KAVOUSS ARASTEH: David?

>> DAVID McAULEY: Yes, Kavouss, go ahead, please.

>> KAVOUSS ARASTEH: Are there any time limits? The letter you sent regarding ICANN58, is there any specific time by which they have to provide the name of those or not?

>> DAVID McAULEY: Thanks, Kavouss. David here for the record. No, I don't think there is a timeline, not that I recall, anyway. I think the time interest here is to move this along somewhat expeditiously because the standing panel is an essential component of the new IRP that was envisioned by the bylaws that just came into effect last October. And so it's important to move it forward in a sensible, informed way, and not let it languish. At least that's my opinion. But there was no timeline specifically that I recall.

Any further comments in this respect? Or questions?
Seeing none --

>> KAVOUSS ARASTEH: Excuse me. I didn't receive a quite clear answer.

>> DAVID McAULEY: Okay.

>> KAVOUSS ARASTEH: You said there's no timeline, but this, a member of the panel, would it be definitive that these are the members of the panel coming from the (Inaudible) that is my question. Has there been anyone nominated from any SO or AC up till now or not? That is the question. And when should this be completed? Now the member is established and the time that he is operating or ready to operate? That is my question on this, David. Thank you.

>> KAVOUSS ARASTEH: Thanks, Kavouss. To be honest, my ability to hear you -- you went very faint, at least on my line, so I am not sure I caught all of that. But Bernie, did you hear that?

>> KAVOUSS ARASTEH: I repeat. Has there been any member up to now identified by SO/AC as a member of the standing panel, and is there any time that the list should be completed that the panel should come into effect? If I properly understood the process, unless the panel has already been established, that is my question. I hope this time you have properly heard me. Thank you.

>> DAVID McAULEY: Excuse me. Thank you, Kavouss. I did hear you this time. My understanding is no SO or AC has chosen a member yet. If there are SOs or ACs who are -- now that they

are aware of it -- sort of looking for candidates, which is one of the things they should be doing under the bylaws, that is not known to me. So there's no panelists that have been identified formally, nobody's been appointed as a panelist, and the expression of interest will go out sometime soon once we and ICANN establishes what seems best for release in such a way that people who apply won't languish indefinitely. So that's my understanding of the state of facts now. If anybody has a different view or anything they would like to say, please weigh in right now.

>> SAMANTHA EISNER: David, this is Sam.

>> DAVID McAULEY: Okay, Sam, yeah.

>> SAMANTHA EISNER: If I could just come on top of your explanation, which I think is right. Kavouss, it might be helpful for you to understand and for everyone to understand that when the expressions of interest go out, it's not -- the SOs and ACs don't make the selection of the arbitrators in the first place. They don't make the nominations. We wait for nomination -- or we wait for the expressions of interest to come in from anyone, and it's only after that point that we'll get the list over to the SOs and ACs. That will be part of the process flow that we are trying to draw out right now that we'll share with the IOT. So the SOs and ACs are not -- they are not on the hook right now. The SOs and ACs are not expect today do anything at the moment other than prepare themselves for the process. They are not in a place where they have any obligation to make selections today.

>> DAVID McAULEY: Thank you, Sam. David here. I am having a real problem with this mute button. But thank you very much.

Anybody else want to comment further on this? Kavouss, did I answer your question or did Sam and I together answer your question?

>> KAVOUSS ARASTEH: Yes, properly answered by you and complemented by Sam. Thank you.

>> DAVID McAULEY: Thank you, Kavouss.

I think we are ready to move to the next agenda item, which is an update by me on issues as listed in the agenda plus one that I neglected to put in the agenda but later addressed in an email. And let me just explain what I am hoping to do here is I think we've had discussions surrounding these issues, joinder, panel conflict of interest, retroactivity of both substantive standards and USP rules and the idea of stanchion under the heading of materially affected as given to standing. We've had enough discussion that we may be able to move these forward. And so my hope here was to update these on the call, knowing that if we agree on the call, what I will do is put these out on

list as a call for first reading that people can comment to on the list. I would commit to getting this done by tomorrow, Friday. People would be able to comment to as a master of first reading on the list, leading up to next week's call, which would be sort of the when we would decide that it's past first reading if, in fact, it does, subject to what people have to say. So that's -- excuse me. That is what I am attempting to do, and that answers a question that Liz posed last week about, you know, she was concerned that we might be getting to first reading last week. So that's what the plan is here, is to go through these things, and that's what I intend to do, and I will start doing it right now. But does anybody have a question or comment on the process?

If not, let's move on, and so the items I was going to give an update on are the first one is joinder, and let me briefly read through where I think we are on joinder. Excuse me just one minute. Where I think we are on joinder, and it's as follows: I think we've agreed that anybody that has participated in the underlying expert panel proceedings, and with respect to a certain section of the bylaw, that they would get -- if they participated as a party there and another person challenges that, then those participants below would get full notice of the IRP and the request for IRP, those two things together sort of create the statement of the IRP, at the same time that the complaint is filed. And all of these parties would have a right -- a right -- to intervene in the IRP. But how that right is exercised would be within the discretion of the procedures officer. And you can see from the text, you know, that that might be as a full party, it might be as an amicus, whatever is decided. And it goes on to say that interim relief could not be available, settlement could not be available for an IRP without allowing people that have this intervention of right to have some say in the matter.

And then it goes on to -- I go on to say -- and these are in the slides I sent yesterday. Let me just take one second here. These are in the slides I sent yesterday. The third point would be the procedures officer would, despite these requests, try and do everything they can to keep the case moving as expeditiously as possible, as envisioned by the bylaws.

And then finally -- and this point is subject to some discussion on list -- finally we say that people who participate in this manner as amici in IRPs would be considered for the limited purpose of Bylaw 4.3R as parties. What that point was they should be eligible for cost shifting if their intervention is found by the panel to be abusive or frivolous.

Malcolm brought up a point on list -- and it's a good

point -- you know, that it should not be an open -- well, I shouldn't speak for Malcolm. He sent an email, and I would urge you all to read it. The way I took it is this would not be appropriate, that an amici would be subject to cost shifting because oftentimes they are just informational, et cetera, et cetera. I wrote back this morning saying maybe we could solve that particular part of it by saying the cost shifting would only be to the extent that an amici brief made ICANN incur costs in defending against a frivolous or abusive argument.

So I would propose that we agree with the joinder that I just summarized and with the change Malcolm submitted and with change submitted by me to the extent they require costs by ICANN to meet frivolous arguments.

So does anybody have a statement? Greg, you have -- your hand is up, so you have the floor on this respect.

>> GREG SHATAN: Thanks. It's Greg Shatan for the record, and I guess the -- a couple of things on this. First, in my limited experience, amici are generally considered to be nonparties and, therefore, are not subject to cost shifting in cases where cost shifting is available to parties. So I think there's kind of an uphill battle here to say that there should be cost shifting for amici in this case. I think it can also have a chilling effect on the participation of amici who may not have a dog in the fight financially to begin with to say that they could be subject to cost shifting.

Finally, especially where there is a question of whose side they may be on or nobody's side, it's a -- I guess it would be the other side who would submit costs, not the ICANN costs, would also have cost in the amicus brief.

It also brings the issue that cost shifting generally -- and I haven't looked at how it works in the IRP context -- usually involves, except in the case of, say, specific motion practice, all of the costs of a case. You know, loser pays type of thing. So you would have to deal with some sort of an accounting issue of how much time was spent dealing with an issue, which might be intertwined with other issues, not a discrete issue. So that creates kind of an allocation nightmare. So for those reasons, I am not in favor of putting a cost shifting burden potentially on amici. If there is an issue with frivolous or vexation briefs -- if they truly are, they are not going to be taken into account to a great extent, if at all, so that's a kind of punishment in and of itself. But I think that cost shifting is not the right tool to use to deal with the potential of frivolous, vexation, or bad-faith amici briefs.

We could also look at whether, in fact, amicus briefs need to be approved to be brought into the case. Or whether they

come in as a right. And it could be that if an amicus brief is such a pile of dung that it might invoke cost shifting if that were an option. The option would be just to say you are not a friend of the court, go away and take your pile of dung with you. Thank you very much. And thank you very much.

>> DAVID MCAULEY: Thank you, Greg. I see there's widespread agreement in the chat with what you said. I think with the email Malcolm sent, I am happy to let this one go. But let me mention a comment you were just saying. This particular amicus brief would be allowed in as a matter of right because these are from parties to an expert panel below. So they have intervention as a matter of right. It's up to procedures officer to decide whether that's as a party or as an amicus. So I don't think there will be an issue of accepting it, et cetera. But I do see the concerns you, Avri, Malcolm, and Samantha -- Sam -- has agreed with. So I am happy to let it go. So I think we are in agreement and will tailor this one not to have cost shifting for amicus briefs. Otherwise, I think that we are in widespread agreement on this, unless anybody else wants to make a comment. If not, I am going to move on to the next such update.

Sam, you have your hand up, so you have the floor.

>> SAMANTHA EISNER: Thanks, David. You know, as I noted in the chat, I share the concerns Greg raised around this, but I do appreciate the effort to try to hold some level of accountability to those participating in an amicus fashion. I think that going to cost probably isn't the way to do that. So the other thing we could consider -- and we can consider more, you know, online -- is, you know, are there other tools we can build in, are there other concrete rules or guidance to the panel about weighing interest and harm or something like that and not use money as the detractor for participation in the IRP?

>> DAVID MCAULEY: Thank you, Sam. David here. One -- let me just make my statement, and then I will ask if Kavouss has a statement.

One idea that comes to me in response to what you just said is perhaps we could write into the rules that even though someone has a right to intervene in amicus as a matter of right, that doesn't prevent -- or we should maybe expressly allow ICANN to immediately argue that such an amicus brief is abusive or frivolous and should not be considered, and the panel would have discretion to grant that. I mean, that's one potential.

But before I move on, I think I heard Kavouss. Kavouss, did you want to weigh in on this item?

>> KAVOUSS ARASTEH: Yes. I agree with what you put on the slides, but I don't follow with this counter proposal that you

made. What you are saying is in the list as you provided, I have no problem with that. Thank you.

>> DAVID McAULEY: Thank you, Kavouss. I think that we have changed the slides that I provided. I think that number 4 on the joinder recommendation is no longer viable; that is, that these people who participate as amicus curiae in an IRP would not be -- would not be -- eligible for cost shifting based on the discussion that we just had, and Sam made a good point that we might want to look for another way to hold such folks accountable for the quality of what their participation is, but we haven't reached agreement on that. That's just a matter under discussion.

I am going to try and move this forward to first reading, even though part of it may remain open, the part that Sam was just talking about, but I'll see if I can do it. But otherwise, I think this discussion is pretty much concluded unless you, Kavouss, want to make another statement or anybody else does.

>> KAVOUSS ARASTEH: No, I don't have another statement. Right now as you express, I have no problem. The way you explained it now, yeah.

>> DAVID McAULEY: Thank you. Okay. Thanks, Kavouss.

So moving to the next issue, which I believe is panel conflict of interest, let's move to that slide. We discussed this, I think last week or in one of the recent calls, and where we are on this is that we've agreed that there's a term limit of five years for panelists. That's what the bylaws provide for. And I think we've agreed that there would be no renewal. The bylaws do not make that point, but Work Stream 1, the final report did make that kind of a statement. It just didn't get into the bylaws. I had proposed something else, but I think there was widespread agreement that would be one term limit of five years nonrenewable.

The next point was that panelists -- we discussed that panelists who are sitting on ongoing cases that are pending when their term comes to an end can nonetheless proceed on and serve as a panelist in that case or cases if there's more than one,.

Two things. One is Sam or ICANN legal had suggested earlier that we might implement staggered terms for panelists by appointing the first standing panel in a manner where roughly half are appointed for five years and roughly half for a three-year term, and I thought my personal reaction was that was a very good idea. And it would avoid losing an entire panel every five years and all the experience that goes with it.

And so assuming we agree with that in the end, if we use a three-year term, would such three-year panelists be eligible for a nomination for a five-year term for a total of eight years of

service? And I said I would recommend yes on that. But I thought I would put that out there for discussion and see if anybody has any comment on that.

Yes, Kavouss, go ahead.

>> KAVOUSS ARASTEH: Yes, I think no matter who proposed that, I proposed that two meetings ago that we should not lose the continuity, and continuity is important. So I agree. Thank you.

>> DAVID MCAULEY: Thank you, Kavouss. Does anybody else have a comment on this? And will I put this on the list in this manner, recognizing a little bit further discussion is needed here. This will be a qualified first reading in that respect.

I also mentioned how do we handle case assignments? You know, if a panelist is appointed for 5 years, can a panelist be assigned to a case 4 years and 11 months into a term?

Greg, you have your hand up. Why don't you take the floor.

>> GREG SHATAN: Thanks. Greg Shatan for the record.

If we are using staggered terms, first off, I share your recommendation. I am obviously still on the staggered terms thing, not the case assignments. But I generally favor other recommendation that we allow the -- those that have the three-year terms to be eligible for a second term. So I guess they would -- we just need to make sure that we keep a stagger. So I guess they will be staggered because they will come in and be in years essentially four through nine or four through eight while the other -- the five-year panelists are one through five and then six through ten. So that keeps up the stagger. But I do think they should be eligible. I mean, frankly, I think having one renewal would make more sense than no renewals, you know, allowing for a total of a ten-year term, noting that for UDRP, we have panelists who have been UDRP panelists for nearly the entire history of it, and there's a certain knowledge base that we lose if we say that people cannot renew. Although I guess they could -- we probably should say that they are not done forever. They could run for the other stagger, if you will, after a two-year hiatus. Maybe we need to clarify that if that's not clear already. I understand the desire not to have a permanent establishment, but given how long IRP cases run compared to UDRP cases, it seems counterintuitive that we might lose a panelist who has only, you know, served on two or three panels, perhaps, and finally has it down, so to speak, and all of a sudden we are back to square one with another fresh panelist and no ability to take advantage of the experienced panelists.

Thanks.

>> DAVID MCAULEY: Thank you, Greg. And Sam's hand is up,

so Sam, you have the floor.

>> SAMANTHA EISNER: Thanks, David. This is Sam Eisner.

You know, looking at the question around whether or not a panelist who is at the fourth year and 11th month of his term or her term and the IRP comes in, should they be able to be seated on that panel, or does their term effectively expire for new IRPs six months prior to the end of the term of their agreement?

You know, we also could address that a bit through the way that we handle the contracts around the IRP standing panel. So we could have it built in that while a panelist wouldn't be eligible for a retainer past the five years, if they were seated on an IRP that was continuing after the time their term ended, they, of course, would be eligible for receipt of any of the hourly payments or anything that arbitrators get. So we could end a retainer function but still keep them on because even if we were to look at this only about things that start close to the end of their term, there always is the possibility that an IRP that began even six months prior to the end of the term would continue on past that five-year term. And so in any situation, we are going to have to account for the possibility that we'll have a panelist on an IRP panel who no longer is considered available for the standing panel for new IRPs as they come in.

>> DAVID MCAULEY: Thanks, Sam. I think the point you make is a good one. Handling it in contract would basically eliminate this as a question, and they would be eligible for case assignments throughout their five-year term. So I thought the question was worth asking, but I think we've handled it.

Now, back to the staggered terms. I agree with what Greg said, but then I did that in the last call, and Malcolm and others made a good case that panelists being beholden to ICANN for their payment would have -- you know, if they were interested in a second term, would have some interest in perhaps pleasing -- you know, I don't think this would happen, but at least the appearance might be that pleasing ICANN, so they shouldn't be eligible for a second term.

And so I have a question, Avri, for you. Because you put a green check up while Greg was speaking. But as I recall, you were in agreement with the -- with Malcolm's point about this. And so this is one of the difficulties of working in such a small group is I think prior to today, I think I was the only voice saying maybe they should be two terms so that we don't lose all the experience at once, but I am interested, Avri, if you -- if I correctly understood what you were saying last week.

>> AVRI DORIA: This is Avri speaking, and two things. One, somehow or other, that was an old green tick, I believe, or an

accidental one, because I wasn't even at my laptop at the time. But I was listening to Greg's arguments, and I've become less sure of my position, I think. I think the argument made about someone only having been there for five years, participated in two panels, being up to speed, and losing that experience being problematic. And I can see that point. And so -- but I also still worry about to what extent does the desire to be reappointed for another five years encourage a particular outlook in the review? And so I haven't completely switched over. I apologize for the remnant green check, but I am sort of in the middle of trying to rethink it, you know, based upon what Greg has said.

Thanks.

>> DAVID McAULEY: Thank you, Avri. And I think it's fair to say, despite what I thought coming into this call, this respect of renewal of a five-year term is still open and can't make it -- Greg, you have your hand up.

>> GREG SHATAN: I will point out what Sam says in the chat. ICANN does not control the reappointment process on its own; it would be the community process as well. So I think merely rendering decisions that were -- that somehow seem to cater to interests of the ICANN organization would not be good enough and, indeed, might -- if they are seen as slanted rather than fair, that would, I think, tend to disqualify them from further consideration, especially on the community side. So I think we have a check and balance with the community being involved. And I think it's also, perhaps, thinking too little of our prospective panelists that they would be toadies looking for reappointment rather than jurists looking to render fair decisions and perform their task to the best of their ability would integrity. So I am not quite that much of a pessimist about our potential panelists that I would believe that they would spend five years currying favor with the ICANN organization for the sole reason of trying to get another five years of the munificent remuneration that they will be offered as a standing panelist. Thanks.

>> DAVID McAULEY: Thanks, Greg.

And again, this is, I think, part of the challenge of working in a small group, but this point is open, the nonrenewal bit. I, perhaps, gave up too easily on it, but so we'll keep it open.

Let's move on to the next issue unless anyone has a comment. And that would be the retroactivity. Oh, I am sorry. I missed something on the panel conflict of interest, and that is the addition of this phrase from the International Bar Association arbitrator conflict of interest rules. We discussed

this last week and thought this would be a good addition to the rules, the language in red that's on the slide that's on the screen and the slide that I sent yesterday. And when we discussed it last week, I don't think anyone objected, but Kavouss did ask that we make a note in the final report where this came from, and that is it came from the International Bar Association, et cetera, which we would certainly be willing to do. What would show up in the rules is simply the red language. So if anyone has a comment, please make it now. Otherwise we can move on to retroactivity.

And as Bernie noted shortly ago, the call is moving on, so let us try to move -- I'll move that slide. Retroactivity recommendations. And I think we discussed this as well last week with respect to making retroactive the substantive IRP standard. There was no support that I discerned for that. And my recommendation is that there be no retroactivity with this respect. The business constituency had asked for it. I didn't see any support for it when we discussed it or haven't seen any on the list. If anybody has any comment in that respect, please feel free to make it now.

And if not, seeing or hearing none, the other part was with respect to panel rules, whether they should be retroactive. And they would only affect cases that have been filed since the new bylaws went into effect. I am sorry, that are now pending or that have been filed since then and that are still pending.

We discussed this, and I believe we all agreed on the last call that the best way to handle this would make it a matter of discretion for the panel. In other words, we would explicitly say a party can make a request in this respect, but it's up to the panel to decide how to handle the request. They could grant the retroactive application of the rules or not, and we put some parameters around that by saying that it would not -- the panel would not allow rules to apply in pending cases if the action were to work substantial unfairness or increase in costs or would otherwise be unreasonable.

Does anybody wish to make a comment in this respect? Seeing or hearing none, I am looking in chat real quick. We can -- Sam, you have a comment. Go ahead. Take the floor.

>> SAMANTHA EISNER: Yeah. Thanks. Just a short note. We are taking a look at this. If we have any concerns about this, we'll come back on this quickly. But we understand the general -- what this is generally trying to achieve with the limitation of cases filed on or after October 1 for the applicability of the rules. So we'll come back quickly if we have any concerns around that.

>> DAVID McAULEY: Thanks, Sam.

And finally, on this update part of the agenda, let's look at the materially -- the standing issue that we discussed, the label it has is "materially affected" because those are the words used in the bylaws, you know, with respect to standing. Let me just move that a bit. Karl Auerbach, I believe it was, recommended anybody essentially be able to bring an IRP. That goes well beyond the bylaws, and I think we and I certainly recommend against that. But then the discussion came up in a recent call about imminent harm. Before I get into that, Sam, your hand is up. Is that a new hand? Whoops, okay.

So then a discussion came up with respect to imminent harm, and it appears that -- and Becky made the point that the -- you know, the rule with respect to interim relief would certainly handle this, and I think she's right in that respect. She mentioned that on list.

Kavouss, your hand is up. Why don't you go ahead.

>> KAVOUSS ARASTEH: Yes, my general problem with all of the (Inaudible)

>> DAVID McAULEY: Kavouss, it's very faint. Is there any chance you could speak up?

>> KAVOUSS ARASTEH: Hello. Do you hear me?

>> DAVID McAULEY: Yes, that's better.

>> KAVOUSS ARASTEH: Yes, my question was who would define that the harm is imminent or is not imminent? Thank you.

>> DAVID McAULEY: Thank you, Kavouss. It is my belief that that would be something that the panel would do. Bylaw 4.3(p) basically says -- and I am reading now -- a claimant may request interim relieve of a certain nature -- it would be sent to an emergency panelist, and if that panelist concluded -- I would believe -- that this is not qualified as something entitled to him -- to interim relief, they would not treat it so but dismiss the matter. So it would be up to the panel, probably the emergency panelist. But what the recommendation here is for imminent harm is to make sure that a claimant can take advantage of Bylaw 4.3(p), and I discussed it in the email and I've discussed it on the slide, and I think we discussed it at some length on the phone call last week. I don't think there's figure left that's controversial here. But Kavouss, let me ask you, is that an old or a new hand? Kavouss?

>> KAVOUSS ARASTEH: It is an old hand. It is removed.

>> DAVID McAULEY: Okay. Thanks very much.

The only thing we recommend against changing is those provisions in the rules that deal with breach of contract for the IANA naming functions contract. I mean, those are breach of contract claims that will be handled as breach of contract claims. I just -- I didn't see the need that this would be

changed, but I am open to comments in that respect.

Hearing or seeing none, I may put this out on the list, and then I think we can move to the next agenda item, which is challenge to consensus policy, but I also note that we are running -- we have ten minutes left. So let's discuss challenge to consensus policy briefly. And I encourage everybody to respond to my email on the list about consensus policy that I sent I think on Tuesday of this week.

This was an area that was addressed by Kathy Kleiman's law firm, which we refer to as Fletcher, and I think the noncommercial stakeholder group as well. But the recommendations boiled down to be along the lines -- you can see in the email that I sent -- along the lines of joinder. And the recommendations were specifically for -- let me read briefly -- that any supporting organization whose policy was being challenged would receive notice from the claimant of the full notice of IRP and request for IRP, which is the full body of the IRP claim, and all the documents that go along with it, contemporaneously with a service upon ICANN. That the SO would have a right to intervene in the IRP, but again, it would be up to the procedures officer as to how the SO proceeds, as a party if the SO wishes. I am not sure they can do that under their budget and operating procedures. Or as an amicus, which may be of more interest to them, but that would be up to the SO as to what they are requesting, would be up to the procedures officer as to what is decided.

Stakeholder groups, working group chairs, and other community members. And frankly, thought that the supporting organization would be sufficient.

Fletcher also suggested some limitations on what the panel can do, what the panel's ruling can be. And my opinion on that was first of all, it's a bylaws matter, and the steps available to the panel in Bylaw section 4.30 were sufficient to handle this.

Here again, I am will be to -- or I am asking people please comment or state other views as they wish right now on the phone. Or on the list when I put this out for first reading. If anyone has a comment, please make it now.

Hearing or seeing none, I will just go ahead and send that to the list. Maybe we can wrap up a few minutes early.

But there's another agenda item, the call for volunteers, and it's something I have been asking. There are still issues left, obviously, if you go to the comments forum, and Bernie's very good Excel spreadsheet where he tabulated the comments under certain headings. There are still issues to pick off, and I think there's a reasonable template in place under which we

can handle them. Greg did something in the jurisdiction group in his capacity as lead in the jurisdiction group that I really liked, and that is sort of pushing a bit on the volunteers. So what I intend to do is reach out to people and ask if you could take one issue or two issues and move them forward. Now, obviously, members of this group from Jones Day and ICANN Legal, I think we would put them in a horribly awkward position because ICANN is going to be a party in these, so I won't be reaching out to them, but others may be receiving an email or call from me saying could you help. We have a deadline looming at the end of this month, and I don't know how we are going to meet it even now. Maybe we should discuss timing at the next call. But the idea of getting help on these is very, very important. I encourage you to look at the issues, look at Bernie's spreadsheet summary, see if you can pick some off and help us move them forward. Everybody's participation is very welcome, even if you can't volunteer to take a lead on an issue.

Is there anybody that has any comments in respect to that or anything else that we've discussed on this call? Otherwise we can wrap up a few minutes early.

Well, not hearing or seeing any, I have to admit I haven't kept up with the chat in the recent minutes, but I will take a look at chat after the call.

Let me thank everybody --

>> GREG SHATAN: David, this is Greg. I have just one quick point. Sorry to interrupt.

>> DAVID McAULEY: Greg, I am sorry, didn't see your hand. Go ahead.

>> GREG SHATAN: Thanks. Just in terms of, as you say, kind of pushing on the volunteers or voluntelling a little bit, I would suggest a sign-up sheet or something so as people pick issues, they can record what they pick, and also we can see what people are picking. And then where there are unpicked issues and unvolunteered volunteers, you can go to the next level of being a pusher, just in terms of the logistics of trying to track and strongly encourage engagement.

Thanks.

>> DAVID McAULEY: Thank you, Greg. Great idea. And I may ask -- offline I may ask Bernie if he can help me in that respect.

So, that was an excellent comment. Anything else? Would anybody else have anything they would like to bring up? Next week we have a call, it's much later than we normally do, which will give other folks a chance to participate. But if not, then I think we can wrap up this call. My thanks, as always, to the people for participation, for the ideas, the chat. I will look

at the chat in depth offline. I have lost track of it in the last ten minutes or so. And thank you all very much. This will wrap the call.

(End of call 1357 CET.)

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EXHIBIT 207

[IOT] Issues Treatment - Joinder

McAuley, David Contact Information Redacted

Fri Jul 21 13:57:11 UTC 2017

- Previous message: [\[IOT\] Issues treatment going forward](#)
- Next message: [\[IOT\] Bringing CEP into IRP IOT](#)
- Messages sorted by: [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)

Dear members of the IRP IOT:

Let's move some issues along on list -see our sign-up sheet<https://docs.google.com/spreadsheets/d/1Hi_HgvrfstT33p5mfYWT4-x-uhEoy9nCK8owX5uTKC0U/edit?ts=591dda09#gid=0> for issues. This email deals with the joinder issue.

These following three numbered paragraphs constitute the previous proposal<<http://mm.icann.org/pipermail/iot/2017-June/000251.html>> on joinder:

1. That all those who participated in the underlying proceeding as a "party" receive notice from a claimant (in IRPs under Bylaw section 4.3(b) (iii) (A) (3)) of the full Notice of IRP and Request for IRP (including copies of all related, filed documents) contemporaneously with the claimant serving those documents on ICANN.
2. That all such parties have a right to intervene in the IRP. How that right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. No interim relief or settlement of the IRP can be made without allowing those given amicus status as a matter of right as described herein a chance to file an amicus brief on the requested relief or terms of settlement.
3. In reviewing such applications, and without limitation to other obligations under the bylaws, the PROCEDURES OFFICER shall endeavor to adhere to the provisions of Bylaw section 4.3(s) to the extent possible while maintaining fundamental fairness.

On July 9th Liz Le of ICANN Legal listed concerns/questions with respect to this proposal in an email<<http://mm.icann.org/pipermail/iot/2017-July/000265.html>>.

My comments (as participant and issue lead):

I will note the gist of Liz's concern/question in italics and then my proposal/answer in red.

One overall note: This joinder proposal is strictly with respect to "parties" to expert panels as per #1 above - when we deal with challenges to consensus policies we can there deal with how SOs may intervene in those matters (remembering that we will ask Sidley to come up with actual "rules" language once we finish our work).

Liz's points (not necessarily her entire comments):

First, there needs to be rules and criteria established as to who can join/intervene by right as well who may be properly joined/allowed to intervene at the discretion of the IRP panels.

The intent is to allow all "parties" at the underlying proceeding to have a right of intervention, but that the IRP Panel (through the Procedures Officer) may limit such intervention to that of Amicus in certain cases. It is not envisioned to allow non-parties from below (or others) to join under these provisions - noting that these provisions just deal with parties below. We are not displacing rule #7 (Consolidation, Intervention, and Joinder) from the draft supplementary rules<<https://www.icann.org/en/system/files/files/draft-irp-supp-procedures-31oct16-en.pdf>> that went out for comment.

Second, clarification and development is needed on the standard of review that is to be applied by the Procedures Officer when determining the extent to which an intervenor may participate. What should the interested parties have to demonstrate (e.g., should the interested parties have to demonstrate harm based on an alleged violation by ICANN of the Bylaws or Articles? What are appropriate interests that will be supported?). What types of briefings and opportunity to be heard are needed in order to allow an interested party to petition the Procedures Officer to exercise his or her discretion and allow the party to join in the IRP?

I don't think the intervenor would have to allege or show harm - that is the job of the Claimant (presumably the "loser" below) - and that Claimant will have to allege/show that the decision by the panel below, if implemented by ICANN, would violate the Articles or Bylaws. The intervenor here would simply need to show party-status below. I would think that a request for joinder would have roughly the same information required of a Claim as per Bylaw 4.3(d) and would also require an equivalent filing fee.

Third, Also fundamental to this question is understanding if there are different levels of "joining" an IRP? Should a person/entity that can allege that they have been harmed by an alleged ICANN violation the Bylaws/Articles be treated differently than a person/entity that just has an interest in someone else's claim that the Bylaws were violated? Keeping the purpose of the IRP in mind, does it make sense to treat each of these as having "IRP-party status"?

I think that in these circumstances (dealing with an expert panel below decision) the "winner" below would most probably be accorded party status and would have an obvious interest. The more difficult case might be an intervenor who was also a "loser" below in cases where there may have been more than two parties. Maybe we should require that they allege and show a material likelihood of winning on rehearing if the IRP panel were to advise ICANN to call for a rehearing.

Fourth, It would also be helpful to clarify if IRP-party status includes the ability to be a prevailing party, is entitled to its own discovery, and if such discovery would be coordinated or consolidated with that of the claimant?

My suggestion would be that anyone with party status (rather than amicus status) have discovery rights as coordinated by the IRP panel.

Fifth, An amicus curiae, as generally understood, typically does not participate as a party to a proceeding. The concept of allowing for briefing at the interim relief stage from an amicus, or a third party that believes it has an interest in the outcome (with IRP-party status or not), could be appropriate, but more information is needed as to the timing and expectation of what intervention or briefing is expected to achieve.

Perhaps this right should be limited to instances where requested interim relief, if granted, could materially harm the amicus's ability to pursue/achieve their legitimate interest.

Sixth, What standard is the panel adhering to when considering an amicus? Are there timing requirements of when the process should be invoked? The timing for an amicus curiae to comment on interim relief should take into account the fact that the interim relief process is an expedited process to provide emergency relief. For example, at what point in time can an amicus curiae comment on interim relief - during the briefing stage seeking interim relief or after the IRP Panel makes a determination an interim relief?

If the above responses don't address standard sufficiently then a specific proposal is invited. As for timing, I propose notice of intent to file within 10 days of receipt of the claim (not business days) with timing for briefs (whether as party or amicus) determined by PROCEDURES OFFICER.

Seventh, In regard to the settlement of issues presented in an IRP, the settlement of disputes is a private and often confidential process between two parties. It is unclear how and why an amicus curiae, who is not a party to the IRP, would be entitled to have input in the settlement amongst two (or more) parties to an IRP. What is the procedure for such a process? What types of briefings and opportunity to be heard are needed in order to allow an amicus curiae to comment on interim relief or settlement? Parties are not even required to notify or brief the panel during settlement discussion, and the panel does not have an opportunity to vet a settlement, so what else would need to be changed (and on what grounds) to make this intervention into a settlement feasible and justified as to cost and burden to the parties? Parties should not be required to prolong an IRP if they would prefer to end it. ... how is the right of an amicus curiae to approve settlement terms balanced with the interests of the parties to the settlement to keep the terms of the settlement confidential?

This seems a fair point and perhaps the right to intervene as to a settlement must be limited to parties.

Eighth, Additional development is needed to ensure that an amicus curiae's exercise of its rights to comment on interim relief or settlement does not delay the emergency relief and prejudice the rights of the parties to the IRP.

The reference (to Bylaw Section 4.3(s)) in paragraph 3 of the original proposal is intended to address this.

Ninth, further clarification and development is needed regarding timing of the joinder and intervention processes. The amount of time in which a party has to intervene or join in the IRP and the briefing schedule for such motion should take into consideration the intent under the Bylaws for IRP proceedings to be completed expeditiously with a written decision no later

than six months after the filing of the Claim if feasible.

Suggest 10 days for notice etc., as noted under SIXTH above.

Tenth, another issue for consideration pertains to the extent to which confidential information can/should be shared with parties intervening/joining. For example, if a claimant wants to submit confidential information in support of its IRP, it should be able to protect that information from being accessible to intervenors, some of whom could be competitors or contracted parties. Do intervenors get access to information exchanged between ICANN and the claimant? How will discovery methods apply to intervenors? Do intervenors have all rights as any other party to the proceeding, up to and including the ability to be determined as the prevailing party?

I would think that the panel, operating under ICDR rules, can handle these matters - e.g. I believe the rule on confidentiality here would be Article 21, subsection 5, which provides:

The tribunal may condition any exchange of information subject to claims of commercial or technical confidentiality on appropriate measures to protect such confidentiality.

(I am referring here to these rules:

[file:///C:/Users/dmcauley/Downloads/ICDR%20%20\(1\).pdf](file:///C:/Users/dmcauley/Downloads/ICDR%20%20(1).pdf)

Best regards,

David

David McAuley

Sr International Policy & Business Development Manager

Verisign Inc.

Contact Information Redacted

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URL:

<http://mm.icann.org/pipermail/iot/attachments/20170721/4eab9499/attachment-0001.html>

- Previous message: [\[IOT\] Issues treatment going forward](#)
 - Next message: [\[IOT\] Bringing CEP into IRP IOT](#)
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EXHIBIT 208

CCWG- IRP-IOT SUBGROUP

CCWG- IRP-IOT SUBGROUP
Thursday, July 27, 2017 - 19:00 to 20:00

>> MR. MCAULEY: Hi everyone, it's David McAuley speaking. Could I please ask that the recording start.

>> Yes, David, please stand by one second while I finish uploading.

>> MR. MCAULEY: Sure.

>> Thank you so much. Here we go.

>> MR. MCAULEY: Thank you.

Hello everyone and welcome to the IRP IOT call of the Thursday July 27th. It is again a small group. We had to cancel the last call for lack of a quorum. And we're well into the dog days of summer, so it's probably not surprising. We struggle to get a decent group even at the best of times, but I would like to thank those that are here for the call. And it may be truncated because we are a small group but let's press on and cover what we can.

Let's begin with the agenda item number 1, which is the attendance. If there is anybody who is on the call by audio only, and not showing up in the Adobe room, would they please make themselves known at this time.

Hearing none, I will ask the folks that are here if anyone has an update to their statement of interest that they want to mention?

And seeing or hearing none, let's proceed.

Note: The following is the output resulting from the RTT (Real-Time Transcription also known as CART) of a teleconference call and/or session conducted into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.

Let's go right down through the agenda. I just want to say hello to Anna Loup and I'll ask her to speak up when we get to item four. She's new to the group and we'll get to that shortly.

First let's look at the signup sheet and talk about that briefly.

And while Brenda is bringing that up, this, the signup sheet that Bernie kindly created is a listing of the issues that we have under discussion for the, for the supplemental rules, but in addition, there are some additional things at the bottom under the second yellow break. And even though it appears light, it appears light with what we're doing, I actually think we've had a lot of discussion surrounding almost all of the supplemental procedures in one form or another, whether it's been on the list or discussion. So I have a feeling we can really hit our stride over the next couple of weeks to move things to first and second reading. And I believe that we can get the supplemental rules out for the second public comment in fairly decent shape; hopefully within a month or two.

The additional matters at the bottom which are the CCEP process, the procedures where I can, where ICANN fails to reply to a claim, rules for appeals and the process for recalling standard panel members, those rules I think we can move on as a subsequent stage, a stage once we get the next set of updated supplementary procedures out or public comment.

So that's the goal. And I would invite folks to look at, especially the ones between the top yellow break and the second yellow break, the rules that we're looking at, there are still a few available for someone to take the lead on commenting. Please give it some thought, and if you feel that you can't, please just be sure and read the emails that will be coming and we'll try and move these forward.

I see Greg is just joined us. Thank you, Greg.

That's the status of the signup sheet. Again my hope is that we'll get the updated supplementary procedure down and fairly decent order and get them out for public comment and get those in a shape where they can be done and useful, then we can move on to the additional materials, additional matters.

Does anybody have anything they would like to say about the signup sheet the issues under discussion, or that, you know, that has a way of looking at moving forward?

Um, seeing or hearing, seeing no hands and hearing none, let's move on to agenda item number 3, which deals with the process flow that Liz kindly sent to the list on July 11th.

This is that document that deals with the SO and ACs and ICANN moving forward with establishing a standing panel. And I believe that we would have a role of assistance in this but it's not a formalized role under the Bylaws. And so, I would like to ask Liz if she could step us through this and then highlight the questions that they posed in that mail of July 11th, and then we could discuss that as best we can.

So, Liz, if you don't mind, I'll ask you to comment on this.

>> Thanks, David.

So, what we did as we mentioned before, ICANN undertook the action to sketch out the road map for the establishment of the standing panel as provided under Article 4 Section 4.3JII. And that's what we set forth here. And we put out, we built into the road map instances where it

would be ICANN organization's role SO and AC roles and in some instances that includes where the IOT also plays with respect to the role of the community.

As I explained in the email to the group circulating, there are some, as we went through this, there are some areas that the Bylaws is silent on and did not provide details, where we would like to seek input from the IOT as to building this process out a little bit more. And I think that area relates to step 2 section 3, which is the initial review embedding and vetting of the applicant.

So, I'll take us back, and I just, I highlight that so you can focus on that as we get to it, but I'll take us back to the first step which is step one is the tender process. Now, we don't think this is applicable at this time because the, it's a tender process to provide admin support for the IOT provider, since we already have an IOT provider in place and they already have their own admin support, we don't think this is applicable at this time.

The next step is the call for expression of interest and the initial evaluation. So, the development for the call, the EOI is something that we've already completed and we worked with the IOT on. And following that, is the identification of solicitation of the application.

We put here, the expected time frame is 45 days, because that's normally when we have a call, call for any expression of interest normally open for 45 days.

As you can see in the break down, we've explained what ICANN's role would be in terms of publishing the call, for expression of interest, call with the boards, and SO and AC in terms of how to get the best qualified candidates that includes social media to promote the EOI. And also revisiting what further steps if we end up getting a low turnout for EOIs.

Along those lines, we have what the SOs and AC role is to circulate the EOI among their membership and provide input into ICANN or if the return is low.

I think the next step as I indicated is where we really need input from the IOT and that's the initial review and vetting of applications. Here we put the expected time frame, our estimate of 30 days, but we put brackets around I, because that's where we would like additional guidance from the IOT in terms of how long this would take.

And I think, one of the steps that goes here is to develop certain standards for how we would evaluate the applicant.

>> David, we saw your hand up and it went down, did you have a question that you wanted us to address now or should we keep going?

>> MR. MCAULEY: Well, thanks, Sam. I had my hand up as a participant, not as a leader. And it had to do with that section, the first section on identification and solicitation of applications. But I'm happy to wait if Liz would prefer to do this, you know, with one go and then go back and get questions. So I'll leave it up to you guys.

>> No, I think that makes sense for us to handle the questions as we go through each section.

>> MR. MCAULEY: Okay. Well, thank you, Liz. So, under that section called identification and solicitation of applications, you mentioned that it would be open for approximately 45 days and your reasoning for that was pretty good, I thought, because that's fairly standard practice in ICANN and that makes sense.

Having said that, I'm looking, when I read this and I thank you for doing this, it's a good document. But as I read it, I was looking for ways to shorten the process. And so I'm wondering if this period where the expression is open for people to act upon, if it couldn't be 30 days? Could we try and, I'm going to try and make suggestions for snipping time off the process in various places, but that's my question here, could it be 30 days? Is it, in light of the reasoning you gave that usually the practice is 45 days, what if we deviated, would that be a terrible imposition? I'm just curious if anyone has a reaction to my question. So that's the first point.

>> Okay. David this is Sam. So, Liz and I agree, there is no mandate for the length of an expression of interest period. One thing that we consistently see across ICANN, particularly around the time of year that expressions of interest or calls may go out, et cetera, sometimes we see lower response than we would hope to and so we might want to have some sort of break point or place for communication between ICANN and the community about, we've only received X number of applications should we be extending this.

So, I think that we should, there is no problem in setting up an initial period that's shorter than 45 days or taking that down to 30, but I think we need to consider the impact if we don't get enough or if people come in, or if we get contacts from potential apply cans that say they need a couple more weeks to submit something.

So, the reaction is it's not a problem, but we might need to remain open to the fact that it might need to be extended.

>> MR. MCAULEY: Sam let me react to that statement again. That makes sense to me. I would, so I would urge that we make it 30 days. It also, you know, this will be worked on by you all in

light of the comments that we give you back. So it's not going to be released probably in July is my guess. And so, it depends when the EIO comes out. If it comes out if first part of September, then it seems to me the 30 days is reasonable. If it came out in the middle of August, maybe, we would have to be very generous on requests to extend. But I would try, but I would think it would be wise for us to set a Tempo of quickness going into it. And so I appreciate your comments and that would be mine.

So I'll move to the next point that I was going to make. And that is where Liz you mentioned you know that the coordinate with the bored and the SO and AC, there I think the IOT would at least with respect to some members in the IOT note a willingness to volunteer.

Now before I press on, I see Bernie's hand is up. Let me see if Bernie wants to step in now.

>> Just a thought throwing out there. Given we're concerned about the timeline for these, this period of applications, if at some point earlier we do know that we're going to launch on a specific date, it might be worth while using the communications group and issue some public media stating that we will launch that on date X. And that gives you sort of several weeks of people knowing that this thing is going to open on a given day. And that might help you gather more applications.

And the communications group at ICANN is really good at using all the channels for that, so just a suggestion if you find it useful.

>> MR. MCAULEY: Thanks Bernie. Seems good to me. And so thank you for noting that.

So then Liz and Sam, I will move on and say that please note that the IOT would like to assist in any way that's reasonable to try to move this along.

Then I would like to note on the issue of low returns. I think that's a fair concern to have. I'll just tell you what my experience has been as a leader of the group. I have been getting indications from people that are interested in applying. So I know that there will be some applications. In fact, I know there are some people that would really like to apply right now.

So, I have two things to say about that. One is, if we do have low return then we could extend, but two, I think it might make sense, and this is for both, you both as well as this group to indicate in the EOI that at the beginning, the standing panel is going to be capped at 7 members. The Bylaws provide that it has to be a minimum of 7. And so, far in my experience, I would characterize the way things are moving as fairly, fairly slow or deliberative. And I think it would be in everybody's interest to say the standing panel is going to start at 7. And you know, the community, the IOT, the board, can always call for increasing the number, if that becomes an operational necessity. But that would be my suggestion to sort of indicate we're looking for 7 members.

And then the only other thing I would say in this respect, leading up to it much like Bernie was stating, anticipating the release. If there is any interest on your part to do a webinar, or a call with SOAC leaders, either I'm personally or I think some of us in the IOT would be happy to help in that respect; and to sort of explain the Bylaws, explain the process flow, and field questions.

So, those are my comments with respect to this section. Thank you.

>> The thanks David. If there are no other questions on this section, we can move on to the next section, which would be the initial review and vetting of the applications.

And as I said before, here is where the bylaw system does not have much as details on what this process looks like. So this is what, how we have sketched it out is we think this involves developing a standardized template for the valuation of the applicants. And that incoordination with the bored and the SOs and the ACs, that probably would include identifying what constitutes, what a well qualified candidate looks like, and we would work with the board and the SOs and ACs to identify the qualified applicants from the interviews.

I think that we don't necessarily have to wait to receive all the EOIs or even for the posting of the call in order to do this. I think this can be done concurrently and the sooner we start this work the better.

Then, there will be an initial review of the application and then there will be an initial initial interviews.

I think here is where we know in our footnote and in our email to the group, here is where we would really appreciate input from the group, because in terms of what this looks like, how should it be, does it look like ICANN does the initial interview and then the SOs and ACs do the secondary interviews, or should the, would the SOs and ACs and the bored participate in the initial interview?

So, it's, this is the process where we would appreciate some input from the group on.

>> Just to add onto that, I think I think the types of process that we build in a have an impact on the timing. So if you imagine an initial interview process that requires involvement from large numbers of people from the community, that would take more time to coordinate than having a smaller number of people participate in the initial interview process.

And so, not without, I think we can go anyway on it. It's just a matter of what, we're looking to the IOT to help us maybe narrow down what we think would serve the SOand CArole in this process and where the SOs and AC would be available.

As we also note to the extent that not everyone can participate in an initial interview process, for example, we think that there would be, it would be important to make sure we had as much transparency around the process with ICANN have been obligations to provide documentation and keep records, so that it's clear, it's clear where things stand for anyone who is watching the process.

David, we see your hand up?

>> MR. MCAULEY: Yes, I was on mute. Sorry about that. So thank you.

I will make some comments and that I see Bernie's hands is up too. Then I'll call on Bernie.

So, thank you for this. My comments here, initial review and vetting of applications expect the time frame in brackets 30 days.

I would suggest that we say up to 30 days. And my thinking is this. Again I'm sort of looking for ways to shorten the process, deliver on the new IRP more quickly. And let's say we got 20

applications. It seems to me that if there were 20 rather than 50 or a hundred, that the review and vetting would be done relatively quickly; 21 days, 15 days, I don't know.

So I would suggest up to 30 days as needed, or some such language.

Then with respect to interviewing, I think your offer is generous, to do the interview and record them so it's transparent, et cetera. But I would suggest that while that may work, you know, that you take the lead in the interview, you should at least invite the SO, taken ACs to have one representative along on the call, you know. And the difficult part for me is what capacity. Should they be there just listening or can they ask questions?

And I guess there are numerable references we could come up with. For instance we could invite SO and AC to submit the question to IOT and the IOT help in the interview if people are concerned that ICANN should not be doing the interview entirely. ICANN organization, that is.

So, there is ways we can crack this nut, but I would at least invite SOs and ACs they will be given the schedule and invited to have somebody from their council come along. That way, we wouldn't be coordinating schedule for ten people, but we would be allowing ten people perhaps to sit in, in some form or fashion.

I know that needs a little more work, but that's my comment.

So, next tile turn to Bernie.

>> Thank you. Just a comment as you considered the consider the processes for doing this.

I guess, in a way, for me, this could almost turn out in a very similar fashion to the selection of review item members for some of the reviews under the new rules, which are under the Bylaws.

And I think that we should be informed about how well and some of the challenges that have resulted from the early applications of that; when considering the process for this. Thank you.

>> MR. MCAULEY: Thanks Bernie.

So, back to you Liz.

>> Firsts this is Sam. First I want to react to Bernie's comment.

I think Bernie, you're exactly right, the issue of how do the SO, ROs and ACs come together to develop a slate, to make these sorts of recommendations? How do they participate in the evaluation of candidates, which is actually almost different, because there is a, the Bylaws suggest that this is a collective and not necessarily an individual SOand AC nomination process.

That's where we really started running into concerns about setting out the time frames and making sure the time frames were realistic. Because the more, the more heavily involved you have SO and AC participants, the longer the process will likely take. And so there has to be work around the definitional roles of what those participants are doing. SOand AC would likely have to identify their process for selecting the people who help represent them in those, in that work. And then we also do need to have some, have some concerns around identification of conflict of interest, particularly at interview stage and making an initial valuation stage, to make sure that the more people are involved in the interview process, the less likely it is that

they might actually be working in a particular interest towards a candidate to move them through, right? It's that kind of independence consideration that you have.

So, that's one of the reasons why we're flagging this for the IOT to get some ideas of how we can present this to the SO and AC in a reasonable way and if you have idea of how you might go fact to your SO and AC and raise these issues and get some ideas of how we want to move this forward and solve for the issues instead of making this look like ICANN just mandated a particular process.

So, you know, we could have some people from the MSI team come and talk about the selection process. I know a bit did how that's gone, but it's really, the issue that we're actually trying to solve for is an issue that hasn't yet been solved in the review team process, which is what exactly is a collective responsibility? And so in some ways we're trying to, to cut off some of the issues that happen within the review team selection process, where some SOs and ACs haven't been fully okay with the processes so that we have a more community developed process from the outset and understand how everyone is supposed to interact.

When I see and I see there are reactions back to this on the list. So I'll turn this back to you, David.

>> MR. MCAULEY: Thanks, Sam.

Bernie, that an old hand on new hand?

>> No, it's a new hand. Maybe I'll just repeat a comment that was made to me by someone from the SOs. They were concerned that on this particular process that although it says it's a

community selection, that somehow this would end up for at least the first round just to get through it, would end up looking more like the selection of our team members. And that if you will, completely horrified the person who was making the comment.

>> MR. MCAULEY: Bernie, it's David. David speaking. Could you, I'm not sure I follow. Could you repeat? The first round would be more like our team members?

>> No, more like the selection of review item members for the reviews.

>> MR. MCAULEY: Oh, oh. Okay. Thank you, Bernie.

And I have a reaction to what Sam was saying. And I know that there are, you know, well intentioned, good faith people out there in this process, that are looking for ways to help us make this work sensibly and quickly and result in good panel, good selection, people that meet the selection criteria very well. So that's what I'm really sort of getting after.

So, Sam, you made some good questions. And I think it might help if we could work this out on the list. You know, go through these questions. I personally, you can tell because I mentioned it several times, would sort of like to design a brief webinar or just discussion with SOs and ACs that simply highlights, here's what the Bylaws give you, here's what the organizational issues are, we don't know how to do this. It is a community thing. We want to discuss it. Here are bullet points about the issues involve. The very things we're discussing now. So that we could at least move too ball down the field a little bit.

I've already spoken to a number of SOs in Copenhagen and I think in Johannesburg, and I've done it on the list as well. Sort of surprising people, here's what's coming. But now we're getting to the formative stage where the actual issues are going to be wrestled with.

If there is anyway we could move this quickly on the list, maybe you and myself and Liz and other volunteers from the IOT, sort of move it forward, I would very much think that would be a good idea; hopefully with the idea of having some type of communication with SOs and ACs even in the month of August which everybody dreads, but if there is a week notice and there was a subject put out there and the importance of it, I think we could gather folks and get the thinking started and this could come together fairly quickly. Thank you. Back to you Sam and Liz unless someone else would like to make a comment, but I don't see any other hands. So why don't you guys go ahead.

>> Thanks David. So, Sam and I are in agreement with you that webinar is the vehicle to move this along. It would be a good idea. Whichever mechanism it is, we want to be able to get this done so we can go on, move on with this process of actually establishing, selecting the panel.

The next step once, after the initial review and vetting of applications will be the nomination of the slate. And that comes from the SOs and ACs that nominate the slate.

Here again, we have in brackets, which is an estimate time frame of 30 days. It might be sooner than that. Really depends on the SOs and ACs and how they envision the process will be built out.

ICANN role is really to support SOs and ACs as needed, I can it's up to the SOs and ACs and reach a mechanism how they will reach the slate of the nominees. Whether they'll do second interviews, whether they will arrive at the slate itself.

And then, once they provide and communicate the slate to the board, the final step will be for the board to act on the slate and we have the expected time frame would be 30 days and that's based on, we'll schedule a board meeting at the next feasible opportunity once ICANN receives the recommendations, and then the board will be able to act upon the proposed slate at that meeting.

>> MR. MCAULEY: Thanks Liz. It's David again for the record.

Let me just react. I think that all makes sense. I would like to just sort of close my comments with, to repeat one thing I said earlier. Where we say 45 days, let's try to make it 30. Where we say 30 days, let's say up to 30 days, because in all of those instances there may be ways to truncate it. I think the SOs and ACs and ICANN board should also be made aware of the need to move with dispatch on this thing.

And then, I know there is details we they'd to come up with for engaging those who are going to be chosen to serve on the standing panel. And so I think we need to give some thought or ICANN needs to give, the community needs to give some thought at some point what would a contract look like for service. And it seems to me that the sub taken active rules of service would strictly be those from the Bylaws. In other words ICANN would have no role in how someone fills their role as a standing panel member. You know, the Bylaws provide what those criteria and standards are. But I can will have a role in paying them, determining what are they

paid. So I would suggest the background, ICANN legal and policy may want to discuss this with the ICDR. I don't know how you create these contracts, but theoretically, the IOT would have some input into that too.

So I would encourage you to sort of be working along those lines too in parallel. And hopefully as we said, we could move some of this forward on the list.

If I could, I would like to give Sam and Liz, you, the sort of the duty of coming up with the first email to move this forward, then we'll move from there. If the that would make sense and would be acceptable to you.

>> Yeah. We can do that, David. This is Sam. And just in terms of the contract, there is also the fact that there is, one of the things around independence, of course ICANN is responsible for paying and everything, but likely because there is ICDR is almost likely on their paper as opposed to an ICANN contract, but I think that there probably is some value in making sure that what goes into a standardized statement of work, that we would expect the ICDR to insert into the contracts be something that we all agree. That what we're actually telling the panel is there being contracted to do is what we all agree they're supposed to do. There is probably some room for working with the community on making sure that everyone is aligned, that that statement of work is appropriately done.

But we'll go and take the first action to flush out a little bit more to an email some of the issues that we think we could raise. We'll probably think about it in terms of you know, how would we kick off a webinar? What would web posting in for questions to get input from the community and try to focus it that way.

>> MR. MCAULEY: Thanks, Sam.

So, I think we're done with this agenda item number 3 unless anybody including Sam and Liz, anybody wants to make further comment.

If so, please note.

Seeing no hands and hearing none, let's move on to the next agenda item, the CEP process.

Let me set up this brief, this will be a very brief discussion. You've seen the emails that went back and forth. Suddenly Ed more wrist left the CCWG for accountability workstream 2. I didn't know that was going to happen. And the co chairs came to me on behalf of the IOT and asked if we would be willing to pick up the CEP process. And then you've seen the letter that was passed around among us and that I sent back to the chairs saying sure, we would love to do this, we would like Anna Loup to join our group, an that has been active in the CEPprocess with Ed. And we would like ECEP come with us and not be a workstream even differ anymore.

Jordan wrote back and said they seem like reasonable questions and they'll Dell with it at the next plenary.

That's where we are. We would welcome to our group Anna Loup. Anna is on the call today, and I'm going to ask Anna if she would if two 30 second bio of hers, and second 30 second segment would be roughly what's going on in CEM that Ed and her have would be working on. I've met Anna, so Anna, I'll give you the floor.

>> Great. Thanks so much, David.

So, again my name is Anna Loup. My first 30 second segment, I'm a PHD student at UCSK (indiscernible). I'm working social, economic and political relation of (indiscernible) my academic spiel through. I look mainly at broad Internet critical infrastructure settings from sore the of bio in my work at IG. From 2014 to 2016 I worked in ICANN DDG position. I was a CCP metrics intern before I became a member of the NCPH, NCSG. I'm currently a Compass Fellow at the Center of the (indiscernible) and Technology. That's my academic work.

Regarding the CEP, it's my only project within the ICANN community due to demands of my academic research and policy work but I'm really excited to continue to aid the community in the development of what I think is an important aspect of the Bylaws and hope to learn a lot from your discussions and expertise.

My work for CEP was mainly to advise Ed on the collection of discussion data and interviews because I'm not a lawyer. I work with lawyers every day but I'm not one.

So I mainly was the methods person and the data person. I was tasked with note taking, helping re discussion during our calls, PowerPoint development. And I also sat in on many of the informal interviews we conducted in the development of two pager (indiscernible).

Hopefully I can answer any questions you might have. Again we were really in the discovery process, and we at Johannesburg were trying to engage the community more with a few questions to get feedback before we had an actual outcome. So really it was a discovery process. So I think this is a great time to see, the CEP, it is a good point, you know, if it had to move, this is a good point for movement. But I'm glad to be working with all of you and thanks so much, David.

>> MR. MCAULEY: Thank you, Anna. And, we're very happy to have you join us.

We will now, unless anybody has a comment, question, anything they want to say on this agenda item.

If not, we will move on to the next agenda item, which is the joinder issues, issue.

I think what I'll do here is just do a lot of reading. I'll do it very quickly. But roughly speaking we had come to a statement of our proposed program on joinder and Liz and Sam brought up some issues. Good issues to think about as we think about joinder. And so, I think it was this past weekend or Friday I wrote back which suggested a response and I would like to go through that now.

So I'm hoping to move this to near conclusion.

The position that we ridge three came to on joinder was as follows. It's three points. One that all those who participated in the underlying proceeding as a party, and remember we're talking about joinder of people who are coming from expert panel decisions only in this respect; that those people receive notice from the claimant in the IRPs. In IRPs under the bylaw section for the expert panels. That they get notice of the full notice of IRP and request for IRP, including all the documents. And they get that contemporaneously with the employment of serving ICANN.

Two that such parties have take right to intervene the IRP. How the right shall be exercised to the procedures officer. How that could be allowing party stands a or allowing the parties to file amicus briefs. As procedures officer determines in their discretion. No interim relief or

settlement could be paid with the IRP can be made without allowing those given the amicus status as a matter of rights as described herein a chance to file a amicus brief on requested rove leave of the materials of settlement.

3. We (indiscernible) procedures offer, moving links things along with dispatch.

So, then Liz's comments came and I boiled them down to a number, different number of things and I'll read them and my suggested answer. And then I'll invite comment.

So, Liz's points first. There needs to be rules and criteria established as to who can join intervene by right as who may be properly allowed to join, allowed to intervene at the discretion of the panels. My suggestion was intended to allow all parties at the underlying proceeding to have a right of intervention but that the IRP panel through the procedures officer could limit such intervention to being that of an amicus. Not in division to allow nonparties from below or others to join under these provisions. Noting that these provisions deal with parties below. Basically an expert panel hearings.

We're not displacing rule number 7 will consolidation, intervention joinder from the draft supplementary rules were up for comment.

So, that's the end of the first part. Anybody have any comment or concerns or desired outcomes? And I particularly interested, Liz, and Sam in what your reaction is.

>> For this, for this portion, I mean it seems fine. I don't, I'm not trying to reopen a bag of worms, or can of worms, whatever that statement is. But this only discusses cases where there

is a challenge to a expert panel or one of the evaluation panels, like that happened in the new detailed program.

So, you I'm not suggesting we need to go further, but I just want to make sure that we have, that we're clear within the IOT, that we're not addressing situations where people might be able to intervene when, when there is not that kind of underlying procedure that's been, someone was designated a party to.

>> MR. MCAULEY: Thanks, Sam. So I think what that means is on section 7, the joinder session, we need to be, take these comments into account. I think that's fine.

And the second, let me go to the second point. And I will paraphrase here, because I was reading so quickly that the captioning wasn't able to keep up.

Second, clarification and development is needed on the standard of review to be applied by the procedures officer. What should the interested parties have to demonstrate? Harm based on alleged violation by ICANN? What are the appropriate interest that will be supported? What types of briefs and opportunity to be heard are needed in order to allow an interested party to petition? To join in the IRP?

My response, the intervener would not have to allege or show harm. That's the job of the claimant, presumably the person or the party that lost the expert panel below. In that case, the claimant is going to have to allege that the decision by the panel below, if ICANN implemented it would violate the articles or the Bylaws. Here the intervenor would simply need to show that they were a party below. Would have roughly the same kind of information

required in a claim and perhaps an equivalent, or yes an equivalent filing fee. That's a suggestion.

Again, does anyone want to comment on this? And, Sam and Liz, I put you on the spot last time. You don't need to comment, but if you don't, I'll sort of assume that you are okay with the explanation subject to what Sam just said about joinder and other instances.

>> Yeah. I think on this one, we still have some concerns. I mean if you're giving someone a party status to an IRP, IRT is for the demonstration of, for someone to allege that ICANN violated Bylaws or the articles of incorporation. And that that person experienced harm because of it.

And so, if it's about bringing a, bringing someone in to support a briefing, that's one thing. And this is I think where we go to that, our comments around the levels of what does intervention mean, what does joinder mean, what rights are we giving to people? Because, you know, what is the value of adding people to an IRP? Not about adding voices, but adding people to an IRP when those people or entities actually don't have a claim or don't wish to state a claim that they were injured by ICANN's violation or alleged violation of the Bylaws or articles of incorporation.

Because that seems to not really be in support of the purposes of the IRP.

Now, if this is about how do we get voices into the IRP, so if someone, if there is a party who says, I fully agree with, claimants position and I want to show that, I want the panel to know that I agree with them and to give some information about that; that's one thing, but we wouldn't then say that they have, that they're then considered a party to the IRP.

So, some of this might be language issues in getting clearer on our language, but also about the intentions and the different levels for which we think people are joining.

>> MR. MCAULEY: Thanks, Sam. I understand your point. And I too have a little bit of concern about party status. On the other hand, the Bylaws give the loser below, an explicit right to an IRP hearing. Basically an appeal of the expert panel below.

And so, I think the desire for party status is a desire for equivalence. And recognizing that the party that's going to be intervening is the winner below. Which after all, they won the case, so they have, they shouldn't be relegated to secondary status.

Now, having said that, if they had a full right to be, as you put it, a voice in the hearing, I think that might make sense. But in a later point, you and Liz made the point that someone in amicus status couldn't really upset an settlement, and I think that, if you maintain both positions, that is that the winner below should not be a party but amicus in an appeal, but then the winner below couldn't have an active voice in settlement discussions.

I don't know, I have, I'm just struggling with that. So that would be my comment to your comment. And I think your hand is up, is that new?

>> Yeah. That is new.

So, first, I think we have a much different understanding from the CCWG process of what the, what it means to have included the language around the expert panel decisions into the Bylaws.

So, we agree during the CTWGworkstream one, that it was important for the community to have that specific example of a time when ICANN might have violated its Bylaws or articles of incorporation listed as a time when the community could come, when a claimant could issue an IRP, but is actually not an automatic right of appeal.

The party that wishes to challenge ICANN's conduct in terms of whether or not ICANN's conduct violated the articles or Bylaws in its acceptance of a panel decision like that, has to allege that it is against ICANN's articles or Bylaws. And so there could be multiple places where someone could lose at an evaluation panel and actually not have a claim that ICANN violated its Bylaws in accepting that.

So I think we need to make sure we're not talking about an automatic right of appeal.

Then we have to think about what the out comes of IRP are. Because my reaction to what I was hearing is that, this is, it becomes a redoing of the evaluation process and that's not what the IRP is intended to do. The IRP is intended to look at whether or not ICANN violated its Bylaws in accepting a panel decision. And so, the potential out comes of that, of that IRP review of it are a finding that, yes, ICANN did, or no ICANN didn't. But even a yes, ICANN did doesn't require that the outcome of the panel, the evaluation panel be changed. It could require many different things to happen. It could require the panel evaluation to happen again, or ICANN to deal with rectification its Bylaws violation, but it doesn't automatically displays the loser or the winner with the loser.

So, it's important, I mean, I think it's important, in these situation, around panel decisions, of course, the person who won, or other people who might have also lost, want to do something

to preserve their position if future process needs to happen around the decision after the IRP panel decision. So of course they want to have a voice in it; but it's not clear how, how giving them a party status in an IRP might be necessary if they're not actually saying that they're, that they experienced a violation because of what happened.

>> MR. MCAULEY: Sam, thanks. It's David.

So, I think, I think you're persuading me on the element of party status, but my question was, if some of suggestions for those of us that are the IOT sort of came to your point of view on that, would you still maintain your position that the AMICUS should not have a decision on settlement.

And I'm with you all the way through, and I understand the standard is, you know, for a successful IRP is did, or would ICANN breach its Art calls or its Bylaws. And that's very, it's a very tough and narrow standard, but it's possible that the loser below could come up with an argument that looks convincing, that implementing the expert panel judgment would violate the articles or Bylaws, whereas another party may be able to blunt that argument.

In other words, it's not always black and white. There may be gray cases. And so, what I'm saying is, if we agree with you that there is not a right to party status, but amicus status, wouldn't the people who won bow that are acts as a.m. cuss have some say if settlement broke out. I don't know how settlement discussions are handled if the breach of Bylaws or articles, but that's what's on the table.

>> So, there are situations where someone might file an IR.

P and they file an IRP in good faith, that they believe that there is a violation of ICANN's Bylaws or articles of incorporation, but there could be a really big question as to whether or not that happened and the parties could find that there are other terms that they want to settle their dispute on, and it might not be necessary to reach the question of a relation of bylaws or articles in order to do that.

So, one of the things that I feel very confident in saying today is, let's give the example. If an expert evaluation panel outcome was something that was part of the challenge raised in an IRP, and ICANN's acceptance of that was part of challenge raised in the IRP. ICANN settlement of this dispute with the claimant, if it included ICANN just over turning and changes its position and accepting someone else has the win error modifying the outcome of that evaluation panel action, that would be a problem for ICANN. That in and of itself should be challengeable conduct to ICANN, because the outcomes of the IRP process aren't supposed to be about eventually, of course it's about changing and making sure ICANN is acting in accordance, but ICANN shouldn't be settling claims within an IRP in a way that just totally just changes what happened, only in favor of one party. That in and of itself isn't the outcome.

What would people do to settle their dispute? Maybe there are other issues and things that are, are at play. At no other place does ICANN, or do we know of, this isn't just about ICANN, that we have people who come in other than in a class action type will situation, where people comment on terms of a settlement. Settlements are often between and amongst people. Settlements, you know, who knows what the terms of the settlements are. They could be for very little. Who knows if the it would be anything of monetary. I have no idea what settlements we're even talking about, but those are not things that you would expect the IRP panel itself to

have a view on, if two parties agreed amongst themselves that they no longer wanted to pursue an IRP? I think it would be really difficult to say if two parties no longer want to purchase sigh an IRP or if a claimant doesn't want to pursue an IRP, and if they, if they come to a point that they think maybe they're not going to win after going through the process a bit; that neither the ICANN community which is funding these, because of the way that the funding has changed, or the claimant should be compelled to because there is someone who is standing on the outside telling them to keep doing it.

So, I think we need to look back some more at the settlement issue.

>> MR. MCAULEY: Hi. It's David again. Fair point. I think you make sense. I'm not fully convinced but let me ask you a question.

I think the points that you're raising go all the way through the first seven points that I listed in my list. I listed them first, second, third, et cetera. I think that they're all sort of wrapped up one through seven in this discussion.

Is there any chance, Sam, that you and Liz could, like within the next week, come out on list and say here is what we're suggest, what the language would look like. Doesn't need to be long, but I think it would be helpful; as a way to move this forward.

>> So, David, you know, I know that you're really trying to kick start some conversation on the IOT list. And I think from our perspective, we would like to hear some other voices, if other voices are willing to come in, to make sure that it's not just two positions. I think that there are, there are some gray area here, where maybe some other people who are listening have some ideas of how to maybe bridge the gap here.

You know, I don't, we could try coming up with language, but I think it wouldn't be a surprise if the language that we came out from today would be something that people might not be fully accepting of. And so, I think we would like to hear some other voices too, because I don't want this to just become a part of ICANN taking too hard a position and the IOT doesn't agree. I think we would like to hear some other voices of disagreement to see if other places that we could innovate and move this forward.

>> MR. MCAULEY: That's okay. I would love, I would love to encourage other people to weigh in. So what maybe your suggestion is a good one. I'll go out to list. This will be my action item, to say I've made a point in the red comments. You all have made the point in your email. We're at logger heads. We really need other voices to weigh in and make other suggestions.

If the they do or they don't, we'll have to move from there in the next call or two calls from now. So, I, that's fine. That makes sense to me, as a matter of fact.

So, let me ask you if, I think what we're discussing is the points one through seven. I still have points 8, 9 and 10. So, let me ask, Sam, if you and Liz had any concern with what we said in that respect.

8 was additional development as needed to ensure that amicus curiae exercises it's right to comment or interim relief does not delay emergency relief. I stated simply sedated the reference to the Bylaws in paragraph 3 of the original proposals intended to address. Just maybe we could beef it up.

Do you, what were your thoughts on that specific point?

>> So, we haven't gotten this far down the list in terms of discussing it together.

>> MR. MCAULEY: Okay.

>> We can take the action on this to come back on the 8th, 9th, 10th and give some reaction. Well be happy to do that.

>> MR. MCAULEY: If you would do that, that would be great.

So, let me ask if anyone has a comment now. Otherwise we're going to move to the next agenda item. So I don't see any hands or hear anybody. Let's move to second reading.

By the way, I think we can get through this fairly quickly, but at the end on AOB, if there is any other business, I want to talk to Bernie about schedule, so we do need a few minutes for AOB.

Anyway on second reading for retro activity. There was a mail that I sent on Monday, June the 5th to the list and it December jibed what we had agreed at first reading. This was with respect to retro activity issues, there were two issues. One dealt with retro activity of the substantive IRP standard and the other dealt with retro activity of the new updated supplementary rules of procedure.

And we decided or we said at first reading, one, with respect to new substantive IRP standard we said no retroactive (indiscernible) to IRP pending on 2016. That's the date the Bylaws became effective.

And 2, with respect to retroactive application of new updated supplementary procedures, once they're adopted, the procedures shall be amended would to allow a party to request the panel

to decide this is a matter of discretion. And we proposed adding a standard for the panel to review these requests, specifically that if all parties did not consent to that, then it would not allow the new rules to apply pending cases, if that action would work a substantial unfairness, or increase in costs to a party, or otherwise be unreasonable in the circumstances.

So, this is the second reading and it's open for people to comment, object, suggest additions, et cetera. And the floor is open for that. I don't see any hands or hear anything. So and I haven't seen anything on list. I think I'll make one last call on list and this will be done.

So that agenda item is now done. The second reading on retro activity.

There is now a slot for further discussion on ongoing monitoring, this is a comment that Avri is leading. I know Avri divided attention on this call, but I also know that she may make a brief comment. Avri do you have anything you would like, your hand is up so the floor is yours.

>> Thanks. This is Avri speaking. Yeah, my other call ended at the hour, but thank you.

So, yeah, what I wanted to say is that I have not really caught up in the writing on this. In fact I most definitely haven't caught up. Since our last conversation where we started extending towards one of the particular choices. So, with apologies, I'll get that done before the next meeting and then hopefully, you know, the proposed way forward will be there for people to comment on. And as soon as I get it done, I'll send it to the list.

>> MR. MCAULEY: Many thanks, Avri. And thank you for hanging in while there were two calls going on. I've done that and it's not the easiest thing to do. So thank you.

Moving on to the next agenda item, discussion first reading for challenges to consensus policy. This mail is one I sent out to the list on may the 9th. The comments roughly were from the noncommercial stakeholder group, I'm sorry that Robin had to drop off the call. And from Kathy Cleiman at the Fletcher Law Group. But it's basically that the comment was, fair is fair. If an SO has labored on a PDP and gotten it into policy, and someone comes and challenges the PDP, then the SO that was involved in developing it should have some say in the matter.

This is very similar to the joinder discussion that we just had. And I mentioned recommendations in the mail that I just cited saying that we should create a mandatory right of intervention for the supporting organization whose policy was under challenge. And I recommended that we treat it along the lines of the joinder issue so it will be subject somewhat to what we agree in joinder, but still open and under discussion as we just heard.

I recommend that the SO involved receive notice from the claimant of the full package; at the same time they serve it on ICANN. That such SO have a right to intervene in the IRP and that would be treated simply to what we agree on jurisdiction.

I suggested that we not go as far as some had encouraged us, providing notice to stakeholder groups, Working Group chairs and community members, and those who helped create the consensus policy and whose interests are represented and affected by it. I thought those were very broad terms, I mean those who helped create the consensus policy and whose interest are represented.

Seemed to me that a notice to the SO was adequate. And I did not see a need to limit what a panel could do with respect to a judgment, thinking their abilities as described in 4.30 were sufficient.

So, that was what's on the table. And, as I said in the agenda, this is really for first reading, and probably can't even get that far because it's subject to much of what we just discussed on joinder. But substantively it's very similar. So I would like to get out on the discussion now. If there are any objections to or different interests that want to be, people want to state about IRP's dealing with PDP, policy developed as a result of a PDP developed by an SO. So the floor is open for anybody that wants to comment on this issue.

So I see no hands and don't hear any. As I said, this really won't get the first reading because it's going to be wrapped up in the joinder kind of issues, but there is enough here to move this forward to the list and say we're making progress on this. It's going to be treated like joinder. If you have thoughts you better raise them fairly quickly. And that's probably what I will do with this.

So, having said that, we can wrap this up fairly early. We're through everything except AOB. And then on AOB I wanted to talk about schedule.

We're in the dog days of summer it's difficult to get people to teleconference meetings. I'm going to ask Bernie if he could tell us what our current quelled is what's available to us and if anybody has any thoughts, let's discuss them right now. And as Sam said earlier, I'm sort of very interested in moving things on the list.

So, Bernie, can you help us?

>> Yes David. We have staff, are holding Thursday 3 August 1300 UTC for this group. It hasn't been confirmed yet, but there is a hold there. So we and that is for another 90 minute call. So, that's an option.

If we don't want it on Thursday, we could actually have it on Wednesday, because I believe that slot will be opening up shortly.

And after that, we don't have anything reserved. August is not overly full. There are, if you want to have a meeting at 0500, there is a lot of room there. There is some room at 1500 sorry, 1900, and a bit more room at 1300, if we want to take other dates. September is very sparse. So, basically, most requests for dates in September would be acknowledged at this point.

Just a note. If we want to present something to the plenary before sending it to public comments, there is about nine weeks left between now and presenting something to the plenary, so that we can take it to public comment after the abu Dhabi meeting.

Then that also raises more of a practical question, David, we can talk about that. But there is a hard stop on funding at the end of June 2018. So if we want to get done, we sort of have to factor those elements in. Back to you, sir.

>> MR. MCAULEY: Thank you Bernie. Thanks very much. Here's what I would suggest to the group; is that we not meet on August 3rd or even the 2nd. I have some personal interest in this. I like to prepare for these calls and I'm going to be side type up, I'm very tied up between now and next week. And so I would have a very difficult time of preparing.

So I would suggest that we try and find a 1900 time in August. Bernie, can you tell us which 1900 slots are available in August, 1900 UTC.

>> I'll bring that up right now. If you'll give me a second.

August. All right. So, we have just said no to the 3rd. Let me remove that while we're at it.

>> >> MR. MCAULEY: That's my suggestion. I want to see what people say.

>> Okay, I'll leave that in, but as I said it's not confirmed. 1900 slots right now, we have Monday the 7th, Thursday the 10th, Friday the, yes, Thursday the 10th, Friday the 11th. The week of the 14th is rather open except for Tuesday the 15th. The week of the 21st, we only have Friday the 25th at 1900. And the week of the 28th of August, currently we have Monday and Thursday, 1900 slots. The Friday of that week is Friday September 1st, and I doubt you're going to want to book anything there because the Monday after that is Labor Day weekend, so Friday attendance typically on that Friday is absolutely awful.

>> MR. MCAULEY: So, Bernie, is Thursday the 17th, is that a Thursday, the 17th?

>> That is correct, sir, that is open at 1900.

>> MR. MCAULEY: So, my suggestion to this group given that August is the heart of the dog days of summer is that we have one meeting for 90 minutes on Thursday the 17th. Does anybody want to object to that? Or press on with August the 3rd?

Seeing no objections, let's do that, Bernie. We'll take the 17th. If we could try do have a 90 minute session at 1900.

>> Done.

>> MR. MCAULEY: And cancel the 3rd.

I will, let's work on list for the September date. It's just a little bit far out right now, but the one meeting, my hope is to move issues on the list and then maybe just decide another date for September on the list.

>> Very well, sir. Thank you.

>> MR. MCAULEY: If there is nothing else in AOB. Or let me ask, does anyone else have any other comments they want to make?

If not, it's been a long call, but we're short of 90 minutes, which is good. I want to thank everybody for being on. I especially want to thank Anna, Sam and Liz for all of your input. Bernie for helping us with the scheduling. And Brenda with all the stuff I sent her beforehand.

Avri, for you, thank you for hanging in on two calls. I want to thank everybody and that's the end. We'll stop the recording and I'll wish everyone the best and see you on the list.

EXHIBIT 209

**RECOMMENDATION
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECONSIDERATION REQUEST 18-8
28 AUGUST 2018**

The Requestor, Afilias Domains No. 3 Ltd. (Afilias), seeks reconsideration of ICANN organization's response to the Requestor's request for documents, pursuant to ICANN's Documentary Information Disclosure Policy (DIDP), relating to the .WEB contention set.¹ Specifically, the Requestor claims that, in declining to produce certain requested documents, ICANN org violated the DIDP and its Core Values and commitments established in the Bylaws concerning transparency and openness.²

I. Brief Summary.

The Requestor submitted an application for the .WEB generic top-level domain (gTLD), which was placed in a contention set with other .WEB applications. The Requestor was invited to, and did, participate in an auction to secure the right to operate the .WEB gTLD. The Requestor did not prevail at the auction; another applicant, Nu Dot Co, LLC (NDC), placed the prevailing bid.

On 23 February 2018, the Requestor submitted a DIDP Request to ICANN org requesting documents related to the .WEB contention set (First DIDP Request).³ ICANN org responded on 24 March 2018 (First DIDP Response).

On 23 April 2018, the Requestor submitted a reconsideration request challenging ICANN org's responses to Items 1, 4, 5, 6, and 9 in the First DIDP Response (Reconsideration Request 18-7). At the same time, the Requestor submitted a Reply to the First DIDP Response, in which

¹ Reconsideration Request 18-8, § 3, at Pgs. 1-5, <https://www.icann.org/en/system/files/files/reconsideration-18-8-afiliias-request-redacted-22jun18-en.pdf>.

² *Id.*, § 6, at Pgs. 6-11.

³ 23 February 2018 DIDP Request No. 20180223-1, available at <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-request-23feb18-en.pdf>.

it revised Items 1, 4, 5, 6(a-b), and 9(a). With respect to the amended requests, ICANN org determined that they would be treated as a new DIDP request (Second DIDP Request), with an effective submission date of 23 April 2018. On 23 May 2018, ICANN organization responded to the Second DIDP Request in accordance with the DIDP Process (Second DIDP Response).

On 5 June 2018, the Board Accountability Mechanisms Committee (BAMC) summarily dismissed Reconsideration Request 18-7.⁴

On 22 June 2018, the Requestor submitted Reconsideration Request 18-8 (Request 18-8). The Requestor claims that ICANN org's application of certain Defined Conditions for Nondisclosure (Nondisclosure Conditions) in the Second DIDP Response, which resulted in certain requested documents not being produced, violated ICANN org's commitment under the Bylaws to operate with transparency and openness.⁵

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN org transmitted Request 18-8 to the Ombudsman for consideration, and the Ombudsman recused himself.⁶

The BAMC has considered Request 18-8 and all relevant materials and recommends that the Board deny Request 18-8 because ICANN org adhered to established policies and procedures in its Second DIDP Response; and ICANN org did not violate its commitments established in the Bylaws concerning transparency and openness.

⁴ Determination of the BAMC on Reconsideration Request 18-7, 5 June 2018, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-7-afilias-bamc-determination-request-05jun18-en.pdf>.

⁵ Reconsideration Request 18-8, § 6.1, at Pg. 7.

⁶ ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(1)(iii); *see also* Ombudsman Action Regarding Reconsideration Request 18-8, Pg. 1, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-8-afilias-ombudsman-action-20jul18-en.pdf>.

II. Facts.

A. Background Facts.

1. The New gTLD Program and String Contention

In 2012, ICANN org opened the application window for the New gTLD Program and created the new gTLD microsite,⁷ which provides detailed information about the Program. ICANN org received seven applications for the .WEB string, including an application from the Requestor (Application), which were placed into a contention set together with one application for the .WEBS string.⁸ Module 4 of the Guidebook describes situations in which contention for applied-for new gTLDs occurs, and the methods available to applicants for resolving such contention sets, including through community priority evaluation or through voluntary agreement among the involved applicants.⁹

Should resolution not occur through these processes, the contention set will proceed to an ICANN facilitated auction of last resort.¹⁰ The auction procedures are set forth in the Guidebook, and were developed with extensive community consultation.¹¹ Additionally, the auction is governed by the Auction Rules that were developed with community consultation via the public comment processes for both direct and indirect contention set auctions.¹² As part of ICANN's commitment to transparency, ICANN org established the New gTLD Program Auctions webpage, which provides extensive detailed information about the auction process.¹³

⁷ <https://newgtlds.icann.org/en/>.

⁸ See Applicant Guidebook (Guidebook), § 1.1.2.10 (String Contention); see also <https://gtldresult.icann.org/applicationstatus/applicationdetails/292>; <https://gtldresult.icann.org/applicationstatus/contentionsetdiagram/233>.

⁹ Guidebook, § 4.3 (Auction: Mechanisms of Last Resort).

¹⁰ See *id.*

¹¹ See *id.* at § 4.3.1.

¹² See Auctions webpage, at News Archive section, WEB string, <https://newgtlds.icann.org/en/applicants/auctions>.

¹³ <https://newgtlds.icann.org/en/applicants/auctions>.

2. Resolution of .WEB/.WEBS Contention Set

Following the procedures set forth in the Guidebook, ICANN org first scheduled an auction of last resort for 27 July 2016 to resolve the .WEB/.WEBS contention set (Auction).¹⁴ On or about 22 June 2016, Ruby Glen LLC (Ruby Glen), one of the applicants for the .WEB string, asserted that changes had occurred in NU DOT CO LLC's (NDC's) application for .WEB. In particular, Ruby Glen claimed that changes had occurred to NDC's management and ownership, and that the Auction should be postponed pending further investigation.¹⁵

ICANN org investigated Ruby Glen's allegations. After completing its investigation, ICANN org sent a letter to all of the members of the .WEB/.WEBS contention set stating, among other things, that "in regards to potential changes of control of [NDC], we have investigated the matter, and to date we have found no basis to initiate the application change request process or postpone the [A]uction."¹⁶

Ruby Glen then invoked one of ICANN org's accountability mechanisms by submitting a reconsideration request on an urgent basis (Reconsideration Request 16-9), seeking postponement of the Auction and requesting a more detailed investigation.¹⁷ After carefully considering the information related to Reconsideration Request 16-9, ICANN's Board Governance Committee (BGC) denied Reconsideration Request 16-9 on 21 July 2016.¹⁸

The next day Ruby Glen filed a lawsuit against ICANN¹⁹ and, at the same time applied for a temporary restraining order (TRO Application) seeking to stop ICANN org from

¹⁴ See <https://newgtlds.icann.org/en/applicants/auctions/schedule-13mar18-en.pdf>.

¹⁵ See <https://www.icann.org/en/system/files/files/litigation-ruby-glen-icann-memorandum-point-authorities-support-motion-dismiss-first-amended-complaint-26oct16-en.pdf>.

¹⁶ <https://www.icann.org/en/system/files/correspondence/willett-to-web-webs-members13jul16-en.pdf>.

¹⁷ <https://www.icann.org/en/system/files/files/reconsideration-16-9-ruby-glen-radix-requestredacted-17jul16-en.pdf>.

¹⁸ <https://www.icann.org/en/system/files/files/reconsideration-16-9-ruby-glenradix-bgc-determination-21jul16-en.pdf>.

¹⁹ <https://www.icann.org/en/system/files/files/litigation-ruby-glen-complaint-22jul16-en.pdf>.

conducting the Auction on the scheduled date.²⁰ The Court denied the TRO Application²¹ and the Auction took place on 27 and 28 July 2016. NDC secured the winning bid.²²

On 28 November 2016, the Court dismissed Ruby Glen's complaint and entered judgment in ICANN organization's favor.²³ Ruby Glen appealed that decision, and the appeal is currently pending.²⁴

3. The Requestor's DIDP Requests

On 23 February 2018, the Requestor submitted the First DIDP Request to ICANN organization requesting the following ten categories of documents related to the .WEB contention set.²⁵

1. All documents received from Ruby Glen, NDC, and Verisign in response to ICANN's 16 September 2016 request for additional information;
2. Ruby Glen's Notice of Independent Review, filed on 22 July 2016;
3. All documents filed in relation to the Independent Review Process between ICANN and Ruby Glen, initiated on 22 July 2016;
4. All applications, and all documents submitted with the applications, for the rights to .WEB;
5. All documents discussing the importance of .WEB to bringing competition to the provision of registry services;
6. All documents concerning any investigation or discussion related to
 - a. The .WEB contention set,
 - b. NDC's application for the .WEB gTLD,
 - c. Verisign's agreement with NDC to assign the rights to .WEB to Verisign, and
 - d. Verisign's involvement in the .WEB contention set, including all communications with NDC or Verisign;
7. Documents sufficient to show the current status of NDC's request to assign .WEB to Verisign;
8. Documents sufficient to show the current status of the delegation of .WEB;

²⁰ <https://www.icann.org/en/system/files/files/litigation-ruby-glen-ex-parteapplication-tro-memo-points-authorities-22jul16-en.pdf>.

²¹ <https://www.icann.org/en/system/files/files/litigation-ruby-glen-courtorder-denying-plaintiff-ex-parte-application-tro-26jul16-en.pdf>.

²² <https://gtdresult.icann.org/application-result/applicationstatus/auctionresults>.

²³ <https://www.icann.org/en/system/files/files/litigation-ruby-glen-judgment-28nov16-en.pdf>.

²⁴ <https://www.icann.org/en/system/files/files/litigation-ruby-glen-notice-appeal-regarding-dismissal-20dec16-en.pdf>.

²⁵ 23 February 2018 DIDP Request No. 20180223-1, available at <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-request-23feb18-en.pdf>.

9. All documents relating to the Department of Justice, Antitrust Division's ("DOJ") investigation into Verisign becoming the registry operator for .WEB ("DOJ Investigation"), including:
 - a. Document productions to the DOJ,
 - b. Communications with the DOJ,
 - c. Submissions to DOJ, including letters, presentations, interrogatory responses, or other submissions,
 - d. Communications with Verisign or NDC relating to the investigation, and
 - e. Internal communications relating to the investigation, including all discussions by ICANN Staff and the ICANN Board; and
10. All joint defense or common interest agreements between ICANN and Verisign and/or NDC relating to the DOJ investigation.²⁶

On 24 March 2018, ICANN org provided the First DIDP Response. ICANN org responded individually to each of the ten items (and their subparts) by providing links to the publicly available documents responsive to the requests; objecting to certain requests as vague, overbroad, or unrelated to ICANN's operational activities; and/or confirming that documents responsive to the items do not exist. With respect to certain requested materials that were in ICANN org's possession and not already publicly available, ICANN org explained that those documents would not be produced because they were subject to certain Nondisclosure Conditions set forth in the DIDP. Notwithstanding the Nondisclosure Conditions, ICANN org considered whether the public interest in disclosure of the information subject to these conditions outweighed the harm that may be caused by such disclosure and determined that there were no current circumstances for which the public interest in disclosing the information outweighed the harm of disclosure.²⁷ With respect to requests that were vague, ICANN org indicated that the Requestor could amend its DIDP Request to clarify, if it so wished.²⁸

²⁶ *Id.*

²⁷ 24 March 2018 Response to DIDP Request No. 20180223-1, available at <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-response-24mar18-en.pdf>.

²⁸ *Id.*

On 23 April 2018, the Requestor submitted a reconsideration request challenging ICANN org’s responses to Items 1, 4, 5, 6, and 9 in the First DIDP Response (Reconsideration Request 18-7). At the same time, the Requestor submitted a letter replying to the First DIDP Response.²⁹ In its letter, the Requestor offered to enter into a confidentiality agreement with ICANN org under which the Requestor would limit disclosure of any material produced by ICANN org in response to Requests 1, 4, 6, and 9 and designate such material as “highly confidential” and accessible only to the Requestor’s outside counsel. The Requestor also revised Items 1, 4, 5, 6(a-b), and 9(a) of the First DIDP Request as follows:

Request	First DIDP Request	Second DIDP Request
1	All documents received from Ruby Glen, NDC, and Verisign in response to ICANN’s 16 September 2016 request for additional information.	Responses from Ruby Glen, NDC, and Verisign, indicating whether they consent to the public disclosure of their responses to ICANN’s 16 September 2016 request for information and prompt disclosure of the documents received from Ruby Glen, NDC, and Verisign related to the 16 September 2016 letter.
4	All applications, and all documents submitted with the applications, for the rights to .WEB.	NDC’s responses to Items 12 and 45 through 50 in its .WEB application, as well as any amendments, changes, revisions, supplements, or correspondence concerning those Items.
5	All documents discussing the importance of .WEB to bringing competition to the provision of registry services.	Any documents, analyses, or studies that contain information regarding potential competition, substitution, and interchangeability between or among .WEB and .COM, .NET, or other gTLDs.
6(a-b)	All documents concerning any investigation or discussion related to a. The .WEB contention set,	Documents related to the .WEB Investigation, including: 1. All documents reflecting NDC’s board structure and any changes thereto since NDC submitted its .WEB application on 13 June 2012,

²⁹ 23 April 2018 Reply to DIDP Request No. 20180223-1, available at <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-23apr18-en.pdf>.

Request	First DIDP Request	Second DIDP Request
	b. NDC’s application for the .WEB gTLD.	<ol style="list-style-type: none"> 2. All documents concerning any investigation or discussion related to NDC’s board structure and any changes thereto since NDC submitted its .WEB application on 13 June 2012, 3. Documents sufficient to show the date on which ICANN first learned that Verisign was going to or had in fact funded NDC’s bids for the .WEB gTLD at the 28-28 July 2016 (<i>sic</i>) auction, and 4. Documents sufficient to show the date on which ICANN first learned that NDC did not intend to operate the .WEB registry itself, but rather intended to assign the rights it acquired related to .WEB to a third party.
9(a)	All documents relating to the Department of Justice, Antitrust Division’s (“DOJ”) investigation into Verisign becoming the registry operator for .WEB (“DOJ Investigation”), including: (a) Document productions to the DOJ.	All documents relating to the Department of Justice, Antitrust Division’s (“DOJ”) investigation into Verisign becoming the registry operator for .WEB (“DOJ Investigation”), including: (a) Document productions to the DOJ, excluding those documents that ICANN has reasonably identified as already being in Afilias’ possession.

The Requestor acknowledged in Request 18-7 that it had submitted the Second DIDP Request and that Request 18-7 was premature. Specifically, the Requestor stated:

Requestor acknowledges that, to the extent it can reach an agreement with ICANN pursuant to the DIDP Reply, this request for reconsideration may become moot in full or in part. Requestor nonetheless submits this request to preserve its rights to contest the [First] DIDP Response should ICANN and Requestor fail to reach an agreement based on the [Second] DIDP [Request]. Requestor believes that the Board Accountability Mechanisms Committee need not and should not decide this Reconsideration Request until after the ICANN Board has considered and responded to the proposed compromise set forth in the [Second] DIDP [Request]. Requestor is prepared to discuss an appropriate “tolling” agreement that would allow Requestor and ICANN to attempt to

reach an agreement concerning the First DIDP Request and the [Second] DIDP [Request].³⁰

On 27 April 2018, ICANN org responded to the Requestor's letter of 23 April 2018.³¹

Regarding the Requestor's offer to enter into a confidentiality agreement, ICANN org stated:

The concept of a confidentiality agreement for the disclosure of documents through the DIDP runs afoul of the DIDP itself, which is to make public documents concerning ICANN organization's operations unless there is a compelling reason for confidentiality. (See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.) Moreover, your proposal is asking ICANN organization to treat Afilias differently than other requestors, and to act in a manner that is contrary to what is set forth in the DIDP Process, which as you know would be in contravention of ICANN's Bylaws.³²

With respect to the amended requests, ICANN org determined that they would be treated as a new DIDP Request, with an effective submission date of 23 April 2018. ICANN org confirmed that it would respond to the Second DIDP Request in accordance with the DIDP Process.³³

On 23 May 2018, ICANN org provided the Second DIDP Response.³⁴ With respect to those requested materials that were in ICANN org's possession and not already publicly available, ICANN org explained that those documents would not be produced because they were subject to certain Nondisclosure Conditions set forth in the DIDP. Notwithstanding the Nondisclosure Conditions, ICANN org also "considered whether the public interest in disclosure of the information subject to these conditions at this point in time outweighs the harm that may be caused by such disclosure . . . [and] determined that there are no current circumstances for

³⁰ Reconsideration Request 18-7, § 3, at Pg. 5.

³¹ See Supplemental Response to DIDP Request No. 20180223-1, 27 Apr. 2018, available at <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-supp-response-redacted-27apr18-en.pdf>.

³² *Id.*

³³ *Id.*

³⁴ See DIDP Response to Request No. 20180423-1, 23 May 2018, available at <https://www.icann.org/en/system/files/files/didp-20180423-1-ali-response-23may18-en.pdf>.

which the public interest in disclosing the information outweighs the harm that may be caused by the requested disclosure.”³⁵

On 5 June 2018, the BAMC summarily dismissed Request 18-7 because Afilias had not sufficiently stated a Reconsideration Request.³⁶

On 22 June 2018, the Requestor submitted Request 18-8. The Requestor claims that ICANN org’s application of certain Nondisclosure Conditions in the Second DIDP Response, which resulted in certain requested documents not being produced, violated ICANN org’s commitment to “‘operate in a manner consistent with [its] Bylaws,’ which require that it operate with transparency and openness.”³⁷

Pursuant to Article 4, Section 4.2(l) of the Bylaws, ICANN org transmitted Request 18-8 to the Ombudsman for consideration, and the Ombudsman recused himself.³⁸

The BAMC has considered Request 18-8 and all relevant materials and recommends that the Board deny Reconsideration Request 18-8 because ICANN org adhered to established policies and procedures in the Second DIDP Response.

B. Relief Requested.

The Requestor asks the BAMC to “disclose the documents requested in the DIDP Request, as amended by the [Second] DIDP [Request].”³⁹

III. Issues Presented.

The issues are as follows:

³⁵ *Id.* at 14.

³⁶ Determination of the BAMC on Reconsideration Request 18-7, 5 June 2018, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-7-afili-as-bamc-determination-request-05jun18-en.pdf>.

³⁷ Reconsideration Request 18-8, § 6.1, at Pg. 7.

³⁸ ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(l)(iii); *see also* Ombudsman Action Regarding Reconsideration Request 18-8, Pg. 1, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-8-afili-as-ombudsman-action-20jul18-en.pdf>.

³⁹ Reconsideration Request 18-8, § 9, at Pg. 16.

1. Whether ICANN org complied with established ICANN policies in responding to the Second DIDP Request; and
2. Whether ICANN org complied with its Core Values and commitments established in the Bylaws concerning transparency and openness.⁴⁰

IV. The Relevant Standards for Reconsideration Requests and DIDP Requests.

A. Reconsideration Requests.

Article 4, Section 4.2(a) and (c) of ICANN’s Bylaws provide in relevant part that any entity may submit a request “for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or staff’s reliance on false or inaccurate relevant information.”⁴¹

Pursuant to Article 4, Section 4.2(k) of the Bylaws, if the BAMC determines that the Reconsideration Request is sufficiently stated, the Reconsideration Request is sent to the Ombudsman for review and consideration.⁴² Where the Ombudsman has recused himself from the consideration of a Reconsideration Request, the BAMC shall review the request without involvement by the Ombudsman, and provide a recommendation to the Board.⁴³ Denial of a request for reconsideration of ICANN org action or inaction is appropriate if the BAMC

⁴⁰ Reconsideration Request 18-8.

⁴¹ ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(a), (c).

⁴² ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(k), (l).

⁴³ ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(l)(iii).

recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.⁴⁴

On 13 July 2018, the BAMC determined that Request 18-8 is sufficiently stated and sent Reconsideration Request 18-8 to the Ombudsman for review and consideration.⁴⁵ The Ombudsman thereafter recused himself from this matter.⁴⁶ Accordingly, the BAMC has reviewed Request 18-8 and all relevant materials, and issues this Recommendation.

B. The DIDP.

ICANN org considers the principle of transparency to be a fundamental safeguard in assuring that its bottom-up, multistakeholder operating model remains effective and that outcomes of its decision-making are in the public interest and are derived in a manner accountable to all stakeholders. A principal element of ICANN org's approach to transparency and information disclosure is the commitment to make publicly available a comprehensive set of materials concerning ICANN org's operational activities. In that regard, ICANN org publishes many categories of documents on its website as a matter of course.⁴⁷ In addition, the DIDP is intended to ensure that documentary information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, that is not already publicly available is made available to the public unless there is a compelling reason for confidentiality.⁴⁸

The DIDP was developed through an open and transparent process involving the broader community. It was the result of an independent review of standards of accountability and

⁴⁴ ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(e)(vi), (q), (r).

⁴⁵ Ombudsman Action Regarding Reconsideration Request 18-8, Pg. 1, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-8-afilas-ombudsman-action-20jul18-en.pdf>

⁴⁶ *Id.* at Pg. 1.

⁴⁷ See ICANN Documentary Information Disclosure Policy (DIDP), <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

⁴⁸ *Id.*

transparency within ICANN org, which included extensive public comment and community input.⁴⁹

Neither the DIDP nor ICANN org’s commitments and Core Values supporting transparency and accountability obligate ICANN org to make public every document in ICANN org’s possession. The DIDP is limited to requests for *documentary information* already in existence within ICANN org that is not publicly available. Requests for information are not appropriate DIDP requests. Moreover, ICANN org is not required to create or compile summaries of any documented information, and shall not be required to respond to requests seeking information that is already publicly available.⁵⁰

In responding to a request for documents submitted pursuant to the DIDP, ICANN org adheres to the “Process For Responding To ICANN’s Documentary Information Disclosure Policy (DIDP) Requests” (DIDP Response Process).⁵¹ The DIDP Response Process provides that following the collection of potentially responsive documents, “[a] review is conducted as to whether any of the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions] identified [on ICANN org’s website].”⁵²

The Nondisclosure Conditions identify circumstances for which ICANN org’s other commitments or Core Values may compete or conflict with the transparency commitment. These Nondisclosure Conditions represent areas, vetted through public consultation, that are presumed not to be appropriate for public disclosure (and that the *Amazon EU S.A.R.L.*

⁴⁹ See <https://www.icann.org/news/announcement-4-2007-03-29-en>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>; <https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-17oct07-en.pdf>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.

⁵⁰ <https://www.icann.org/en/system/files/files/acct-trans-frameworks-principles-17oct07-en.pdf>, at pg. 17.

⁵¹ See DIDP Response Process, <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

⁵² *Id.*; see also “Defined Conditions for Nondisclosure,” available at <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

Independent Review Process Panel confirmed are consistent with ICANN's Articles of Incorporation and Bylaws). They include, among others:

- i. Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents (Internal Deliberative Process);
- ii. Information exchanged, prepared for, or derived from the deliberative and decision-making process between ICANN, its constituents, and/or other entities with which ICANN cooperates that, if disclosed, would or would be likely to compromise the integrity of the deliberative and decision-making process between and among ICANN, its constituents, and/or other entities with which ICANN cooperates by inhibiting the candid exchange of ideas and communications (Constituent Deliberative Process);
- iii. Personnel, medical, contractual, remuneration, and similar records relating to an individual's personal information, when the disclosure of such information would or likely would constitute an invasion of personal privacy, as well as proceedings of internal appeal mechanisms and investigations (Personal Privacy);
- iv. Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement (Nondisclosure Agreements);
- v. Confidential business information and/or internal policies and procedures (Confidential Business Information);
- vi. Drafts of all correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication (Drafts); and
- vii. Information subject to the attorney-client, attorney work product privilege, or any other applicable privilege, or disclosure of which might prejudice any internal, governmental, or legal investigation (Privilege/Investigation).⁵³

Notwithstanding the above, documentary information that falls within any of the Nondisclosure Conditions may still be made public if ICANN org determines, under the

⁵³ DIDP.

particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.⁵⁴

V. Analysis and Rationale.

A. ICANN Org Adhered to Established Policies and Procedures in Responding to the Second DIDP Request.

1. The Response to the Second DIDP Request Complies with Applicable Policies and Procedures.

The Requestor's Second DIDP Request sought the disclosure of documents relating to the .WEB/.WEBS contention set. As an initial matter, the Requestor does not challenge the *applicability* of the Nondisclosure Conditions asserted in ICANN org's Second DIDP Response. Instead, the Requestor claims that ICANN org should have determined that the public interest outweighs the reasons for nondisclosure set forth in the Nondisclosure Conditions.⁵⁵ This represents a substantive disagreement with ICANN org's discretionary determination, and not a challenge to the process by which ICANN org reached that conclusion. On that basis alone, reconsideration is not warranted. However, the BAMC has reviewed the Second DIDP Response and, for the reasons discussed below, concludes that the Second DIDP Response complied with applicable policies and procedures, and that reconsideration is not warranted.

Items No. 1, 4, 5, 6(a-b), and 9(a) in the Second DIDP Request sought the disclosure of documents and information relating to the .WEB contention set:

- “Responses from Ruby Glen, NDC, and Verisign, indicating whether they consent to the public disclosure of their responses to ICANN’s 16 September 2016 request for information and prompt disclosure of the documents received from Ruby Glen, NDC, and Verisign related to the 16 September 2016 letter” (Item No. 1);

⁵⁴ *Id.*

⁵⁵ Reconsideration Request 18-8, § 6, at Pg. 9-11. While the Requestor summarily concludes that the Nondisclosure Conditions were “unreasonably and illegitimately appl[ied]” (*see* Reconsideration Request 18-8, § 6, Pg. 8), the Requestor does not explain how that is so. Without more, the Requestor’s unsupported assertions do not support reconsideration.

- “NDC’s responses to Items 12 and 45 through 50 in its .WEB application, as well as any amendments, changes, revisions, supplements, or correspondence concerning those Items” (Item No. 4);
- “Any documents, analyses, or studies that contain information regarding potential competition, substitution, and interchangeability between or among .WEB and .COM, .NET, or other gTLDs” (Item No. 5);
- “Documents related to the .WEB Investigation, including: (1) All documents reflecting NDC’s board structure and any changes thereto since NDC submitted its .WEB application on 13 June 2012, (2) all documents concerning any investigation or discussion related to NDC’s board structure and any changes thereto since NDC submitted its .WEB application on 13 June 2012, (3) Documents sufficient to show the date on which ICANN first learned that Verisign was going to or had in fact funded NDC’s bids for the .WEB gTLD at the 28-28 July 2016 (*sic*) auction, and (4) Documents sufficient to show the date on which ICANN first learned that NDC did not intend to operate the .WEB registry itself, but rather intended to assign the rights it acquired related to .WEB to a third party” (Item No. 6(a-b)); and
- “All documents relating to the Department of Justice, Antitrust Division’s (DOJ) investigation into Verisign becoming the registry operator for .WEB (DOJ Investigation), including: (a) Document productions to the DOJ, excluding those documents that ICANN has reasonably identified as already being in Afilias’ possession” (Item No. 9(a)).⁵⁶

Consistent with the DIDP Response Process, ICANN org responded individually to each of the five items (and their subparts) by providing links to the publicly available documents responsive to the requests. ICANN org also identified documents responsive to these Items and determined that they were subject to the following Nondisclosure Conditions and thus not appropriate for disclosure:

- Internal Deliberative Process;
- Constituent Deliberative Process;
- Personal Privacy;
- Nondisclosure Agreements;

⁵⁶ 23 April 2018 Reply to DIDP Request No. 20180223-1, *available at* <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-23apr18-en.pdf>.

- Confidential Business Information;
- Trade secrets;
- Drafts; and
- Privilege/Investigation.⁵⁷

Notwithstanding the applicable Nondisclosure Conditions, ICANN org considered whether the public interest in disclosing the information outweighed the harm that may be caused by the disclosure and determined that there are no circumstances for which the public interest in disclosure outweighed that potential harm as discussed further below.⁵⁸ Accordingly, the BAMC finds that ICANN org complied with the DIDP Response Process when it responded to the Second DIDP Request.

The Requestor does not challenge the applicability of the Nondisclosure Conditions identified by ICANN org. Instead, the Requestor claims that ICANN org should have determined that the public interest outweighs the reasons for nondisclosure set forth in the Nondisclosure Conditions.⁵⁹ For the reasons set forth below, the Requestor's claims do not support reconsideration.

2. ICANN Org Adhered to Established Policy and Procedure in Finding That the Harm in Disclosing the Requested Documents That Are Subject to Nondisclosure Conditions Outweighs the Public's Interest in Disclosing the Information.

As detailed above, the DIDP identifies a set of conditions for the nondisclosure of information.⁶⁰ Information subject to these Nondisclosure Conditions is not appropriate for disclosure unless ICANN org determines that, under the particular circumstances, the public

⁵⁷ See DIDP Response to Request No. 20180423-1, 23 May 2018, at Pgs. 5-14, available at <https://www.icann.org/en/system/files/files/didp-20180423-1-ali-response-23may18-en.pdf>.

⁵⁸ *Id.* at Pg. 14.

⁵⁹ Reconsideration Request 18-8, § 6, at Pg. 9-11.

⁶⁰ DIDP.

interest in disclosing the information outweighs the harm that may be caused by such disclosure. ICANN org must independently undertake the analysis of each Nondisclosure Condition as it applies to the documentation at issue, and make the final determination as to whether any apply.⁶¹ In conformance with the DIDP Response Process, ICANN org undertook such an analysis with respect to each Item, and articulated its conclusions in Second DIDP Response.⁶²

As explained above, the Requestor does not challenge the applicability of the Nondisclosure Conditions to the documentary information requested in the Second DIDP Request. Instead, the Requestor claims that ICANN org should have concluded that the public interest in disclosing these documents outweighed the harm that may be caused by such disclosure.⁶³ According to the Requestor, “there is a significant public interest in providing for a competitive market in the DNS that outweighs any harm in disclosure, especially given the proposed confidentiality agreement in the [Second DIDP Request].”⁶⁴ The Requestor’s claims do not support reconsideration.

As an initial matter, as ICANN org previously explained to the Requestor, and the BAMC agrees,⁶⁵ the concept of a confidentiality agreement for the disclosure of documents through the DIDP runs afoul of the DIDP itself, which is to make *public* documents concerning ICANN org’s operations unless there is a compelling reason for confidentiality.⁶⁶ Moreover, the Requestor’s proposal asks ICANN org to treat the Requestor differently than other requestors,

⁶¹ *Id.*

⁶² See DIDP Response to Request No. 20180423-1, at Pg. 14, 23 May 2018, *available at* <https://www.icann.org/en/system/files/files/didp-20180423-1-ali-response-23may18-en.pdf>.

⁶³ Reconsideration Request 18-8, § 6, at Pgs. 8-11.

⁶⁴ Reconsideration Request 18-8, § 6, Pg. 9.

⁶⁵ Supplemental Response to DIDP Request No. 20180223-1, 27 Apr. 2018, *available at* <https://www.icann.org/en/system/files/files/didp-20180223-1-ali-supp-response-redacted-27apr18-en.pdf>.

⁶⁶ See DIDP.

and to act in a manner that is contrary to what is set forth in the DIDP Response Process, which could be in contravention of ICANN's Bylaws. Further, by proposing that the documents be made available only to the Requestor's outside counsel via a "confidentiality agreement," it appears that the Requestor concedes that the requested information is *not* appropriate for public disclosure. In short, the Requestor's proposal to enter into a confidentiality agreement to protect the information contained in the requested materials does not support reconsideration.

The Requestor otherwise lodges various unsupported allegations regarding Verisign's intentions and conduct in connection with the .WEB gTLD. The Requestor alleges that Verisign engaged in a "secretive scheme to obtain the .WEB license for itself [which] was not only unfair, deceptive, and lacking in transparency but was also carried out specifically to stifle ICANN's efforts to promote competition."⁶⁷ As a result, the Requestor claims, "allowing Verisign to obtain the .WEB license based on its subterfuge and collusion with NDC is inconsistent with the promotion of competition, contrary to ICANN's mandate, and constitutes a serious and illegitimate distortion of the fundamental principles of fair play and transparency that underlie ICANN's Bylaws."⁶⁸ The Requestor, however, does not provide any evidence or other support for its assertions; instead, all the Requestor offers is its own personal view. Nor does the Requestor explain how its unsubstantiated claims concerning Verisign's alleged conduct demonstrate that ICANN org violated a policy or procedure when it responded to the Requestor's Second DIDP Request. Without more, reconsideration is not warranted.

The BAMC further notes that, on 1 February 2017, the Antitrust Division of the United States Department of Justice (DOJ), issued a Civil Investigative Demand (CID) to ICANN org in connection with DOJ's investigation of Verisign's proposed acquisition of NDC's contractual

⁶⁷ Reconsideration Request 18-8, § 6, Pg. 10.

⁶⁸ *Id.* at Pgs. 10-11.

rights to operate .WEB. ICANN org provided DOJ with information responsive to the CID. ICANN org understands that Verisign also received a CID from DOJ requesting certain material related to Verisign's involvement with .WEB.⁶⁹ To ICANN org's knowledge, the DOJ closed its investigation in early 2018 without further action.

Ultimately, the BAMC does not agree that ICANN org violated the DIDP Response Process when it determined that the public interest does not outweigh the potential harm in the disclosure of the confidential and privileged documents. ICANN org takes seriously its commitment "where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment in the DNS market."⁷⁰ However, ICANN's Bylaws also recognize that "[s]ituations may arise in which perfect fidelity to all Core Values simultaneously is not possible. Accordingly, in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN's Mission."⁷¹

Two competing Core Values are relevant here. First, the BAMC concludes that ICANN org followed the DIDP Response Process in determining that the requested materials that are subject to Nondisclosure Conditions include sensitive information that, if disclosed, could result in serious harm to ICANN org as well as its constituents and contracting entities. The BAMC further finds that ICANN org followed the DIDP Response Process by concluding that disclosure could, among other things, undermine ICANN org's deliberative processes, materially prejudice the interests of ICANN org and other third parties, violate the attorney-client privilege, and

⁶⁹ See Verisign, Inc. Form 10-K for Year 2017, at Pg. 23, available at: <https://investor.verisign.com/static-files/0563ca8c-4bd1-48c6-8b37-fb338664dfa4>.

⁷⁰ ICANN Bylaws, 18 June 2018, Art. 1, § 1.2(b)(iii).

⁷¹ ICANN Bylaws, 18 June 2018, Art. I, § 1.2(c).

invade personal privacy; and that as a result, disclosure would run afoul to ICANN org’s Core Value of “[o]perating with efficiency and excellence.”⁷² Second, the BAMC concludes that ICANN org did not violate the DIDP Response Process in determining that because many of the materials requested reflect confidential business information of third parties, disclosure would subvert ICANN’s commitment to “striv[e] to achieve a reasonable balance between the interests of different stakeholders....”⁷³ Indeed, disclosure of third party information that was shared with ICANN org in confidence would not reflect a reasonable balance at all, but rather would reflect a one-sided decision to the detriment of the third party whose sensitive information was disclosed. Further, if ICANN org disclosed third party confidential information, community stakeholders would thereafter be hesitant to participate in the bottom-up, multistakeholder model that ICANN org has committed to support.

The DIDP, which was developed through the multistakeholder process with significant community input, specifically permits ICANN org to balance applicable competing Core Values and commitments in any given situation. Here, ICANN org’s commitment to promote competition in the DNS is in tension with its commitment to operate with efficiency and excellence, as well as ICANN org’s commitment to reasonably balance the interests of different stakeholders, and to support the multistakeholder process. Pursuant to the DIDP, ICANN org may exercise its discretion to withhold materials under these circumstances without violating its commitment to promoting competition.

⁷² ICANN Bylaws, 18 June 2018, Art. I, § 1.2(b)(v).

⁷³ ICANN Bylaws, 18 June 2018, Art. I, § 1.2(b)(vii).

B. ICANN Org Adhered to Its Commitments and Core Values in Responding to the Second DIDP Request.

The Requestor asserts that ICANN org’s determination that the requested documents are not appropriate for disclosure was inconsistent with its commitments to “operate through open and transparent processes and to the maximum extent feasible in an open and transparent manner.”⁷⁴ The Requestor believes that, by not disclosing the requested materials, ICANN org “has failed to operate in a manner consistent with its Bylaws, which require that it operate with transparency and openness.”⁷⁵ The Requestor’s claims do not support reconsideration.

The DIDP was developed as the result of an independent review of standards of accountability and transparency within ICANN org, which included extensive public comment and community input.⁷⁶ Following completion of this review, ICANN org sought public comment on the resulting recommendations, and summarized and posted the community feedback.⁷⁷ Based on the community’s feedback, ICANN org proposed changes to its frameworks and principles to “outline, define and expand upon the organisation’s accountability and transparency”⁷⁸ and sought additional community input on the proposed changes before implementing them.⁷⁹

Neither the DIDP nor ICANN’s commitments and Core Values supporting transparency and accountability obligates ICANN org to make public every document in its possession. As noted above, the DIDP sets forth Nondisclosure Conditions for which other commitments or Core Values may compete or conflict with the transparency commitment. These Nondisclosure

⁷⁴ Reconsideration Request 18-8, § 6, Pg. 7 (internal citations to ICANN’s Bylaws omitted).

⁷⁵ *Id.*

⁷⁶ See <https://www.icann.org/news/announcement-4-2007-03-29-en>; <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.

⁷⁷ See <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.

⁷⁸ <https://www.icann.org/en/system/files/files/accttrans-frameworks-principles-17oct07-en.pdf>.

⁷⁹ <https://www.icann.org/resources/pages/draft-mop-2007-2007-10-17-en>.

Conditions represent areas, vetted through public comment, that the community has agreed are presumed not to be appropriate for public disclosure. The public interest balancing test in turn allows ICANN org to determine whether or not, under the specific circumstances, its commitment to transparency outweighs its other commitments and Core Values. Accordingly, without contravening its commitment to transparency, ICANN org may appropriately exercise its discretion, pursuant to the DIDP, to determine that certain documents are not appropriate for disclosure.

As the *Amazon EU S.A.R.L.* Independent Review Process Panel noted in June 2017:

[N]otwithstanding ICANN’s transparency commitment, both ICANN’s By-Laws and its Publication Practices recognize that there are situations where non-public information, e.g., internal staff communications relevant to the deliberative processes of ICANN . . . may contain information that is appropriately protected against disclosure.⁸⁰

As noted above, ICANN org’s Bylaws address this need to balance competing interests such as transparency and confidentiality, noting that “in any situation where one Core Value must be balanced with another, potentially competing Core Value, the result of the balancing test must serve a policy developed through the bottom-up multistakeholder process or otherwise best serve ICANN’s Mission.”⁸¹

Here, ICANN org set forth the basis for its determination in each instance of nondisclosure, which are pre-defined in the DIDP; the Nondisclosure Conditions that ICANN identified, by definition, set forth compelling reasons for not disclosing the materials.⁸² It is entirely within ICANN org’s discretion to make this finding, and ICANN org may conclude as

⁸⁰ *Amazon EU S.A.R.L. v. ICANN*, ICDR Case No. 01-16-000-7056, Procedural Order (7 June 2017), at Pg. 3, <https://www.icann.org/en/system/files/files/irp-amazon-procedural-order-3-07jun17-en.pdf>.

⁸¹ ICANN Bylaws, 18 June 2018, Art. 1, § 1.2(c).

⁸² See DIDP Response to Request No. 20180423-1, at Pgs. 9-21, 23 May 2018, available at <https://www.icann.org/en/system/files/files/didp-20180423-1-ali-response-23may18-en.pdf>.

much without contravening its commitment to transparency. Accordingly, the Requestor's generalized invocations of ICANN org's commitments to transparency and openness do not support reconsideration here.

VI. Recommendation.

The BAMC has considered the merits of Reconsideration Request 18-8, and, based on the foregoing, concludes that ICANN org did not violate ICANN's commitments, Core Values or established ICANN policy(ies) in the Second DIDP Response. Accordingly, the BAMC recommends that the Board deny Reconsideration Request 18-8.

EXHIBIT 210

MEMORANDUM OF UNDERSTANDING BETWEEN
THE U.S. DEPARTMENT OF COMMERCE
AND
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

I. PARTIES

This document constitutes an agreement between the U.S. Department of Commerce (DOC or USG) and the Internet Corporation for Assigned Names and Numbers (ICANN), a not-for-profit corporation.

II. PURPOSE

A. Background

On July 1, 1997, as part of the Administration's Framework for Global Electronic Commerce, the President directed the Secretary of Commerce to privatize the management of the domain name system (DNS) in a manner that increases competition and facilitates international participation in its management.

On June 5, 1998, the DOC published its Statement of Policy, *Management of Internet Names and Addresses*, 63 Fed. Reg. 31741(1998) (Statement of Policy). The Statement of Policy addressed the privatization of the technical management of the DNS in a manner that allows for the development of robust competition in the management of Internet names and addresses. In the Statement of Policy, the DOC stated its intent to enter an agreement with a not-for-profit entity to establish a process to transition current U.S. Government management of the DNS to such an entity based on the principles of stability, competition, bottom-up coordination, and representation.

B. Purpose

Before making a transition to private sector DNS management, the DOC requires assurances that the private sector has the capability and resources to assume the important responsibilities related to the technical management of the DNS. To secure these assurances, the Parties will collaborate on this DNS Project (DNS Project). In the DNS Project, the Parties will jointly design, develop, and test the mechanisms, methods, and procedures that should be in place and the steps necessary to transition management responsibility for DNS functions now performed by, or on behalf of, the U.S. Government to a private-sector not-for-profit entity. Once testing successfully completed, the Parties contemplated that management of the DNS will be transitioned to the mechanisms, methods, and procedures designed and developed in the DNS Project.

In the DNS Project, the parties will jointly design, develop, and test the mechanisms, methods, and procedures to carry out the following DNS management functions:

- a. Establishment of policy for and direction of the allocation of IP number blocks;
- b. Oversight of the operation of the authoritative root server system;
- c. Oversight of the policy for determining the circumstances under which new top-level domains would be added to the root system;
- d. Coordination of the assignment of other Internet technical parameters as needed to maintain universal connectivity on the Internet; and
- e. Other activities necessary to coordinate the specified DNS management functions, as agreed by the Parties.

The Parties will jointly design, develop, and test the mechanisms, methods, and procedures that will achieve the transition without disrupting the functional operation of the Internet. The Parties will also prepare a joint DNS Project Report that documents the conclusions of the design, development, and testing.

DOC has determined that this project can be done most effectively with the participation of ICANN. ICANN has a stated purpose to perform the described coordinating functions for Internet names and addresses and is the organization that best demonstrated that it can accommodate the broad and diverse interest groups that make up the Internet community.

C. The Principles

The Parties will abide by the following principles:

1. Stability

This Agreement promotes the stability of the Internet and allows the Parties to plan for a deliberate move from the existing structure to a private-sector structure without disruption to the functioning of the DNS. The Agreement calls for the design, development, and testing of a new management system that will not harm current functional operations.

2. Competition

This Agreement promotes the management of the DNS in a manner that will permit market mechanisms to support competition and consumer choice in the technical management of the DNS. This competition will lower costs, promote innovation, and enhance user choice and satisfaction.

3. Private, Bottom-Up Coordination

This Agreement is intended to result in the design, development, and testing of a private coordinating process that is flexible and able to move rapidly enough to meet the changing needs of the Internet and of Internet users. This Agreement is intended to foster the development of a private sector management system that, as far as possible, reflects a system of bottom-up management.

4. Representation.

This Agreement promotes the technical management of the DNS in a manner that reflects the global and functional diversity of Internet users and their needs. This Agreement is intended to promote the design, development, and testing of mechanisms to solicit public input, both domestic and international, into a private-sector decision making process. These mechanisms will promote the flexibility needed to adapt to changes in the composition of the Internet user community and their needs.

III. AUTHORITIES

A. DOC has authority to participate in the DNS Project with ICANN under the following authorities:

(1) 15 U.S.C. § 1525, the DOC's Joint Project Authority, which provides that the DOC may enter into joint projects with nonprofit, research, or public organizations on matters of mutual interest, the cost of which is equitably apportioned;

(2) 15 U.S.C. § 1512, the DOC's authority to foster, promote, and develop foreign and domestic commerce;

(3) 47 U.S.C. § 902, which specifies authority over the National Telecommunications and Information Administration (NTIA) to coordinate the telecommunications activities of the Executive Branch and assist in the formulation of policies and standards for those activities, but not limited to, considerations of interoperability, privacy, security, spectrum use, and emergency readiness;

(4) President's Memorandum on Electronic Commerce, 33 Weekly Comp. President's Documents 1006 (July 1, 1997), which directs the Secretary of Commerce to transition DNS management to the private sector; and

(5) Statement of Policy, *Management of Internet Names and Addresses*, (63 Fed. Reg. 31741(1998) (Attachment A), which describes the manner in which the Department of Commerce will transition DNS management to the private sector.

B. ICANN has the authority to participate in the DNS Project, as evidenced in its Articles of Incorporation (Attachment B) and Bylaws (Attachment C). Specifically, ICANN has stated that its business purposes are:

(i) coordinate the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet;

(ii) perform and oversee functions related to the coordination of the Internet Protocol (IP) address space;

(iii) perform and oversee functions related to the coordination of the Internet domain name system, including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system;

(iv) oversee operation of the authoritative Internet DNS root server system; and

(v) engage in any other related activity in furtherance of items (i) through (iv).

IV. MUTUAL INTEREST OF THE PARTIES

Both DOC and ICANN have a mutual interest in a transition that ensures that future technical management of the DNS adheres to the principles of stability, competition, coordination, and representation as published in the Statement of Policy. ICANN has declared its commitment to these principles in its Bylaws. This Agreement is essential for the DOC to ensure continuity and stability in the performance of technical management of the DNS now performed by, or on behalf of, the U.S. Government. Together, the Parties will collaborate on the DNS Project to achieve the transition without disruption.

V. RESPONSIBILITIES OF THE PARTIES

A. General.

1. The Parties agree to jointly participate in the DNS Project for the design, development, and testing of the mechanisms, methods and procedures that should be in place for the private sector to manage the functions delineated in the Statement of Policy in a transparent, non-arbitrary, and reasonable manner.

2. The Parties agree that the mechanisms, methods, and procedures developed under the DNS Project will ensure that private-sector technical management of the DNS shall not apply standards, policies, procedures or practices inequitably or singe out any particular party for disparate treatment unless justified by substantial and reasonable cause and will ensure sufficient appeal procedures for adversely affected members of the Internet community.

3. Before the termination of this Agreement, the Parties will collaborate on a DNS Project Report that will document ICANN's test of the policies and procedures designed and developed pursuant to this Agreement.

4. The Parties agree to execute the following responsibilities in accordance with the Principles and Purpose of this Agreement as set forth in section II.

B. DOC. The DOC agrees to perform the following activities and provide the following resources in support of the DNS Project:

1. Provide expertise and advice on existing DNS management functions.
2. Provide expertise and advice on methods and administrative procedures for conducting open, public proceedings concerning policies and procedures that address the technical management of the DNS.
3. Identify with ICANN the necessary software, databases, know-how, other equipment, and intellectual property necessary to design, develop, and test methods and procedures of the DNS Project.
4. Participate, as necessary, in the design, development, and testing of the methods and procedures of the DNS Project to ensure continuity and coordination between ICANN and Network Solutions, Inc.
5. Collaborate on a study on the design, development, and testing of a process for making the management of the root server system more robust and secure. This aspect of the DNS Project will address:
 - a. Operational requirements of root name servers, including host hardware capacities, operating system and name server software versions, network connectivity, and physical environment.
 - b. Examination of the security aspects of the root name server system and review of the number, location, and distribution of root name servers considering the total system performance, robustness, and reliability.
 - c. Development of operational procedures for the root server system, including formalization of contractual relationships under which root servers throughout the world are operated.
6. Consult with the international community on aspects of the DNS Project.
7. Provide general oversight of activities conducted pursuant to this Agreement.
8. Maintain oversight of the technical management of DNS functions currently performed either directly, or subject to agreements with the U.S. Government, until such time as further agreement(s) are arranged as necessary, for the private sector to undertake management of specific DNS technical management functions.

C. ICANN. ICANN agrees to perform the following activities and provide the following resources in support of the DNS Project and further agrees to undertake the following activities pursuant to its procedures as set forth in Attachment B (Articles of Incorporation) and Attachment C (By-Laws), as they may be revised from time to time in conformity with the DNS Project:

1. Provide expertise and advice on private sector functions related to technical management of the DNS such as the policy and direction of the allocation of IP number blocks and coordination of the assignment of other Internet technical parameters as needed to maintain universal connectivity on the Internet.
2. Collaborate on the design, development and testing of procedures by which members of the Internet community adversely affected by decisions that are in conflict with the bylaws of the organization can seek external review of such decisions by a neutral third party.
3. Collaborate on the design, development, and testing of a plan for introduction of competition in domain name registration services, including:
 - a. Development of procedures to designate third parties to participate in tests conducted pursuant to this Agreement.
 - b. Development of an accreditation procedure for registrars and procedures that subject registrars to consistent requirements designed to promote a stable and robustly competitive DNS, as set forth in the Statement of Policy.

- c. Identification of the software, databases, know-how, intellectual property, and other equipment necessary to implement the plan for competition;
4. Collaborate on written technical procedures for operation of the primary root server including procedures that permit modifications, additions or deletions to the root zone file.
5. Collaborate on a study and process for making the management of the root server system more robust and secure. This aspect of the Project will address:
- Operational requirements of root name servers, including host hardware capacities, operating system and name server software versions, network connectivity, and physical environment.
 - Examination of the security aspects of the root name server system and review of the number, location, and distribution of root name servers considering the total system performance; robustness, and reliability.
 - Development of operational procedures for the root system, including formalization of contractual relationships under which root servers throughout the world are operated.
6. Collaborate on the design, development and testing of a process for affected parties to participate in the formulation of policies and procedures that address the technical management of the Internet. This process will include methods for soliciting, evaluating and responding to comments in the adoption of policies and procedures.
7. Collaborate on the development of additional policies and procedures designed to provide information to the public.
8. Collaborate on the design, development, and testing of appropriate membership mechanisms that foster accountability to and representation of the global and functional diversity of the Internet and its users, within the structure of private-sector DNS management organization.
9. Collaborate on the design, development and testing of a plan for creating a process that will consider the possible expansion of the number of gTLDs. The designed process should consider and take into account the following:
- The potential impact of new gTLDs on the Internet root server system and Internet stability.
 - The creation and implementation of minimum criteria for new and existing gTLD registrars.
 - Potential consumer benefits/costs associated with establishing a competitive environment for gTLD registrars.
 - Recommendations regarding trademark/domain name policies set forth in the Statement of Policy; recommendations made by the World Intellectual Property Organization (WIPO) concerning: () the development of a uniform approach to resolving trademark/domain name disputes involving cyberspace; () a process for protecting famous trademarks in the generic top level domains; () the effects of adding new gTLDs and related dispute resolution procedures on trademark and intellectual property holders; and recommendations made by other independent organizations concerning trademark/domain name issues.
10. Collaborate on other activities as appropriate to fulfill the purpose of this Agreement, as agreed by the Parties.

D. Prohibitions.

- ICANN shall not act as a domain name Registry or Registrar or IP Address Registry in competition with entities affected by the plan developed under this Agreement. Nothing, however, in this Agreement is intended to prevent ICANN or the USG from taking reasonable steps that are necessary to protect the operational stability of the Internet in the event of the financial failure of a Registry or Registrar or other emergency.
- Neither Party, either in the DNS Project or in any activity related to the DNS Project, shall act unjustly or arbitrarily to injure particular persons or entities or particular categories of persons or entities.
- Both Parties shall act in a non-arbitrary and reasonable manner with respect to design, development, and testing of the DNS Project and any other activity related to the DNS Project.

VI. EQUITABLE APPORTIONMENT OF COSTS

The costs of this activity are equitably apportioned, and each party shall bear the costs of its own activities under this Agreement. This Agreement contemplates no transfer of funds between the Parties. Each Party's estimated costs for the first

s x months of th s Agreement are attached hereto. The Parties sha ll rev ew these est mated costs n ght of actual expend tures at the comp etion of the f rst s x month per od and w ll ensure costs w ll be equ tab y apportioned.

VII. PERIOD OF AGREEMENT AND MODIFICATION/TERMINATION

Th s Agreement w ll become effect ve when s gned by a ll parties. The Agreement w ll term nate on September 30, 2000, but may be amended at any t me by mutua agreement of the parties. E ther party may term nate th s Agreement by prov d ng one hundred twenty (120) days wr tten not ce to the other party. In the event th s Agreement s term nated, each party sha ll be so e y respons b e for the payment of any expenses t has ncurr ed. Th s Agreement s subject to the ava ab ty of funds.

Joe Sims
Counsel to ICANN
Jones Day Reavis & Pogue
1450 G Street N W
Washington D C 20005 2088

J Beckwith Burr
Associate Administrator NT A
U S Department of Commerce
Washington D C 20230

PARTIES ESTIMATED SIX MONTH COSTS

A. ICANN

Costs to be borne by ICANN over the f rst s x months of th s Agreement nclude: deve opment of Accred tat on Gu de nes for Reg str es; rev ew of Techn ca Spec f cat ons for Shared Reg str es; format on and operat on of Government, Root Server, Membersh p and Independent Rev ew Adv sor Comm ttees; adv ce on format on of and rev ew of app cat ons for recogn t on by Support ng Organ zat ons; promugat on of conf cts of interest p ces; rev ew and adopt on of At-Large membersh p and e ect ons processes and ndependent rev ew procedures, etc; quarter y regu ar Board meet ngs and assoc ated costs (nclud ng open forums, trave , staff support and commun cat ons nfrastructure); trave , adm n strat ve support and nfrastructure for add t onal open forums to be determ ned; nterna execut ve, techn ca and adm n strat ve costs; ega and other profess ona serv ces; and re ated other costs. The est mated s x month budget (subject to change and ref nement over t me) s \$750,000 - 1 m on.

B. DOC

Costs to be borne by DOC over the f rst s x months of th s Agreement nclude: ma ntenance of DNS techn ca management funct ons current y performed by, or subject to agreements w th, the U.S. Government, expert se and adv ce on ex st ng DNS management funct ons; expert se and adv ce on adm n strat ve procedures; exam nat on and rev ew of the secur ty aspects of the Root Server System (nclud ng trave and techn ca expert se); consu tat ons w th the nternat ona commu ty on aspects of the DNS Project (nclud ng trave and commun cat ons costs); genera overs ght of act v t es conducted pursuant to the Agreement; staff support equa to ha f-t me ded cat on of 4-5 fu t me emp oyees, trave , adm n strat ve support, commun cat ons and re ated other costs. The est mated s x month budget (subject to change and ref nement over t me) s \$250,000 - \$350,000.

Comments concerning the layout construction and functionality of this site should be sent to webmaster@icann.org

Page Updated 31 December 99

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EXHIBIT 211



ABOUT THE PROGRAM

Overview

The New gTLD Program is an initiative coordinated by the Internet Corporation for Assigned Names and Numbers (ICANN), that is enabling the largest expansion of the domain name system. Via the introduction of new top-level domains (TLDs), the program aims to enhance innovation, competition and consumer choice. Many new safeguards to help support a secure, stable and resilient Internet are also being introduced as a result of the program.

TLDs are the letters found at the end of an Internet address, such as .com, .net, or .org. Any TLD that does not represent a country or a territory is known as a generic TLD, or gTLD. The New gTLD Program has enabled hundreds of new top-level domains in ASCII characters and in different scripts ([Internationalized Domain Names \(/en/about/idns\)](/en/about/idns)) to enter into the Internet's root zone since the first delegations occurred in October 2013.

The application window for the first application round closed in April 2012. Comprehensive reviews of the program are currently underway to assess its performance in meeting intended objectives. These reviews will inform ongoing discussions with the ICANN community to determine when a second round will take place.

Resources

- [Fast Facts \(/en/announcements-and-media/infographics\)](/en/announcements-and-media/infographics)
- [Statistics \(/en/program-status/statistics\)](/en/program-status/statistics)
- [Current Application Status \(https://gtldresult.icann.org/application-result/applicationstatus\)](https://gtldresult.icann.org/application-result/applicationstatus)
- [Program Reviews \(/en/reviews\)](/en/reviews)

Program History

In 2005, ICANN's Generic Names Supporting Organization (GNSO) began a policy development process to consider the introduction of new gTLDs, based on the results of trial rounds conducted in 2000 and 2003. The GNSO is the main policy-making body for gTLDs and encourages global participation in the technical management of the Internet.

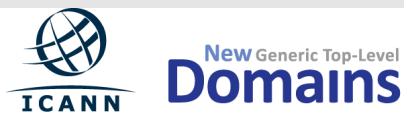
The two-year policy development process included detailed and lengthy consultations with the many constituencies of ICANN's global Internet community, including governments, civil society, business and intellectual property stakeholders, and technologists.

In 2008, the ICANN Board adopted 19 specific GNSO policy recommendations for implementing new gTLDs, with certain allocation criteria and contractual conditions. One such recommendation provided that ICANN should introduce New gTLDs in rounds until the scale of demand is clear. After approval of the policy, ICANN undertook an open, inclusive, and transparent implementation process to address stakeholder concerns, such as the protection of intellectual property and community interests, consumer protection, and DNS stability. This work included public consultations, review, and input to multiple draft versions of the Applicant Guidebook.

In June 2011, ICANN's Board of Directors approved the [Applicant Guidebook \(/en/applicants/agb\)](/en/applicants/agb) and authorized the launch of the New gTLD Program. The application window opened on 12 January 2012. ICANN received 1,930 applications for new gTLDs. On 17 December 2012, ICANN held a prioritization draw to determine the order in which applications would be processed during Initial Evaluation and subsequent phases of the program. These applications were processed by ICANN staff and evaluated by expert, independent third-party evaluators according to priority numbers.

On 22 March 2013, ICANN released the first set of Initial Evaluation results to applicants and the public. In October 2013, the first new gTLDs were delegated.

EXHIBIT 212



[About](#) [Applicants](#) [Program Status](#) [Reviews](#)

News & Media

— Program Statistics

On 13 June 2012, ICANN published all applied-for strings. View high-level program statistics as applications move through the evaluation process.

PROGRAM STATISTICS

Current Statistics (*Updated monthly*)

Application Statistics: Overview (as of 31 December 2018)	
Total Applications Submitted	1930
Completed New gTLD Program (gTLD Delegated** - introduced into Internet)	1232
Application Withdrawn	624
Applications that Will Not Proceed/Not Approved	46
Currently Proceeding through New gTLD Program*	32

Contention Resolution	
Total Contention Sets	234
Resolved Contention Sets	227
Contention Sets Resolved via ICANN Auction	16
Unresolved Contention Sets	7
Applications Pending Contention Resolution	23

Contracting	
Executed Registry Agreements (completed)	1246

contracting)	
Registry Agreements with Specification 13	491
Registry Agreements with Code of Conduct Exemption	79
In Contracting	6

Pre-Delegation Testing (PDT)	
Passed PDT	1244

**Breakdown: Delegation Statistics	
Delegated gTLDs (Introduced into Internet)	1232
Select Subcategories of Delegated gTLDs (NOTE: gTLDs may fall into more than one subcategory)	
Community	52
Geographic	53
Internationalized Domain Names (IDNs)	95

gTLD Startup Statistics (as of 30 December 2018)	
Sunrise	
Completed	585
In Progress	0
Not Started	2
Claims	
Completed	687
In Progress	233
Not Started	6

Please note: Registry Agreement and Delegated gTLD totals are not adjusted for TLDs that subsequently terminated their Registry Agreements and/or were removed from the root zone. In addition, Specification 13 and Code of Conduct Exemption totals are not adjusted if subsequently removed.

[Get a status update on an individual application »](#)

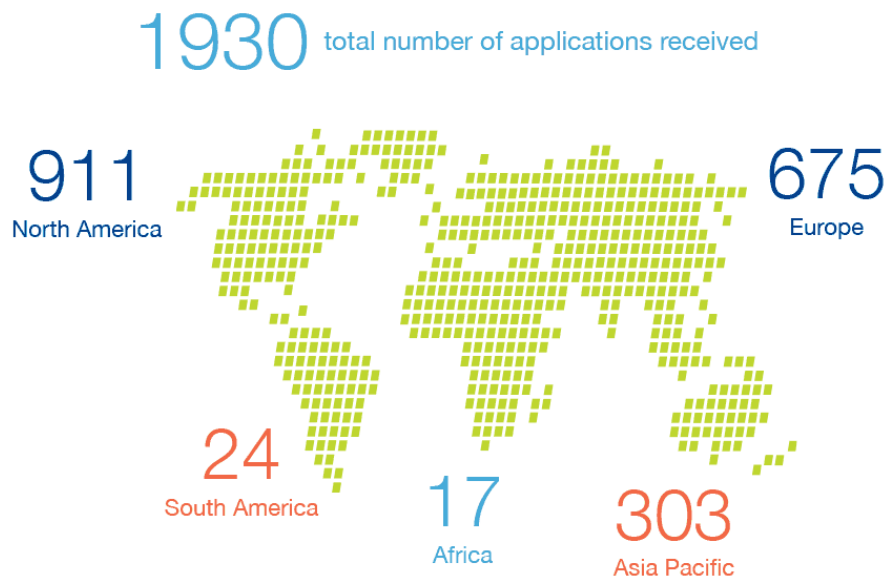
New gTLD Application Submission Statistics

The statistics in this section were calculated based on applications received by the 29 March 2012 deadline.

Application Breakdown by: [Region](#) | [Type](#) | [String Similarity](#)

Application Breakdown by Region

Statistics as of 13 June 2012

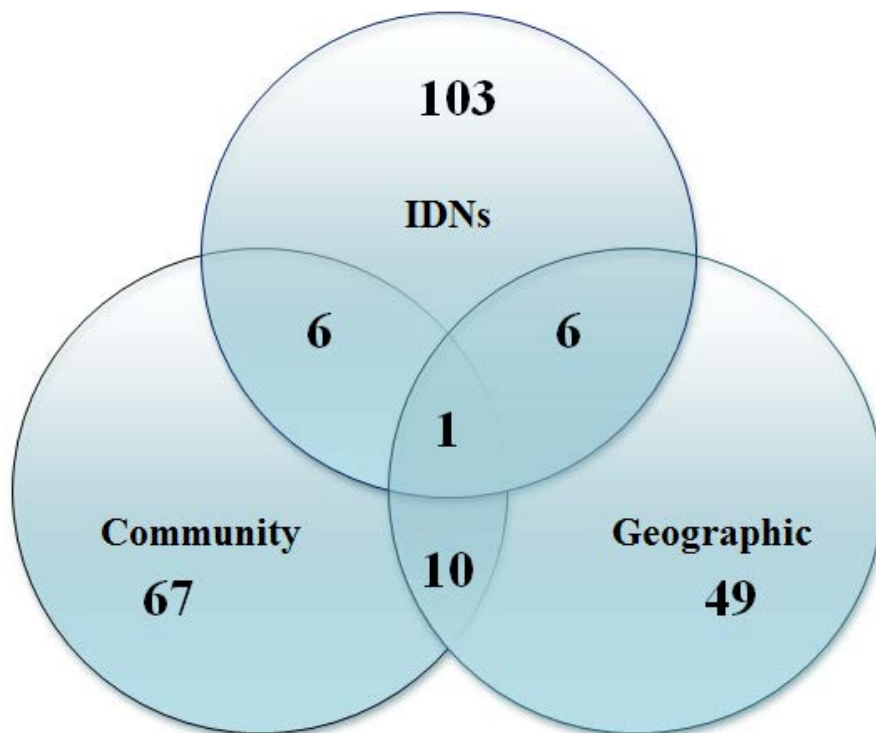


Application Breakdown by Type

Statistics as of 13 June 2012

Application Totals

- Community: 84
- Geographic: 66
- Internationalized Domain Names: 116
 - Total Scripts Represented: 12
- Other: 1846



Application Breakdown by String Similarity

Statistics as of 26 February 2013

Approximate Number of Unique Applied-for Strings: 1,400

- Contention Sets
 - Exact Match: 230
(two or more applications for a string with same characters)
 - Confusingly Similar: 2
 - .hotels & .hoteis
 - .unicorn & .unicom
- Applications in a Contention Set: 751

[Centralized Zone Data Service \(CZDS\)](#)

[Comments & Feedback](#)

[Current Application Status](#)

[Delegated Strings](#)

[Contention Set Status](#)

[Evaluation Panels](#)

[gTLD Correspondence](#)

[Objection & Dispute Resolution](#)

[Post-Delegation Dispute Resolution Procedures \(PDDRP\)](#)

Program Statistics

[Timelines](#)

[TLD Startup Information - Sunrise and Claims Periods](#)

[Trademark Clearinghouse \(TMCH\)](#)

[Uniform Rapid Suspension System](#)

RELATED LINKS

[About the Program](#)

[New gTLD Application Quick Facts](#)

[Overview of New gTLD Applications](#)

[ICANN](#) [APPLICANT GUIDEBOOK](#) [NAMING SERVICES PORTAL](#) [GLOBAL SUPPORT](#)

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EXHIBIT 213

Contention Set: **WEB / WEBS**

**Contention Set On-Hold
Pending Accountability Mechanism**

An Auction took place on 27 July 2016 to remove string contention among the .WEB/.WEBS applicants. 1-1296-36138 [WEB] NU DOT CO LLC and 1-1033-73917 [WEBS] Vistaprint Limited were designated the winners at the close of the Auction.



EXHIBIT 214

From: John Kane Contact Information Redacted
Sent: Thursday, July 7, 2016 4:52 PM
To: Hal Lubsen
Subject: WEB

Bidders:

1. Afilias Domains No. 3 (Afilias plc)
2. WEB.com
3. Schlund Technologies (United Internet)
4. Ruby Glen (Donuts)
5. Charleston Road Registry (Google)
6. DotWeb (Radix)
7. Nu Dot Co (Juan Diego's company)

5/11/16, I sent all .WEB applicants an email saying that we all generally agreed on participating in a Private Auction and Innovative Auctions would send a schedule and agreements to everyone

5/17/16, Applicant Auctions sent the Auction schedule dates:

- May 25th - Draft Board Resolutions Due
- June 1st - Signed Agreements Due
- June 10th - Deposits due
- June 15th/16th – Auction

5/31/16 I sent an email to Applicant Auction asking for confirmation that everyone had completed the first two tasks. They replied that Nu Dot Co had not replied and/or sent in the required information

6/1/16 I sent a text to Jose (Nu Dot Co) and asked if they were participating in the private auction. He replied, "that's right. My board instructed me to skip it and proceed to ICANN"

Since we have had limited contact with Applicant Auction or Nu Dot co.

ICANN auction is scheduled for 7/27/16

Let me know if you need anything else.

JLK

EXHIBIT 215

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS
BEFORE THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

AFILIAS DOMAINS NO. 3 LIMITED,

Claimants

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent

ICDR Case No. _____

WITNESS STATEMENT OF JOHN L. KANE

15 October 2018

I. Personal and Professional Background

1. My full name is John L. Kane. I am a citizen of the United States of America and I presently reside in Wilmington, Delaware. I am the Vice President of Corporate Services for Afilias plc (“**Afilias**”), a global leader in advanced registry services.

2. In 1988, I graduated from Florida International University with a Bachelor of Science in Management. After graduation, I worked in the hospitality industry for several years before joining Pfizer.

3. I joined the Corporation Service Company (“**CSC**”) in 1997 and was promoted to Vice President in 1999. CSC provides a large variety of corporate services to law firms and Fortune 500 companies, including corporate identity management and brand protection solutions. I oversaw the entrepreneurial division and, with the pending breakup of Network Solutions, Inc.’s (“**NSI**”) registry/registrar monopoly business, I proposed that we enter the newly emerging registrar business. I built the business from its first customer to become a significant corporate registrar. CSC is an ICANN-accredited domain name registrar.

4. Since my involvement in CSC, I have remained in the domain name industry. I joined eNom, Inc. (“**eNom**”) in November 2004 as its Vice President of Business Development. eNom is the second-largest ICANN-accredited domain name registrar in the world, managing over 10 million domain names through the largest distribution network in the domain name industry. I became eNom’s President when it was acquired by Demand Media, Inc. (“**Demand Media**”) in 2006, at which point I also began serving as Demand Media’s Executive Vice President.

5. In 2008, I left both Demand Media and eNom to join Afilias as its Vice President of Corporate Services. Afilias provides registry services for several new generic top-level domains (“**gTLDs**”), including .INFO, .RED, .MOBI, .AERO, and .ASIA—and country-code top-level domains (“**ccTLDs**”). In my capacity as Afilias’ Vice President, I am deeply involved in its

registry services business. For instance, I recently headed up our efforts to migrate the .AU TLD to Afilias from Neustar, and have participated in over fifty applications for new gTLDs pursuant to the Internet Corporation for Assigned Names and Numbers' ("ICANN") New gTLD Program.¹

II. The New gTLD Program

6. ICANN intended its New gTLD Program to create competition for VeriSign, Inc. ("VeriSign"), which dominates the registry level of the DNS through its control of .COM and .NET.² When ICANN started the New gTLD Program in 2012, it had already introduced a few new gTLDs into the DNS through two trial application rounds in 2000 and 2003. The New gTLD Program was conceived with the intention of being materially different from the earlier two trial rounds or "proof of concept" rounds: ICANN was now accepting applications from all interested parties for the right to operate new gTLDs without any predetermined cap on the number of gTLDs it would add to the DNS.

7. The New gTLD Program is administered by ICANN pursuant to principles, rules, and procedures set forth in the gTLD Applicant Guidebook (the "**Guidebook**"). The Guidebook is the product of years of development within ICANN, reflecting the consensus of ICANN's various constituencies, including the Government Advisory Committee ("**GAC**") and the Generic Names Supporting Organization ("**GNSO**"). The Guidebook formally adopted the GNSO's 19 recommendations set forth in its 2007 report concerning the introduction of new gTLDs, as well

¹ I have been involved in, and am listed as the primary contact for, the following new gTLD applications: 手机, 信息, موقع, 移动, .AGAKHAN, .AKDN, .APP, .ART, .AVIANCA, .BET, .BLACK, .BLOG, .BLUE, .CASINO, .DESI, .DESIGN, .GREEN, .HAIR, .HEALTH, .HOME, .IMAMAT, .INC, .ISMAILI, .KIM, .KOSHER, .LGBT, .LLC, .LLP, .LOTTO, .LTD, .LTDA, .MAIL, .MEET, .MEMORIAL, .MLS, .NRA, .ORGANIC, .PET, .PINK, .POKER, .RADIO, .RED, .SARL, .SHAW, .SHIKSHA, .SRL, .TEAM, .TICKETS, .VOTE, .VOTO, .WEB, and .WINE. Of these 52 gTLDs, thirty have been delegated to the applicant.

² VeriSign is the registry operator for both the .COM and .NET gTLDs, which collectively control more than 75% of all gTLD domain name registrations. VeriSign's market position has not been diminished over the last 18 years.

as the recommendations of governments, individuals, businesses, and other constituencies. In short, the Guidebook reflects the consensus of the Internet community concerning not only how new gTLDs should be allocated but also the principles, rules, and procedures underlying their allocation.

8. Broadly speaking, the Guidebook's process for new gTLD applications is as follows. *First*, the applicant is required to complete and submit an application based on more than 50 detailed questions, which requires the applicant to describe its business case for the proposed new gTLD, demonstrate that it has sufficient finances to operate the registry and achieve its business goals, as well as provide detailed technical information about how it intends to operate the registry. The application also requires the complete disclosure of all persons and entities associated with the application to allow ICANN to conduct due diligence of all parties associated with the operation of the registry.³ Non-confidential sections, which comprise the majority of the application, are published on the ICANN website so that the broader Internet community has transparency into who is applying for which new gTLDs and why.⁴

9. As I understand the purpose of these required disclosures, they are to enable ICANN, its application evaluators, the GAC, and the broader Internet community to have a meaningful opportunity to assess the merits of an application. In connection with this broad community review, certain constituencies, including the GAC and specific interested parties, are given standing to lodge formal complaints with ICANN concerning the merits of any particular application.⁵

³ ICANN, *gTLD Applicant Guidebook* (4 June 2012), [Ex. JLK-1], Sec. 1.2.1 (pp. 1-21 to 1-25).

⁴ *Id.*, Sec. 1.1.2.2 (p. 1-5).

⁵ *See, generally, id.*, Secs. 1.1.2.3-1.1.2.4 (pp. 1-5 to 1-8); *id.*, Module 3 (pp. 3-2 to 3-25).

10. In the Guidebook and its associated guidelines, ICANN requires applicants to promptly submit a change request in the event that any information (including omission of material information) in the application was, or became, untrue, incomplete, or otherwise misleading.⁶ This obligation endures throughout the Guidebook’s process, which only concludes once an applicant executes a registry agreement with ICANN.⁷ Moreover, change requests are not automatically approved; indeed, ICANN is required to evaluate whether any such changes would be approved pursuant to enumerated criteria.⁸ In sum, to me the Guidebook and its associated guidelines make it clear that ICANN, its various constituencies, and the broader Internet community would each have a meaningful opportunity to review, consider, and, if necessary, object to a final complete and truthful application.

11. *Second*, if an application is approved at the conclusion of the evaluation and objections period, the applicant is awarded the applied-for gTLD registry unless another applicant is also approved for the same or similar gTLD. In that event, ICANN groups all approved applicants for the same or similar strings into a “**contention set**.” If a gTLD becomes the subject of a contention set, the various members of the contention set have the option to resolve the “contention” among themselves and determine which entity will be awarded the rights to the gTLD (the “**Voluntary Resolution Period**”).

⁶ *Id.*, Sec. 1.2.7 (p. 1-30) (“If at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN via submission of the appropriate forms.”); *id.*, Module 6 (p. 6-2) (“Applicant warrants that the statements and representations contained in the application . . . are true and accurate and complete in all material respects. . . . Applicant agrees to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading.”).

⁷ *Id.*, Sec. 1.2.7 (p. 1-30).

⁸ ICANN, New gTLD Application Change Request Process and Criteria, *available at* <https://newgtlds.icann.org/en/applicants/global-support/change-requests> (last accessed on 5 Sep. 2018), [Ex. JLK-2], p. 3.

12. While certain contention sets are resolved through the formation of joint ventures or other collaborative efforts regarding the operation of the relevant gTLD registry, the more common path is to resolve contention sets through private auction. The rules of these private auctions have varied to some degree, but in all cases the threshold requirement is that all contention set members must participate in the private auction. Under the private auction model, the proceeds from the winning bidder are divided among the losing bidders. As such, all contention set participants stand to benefit and are therefore incentivized to participate in the private auction.

13. *Third*, where the contention set cannot be resolved during the Voluntary Resolution Period, ICANN will administer an auction of last resort to determine the winning applicant. Only the successful applicants for the relevant gTLD are permitted to participate in the ICANN auction, which is subject to various deadlines and rules, as well as disclosures regarding sources of funds and the identity of any party that an applicant might designate to bid on its behalf. Unlike the private auction process, instead of the proceeds of the ICANN auction being divided among the losing applicants, the proceeds are paid to ICANN. For this reason, applicants normally should prefer a private auction because, if they do not win the private auction, they are still able to recover at least some (if not all) of the costs of the application process, and indeed make a significant amount of money.⁹ Attached as Annex A is a table indicating how various new gTLD contention sets have been resolved.

14. *Fourth*, following resolution of the contention set, unless the winner is disqualified or some reason arises that would cause ICANN to determine that it should not enter in to a registry agreement with the applicant, the prevailing applicant is obligated under the Guidebook to

⁹ The costs associated with applying for a gTLD are steep. The application fee is itself USD 185,000, on top of which applicants must invest significant time in providing technical and financial data.

negotiate and execute a registry agreement with ICANN for the applied-for gTLD and engage in pre-delegation testing. In the registry agreement, ICANN requires all registry providers to agree to “operate the registry for the TLD in compliance with all commitments, statements of intent and business plans stated in the following sections of the Registry Operator’s application to ICANN.”¹⁰ Once a registry agreement is concluded and the applicant passes all pre-delegation testing, ICANN will delegate the gTLD to the root (that is, add the gTLD to the DNS). Once the gTLD has been delegated, the Guidebook process is concluded.

III. The .WEB Contention Set

15. ICANN received seven applications for .WEB, as set forth in the following table:

APPLICANT	AFFILIATED ENTITY
Afilias Domains No. 3 Limited	Afilias plc
Charleston Road Registry Inc.	Google, Inc.
DotWeb Inc.	Radix FZC
NU DOT CO LLC	STRAAT Investments
Ruby Glen, LLC	Donuts, Inc.
Schlund Technologies GmbH	InterNetX GmbH
Web.com Group, Inc.	--

16. NU DOT CO LLC (“NDC”) was one of the smallest applicants for .WEB. During the Voluntary Resolution Period, I had numerous communications with representatives of each of the .WEB contention set members, including Jose Ignacio Rasco III, who was a founding member of NDC and NDC’s primary contact for its .WEB application. During these conversations, which are specifically authorized by the Guidebook, I was able to assess both the strategies and potential market valuation for .WEB. From these conversations and negotiations, as well as from the results of contemporaneous auctions of other gTLDs, I drew several conclusions:

1. I estimated that the market value for .WEB at auction would be somewhere around USD 70-75 million.

¹⁰ ICANN, Base Registry Agreement (31 July 2017), [Ex. JLK-3], Specification 11(2) (p. 97).

2. It did not appear that many of the contention set applicants were willing to pay anything close to that amount at auction for .WEB. At that level, a losing applicant in a private auction would stand to earn more than USD 10 million on their USD 185,000 investment. Most applicants were willing to take that profit. This was, in part, driven by the marketing costs for .WEB, which were projected to be considerable. Given Afiliias' good relationships with leading registrars, we held a considerable advantage over the other members of the contention set, who would need to spend more than we would on marketing.
3. It appeared that our primary competition for .WEB would be from three other applicants: Web.com Group, Inc.; Ruby Glen, LLC; and DotWeb Inc.
4. Because Afiliias valued .WEB based on its long-term competitive prospects, our valuation was materially different from most of the other .WEB applicants.

For these reasons, we were confident that no other member of the .WEB contention set would outbid Afiliias at auction.

17. The .WEB contention set had not set a schedule for a private auction because ICANN was still in the process of resolving how to deal with an application for the .WEBS gTLD. As of the fall of 2015, the contention set had been on hold for approximately two years. Ultimately, in October 2015, ICANN determined how .WEBS should be treated in connection with the .WEB contention set. Thereupon, the contention set members began discussing in earnest the schedule for the private auction.

18. Over the course of the next several months, I took the lead in trying to organize a voluntary resolution of the contention set by way of a private auction. During this time, in coordination with the private auction house, I had regular communications with representatives of all members of the contention set, largely by phone or text message.

19. During the period between October 2015 and April 2016, I had numerous communications with Rasco of NDC. On numerous occasions during this period, he told me that he fully supported resolution by private auction.

20. ICANN set a date for the ICANN-administered auction on 27 April 2016. As expected, the contention set members quickly moved to discuss scheduling a private auction. I took the lead again. Over the course of the next few days, I or the private auction house spoke with members of the contention set to confirm that they were “in” for a private auction. This included NDC, with whom the private auction house had communicated.

21. On 11 May 2016, I therefore sent an email to all of the contention set members stating “Good news! I have spoken directly with most members of the contention set and/or saw confirmation in email that everyone is willing to participate in a .WEB only auction. If for any reason anyone’s position has changed please let the group or the auction house know ASAP.”¹¹ No one replied to my email contradicting my understanding of the state of play. I therefore instructed the private auction house to move forward.

22. On 17 May 2016, the private auction house sent the auction agreement to each member of the contention set and identified a number of deadlines. According to the schedule, the signed agreements needed to be returned to the private auction house by 1 June 2016 and deposits paid by 10 June 2016. The auction would be held from 15-16 June 2016. Afilias submitted its signed agreement on 19 May 2016.

23. On 31 May 2016, I communicated with the private auction house to confirm receipt of Afilias’ application, as well as the applications of the other members of the contention set.¹²

¹¹ Email Communications between .WEB Applicants (*various dates*), [Ex. JLK-4], p. 1 (email from J. Kane dated 11 May 2016).

¹² See Email from J. Kane to H. Lubsen (7 July 2016), [Ex. JLK-5].

My contact at the private auction house told me that they had received signed applications for everyone except for NDC.¹³ My contact further stated that they had tried to contact NDC about the outstanding agreement without success.¹⁴

24. On 1 June 2016, I sent a text to Rasco about the outstanding agreement. Rasco replied that NDC's Board had instructed him to not participate in the June private auction, but to proceed to the July ICANN auction.

25. NDC's position made no sense to me. First, while Rasco had implied that the decision not to proceed with the private auction was not his, this did not make sense: to my knowledge, NDC's board consisted of Rasco, Juan Diego Calle, and Nicolai Bezsonoff. Second, withdrawing from the private auction would cost NDC a considerable amount of money. If my projections were correct, NDC stood to walk away with more than USD 10 million as a losing bidder. And, third, given my discussions with NDC during the Voluntary Notification Period, it seemed clear to me that they were in it for the payout, which necessitated participating in a private auction. I therefore followed up with Rasco, specifically asking how "his board" could have rejected the private auction when he was one of the three board members. Rasco reiterated that it was a board decision and refused to elaborate further, skirting the issue.

26. At the time, I assumed that NDC was merely holding out for a larger guaranteed payment, as other contention set members had done in the past. I therefore prepared a proposal that would guarantee NDC a larger payday should it lose the private auction. NDC rejected this plan, stating again that it was committed to proceeding to the ICANN auction.

¹³ *See id.*

¹⁴ *See id.*

27. In early July 2016, one of contention set members, Ruby Glen, LLC (“**Ruby Glen**”) asked ICANN to postpone the auction until ICANN could fully investigate allegations concerning a change in ownership of NDC.¹⁵ Ruby Glen asked Afiliias to join in that effort, but we declined, mainly because we were confident that we would win either a private auction or ICANN auction for .WEB and so we did not see delaying the auction as being in our interest.

28. On 13 July 2016, Christine Willett, the Vice President of ICANN’s gTLD Operations, wrote to the members of the contention set, informing us that ICANN had completed its investigation of NDC and had not found any reason to suspend the auction.¹⁶ At the time, we had no reason to think that ICANN had not looked in to the matter thoroughly.

Confidential Information Redacted

Rumors had been circulating in the market that VeriSign and NDC had entered in to some sort of arrangement. Confidential Information Redacted

29. The .WEB ICANN auction therefore proceeded as scheduled with all but one other bidder exiting the market after the USD 71.9 million round. We did not know who the other bidder was. We kept bidding in the follow-on rounds, but we were capped out at USD 135 million. The

¹⁵ See *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Ca.), Exhibit D to Declaration of Christine Willett in Support of ICANN’s Opposition to Plaintiff’s *Ex Parte* Application for Temporary Restraining Order (25 July 2016), [Ex. **JLK-6**], p. 5 (email from Jon Nevelt dated 3 July 3, 2016).

¹⁶ Letter from ICANN to .Web Auction Members (13 July 2016), [Ex. **JLK-7**], p. 1.

exit bid for the last round of the auction was USD 142 million. We submitted a bid at USD 135 million and were shortly informed that our bid was not successful.

30. During the final rounds of the auction, something did not appear right to us. No gTLD had ever been auctioned for more than USD 50 million. Even gigantic corporations like Google had declined to bid USD 50 million to secure gTLDs they had applied for. Considering our opposition, our USD 135 million cap had seemed more than sufficient to win the day. At the close of the auction, we were dumbfounded. We could not believe that any member of the contention set had outbid us.

31. As it turned out, the rumors that had been circulating were right. Hours after the auction concluded, VeriSign filed its 10-Q for the second quarter of 2016 with the SEC, stating that it had committed to pay approximately USD 130 million for the future assignment of contractual rights. Immediately, numerous media sources were reporting that VeriSign had likely acquired .WEB. Days later, on 1 August 2016, VeriSign issued a press release confirming that it “provided the funds for [NDC’s] bid for the .web TLD” in exchange for NDC’s commitment to “seek to assign the [.WEB] Registry Agreement to VeriSign upon consent from ICANN.”¹⁷

32. On 8 August 2016, we sent a letter to Mr. Atallah, informing ICANN that VeriSign’s acquisition of the rights in the NDC application for .WEB constituted a violation of the Guidebook and asking that ICANN undertake an investigation of the matter and take appropriate action against NDC.¹⁸ As we explained in our letter, VeriSign’s acquisition of NDC’s rights constitutes a violation of Paragraph 10 of the Terms and Conditions set forth in the Guidebook,

¹⁷ The press release reads in part: “The Company entered into an agreement with Nu Dot Co LLC wherein the Company provided funds for Nu Dot Co’s bid for the .web TLD. We are pleased that the Nu Dot Co bid was successful.” Verisign, *Verisign Statement Regarding .Web Auction Results* (1 Aug. 2016), [Ex. JLK-8].

¹⁸ Letter from S. Hemphill (Afilias) to A. Atallah (ICANN) (8 Aug. 2016), [Ex. JLK-9].

which prohibits applicants from reselling, assigning, or transferring their rights in connection with an application.¹⁹ We requested that ICANN suspend any further action in the matter, including entering into a registry agreement for .WEB with NDC. We simultaneously filed a complaint with the ICANN Ombudsman regarding the same.

33. On 9 September 2016, we sent a follow-up letter to Mr. Atallah, explaining that NDC had violated the Guidebook and that it was ICANN's duty to deny NDC's application, disqualify NDC's bid, and proceed with the contracting of a registry agreement with the second-highest bidder, Afilias.²⁰

34. On 16 September 2016, Ms. Willett wrote to us requesting further comment on the matter.²¹ We sent a response letter on 7 October 2016 answering the questions posed by ICANN and reaffirming our position that the actions taken by NDC and VeriSign should result in disqualification of NDC as a member of the contention set for .WEB and should invalidate NDC's bid.²² We again urged ICANN to disqualify NDC's bid and prevent VeriSign from obtaining control over .WEB.²³

35. Over a year passed without any additional communication from ICANN regarding the matter. On 23 February 2018, we wrote to the ICANN Board requesting an update on its investigation and requesting several documents under ICANN's Documentary Information Disclosure Policy ("**DIDP**").²⁴ ICANN responded to our request and deemed our request for an

¹⁹ *Id.*, p. 1.

²⁰ Letter from S. Hemphill (Afilias) to A. Atallah (ICANN) (9 Sep. 2016), [Ex. **JLK-10**].

²¹ Letter from C. Willett (ICANN) to J. Kane (Afilias) (16 Sep. 2016), [Ex. **JLK-11**].

²² Letter from J. Kane (Afilias) to C. Willett (ICANN) (7 Oct. 2016), [Ex. **JLK-12**].

²³ *Id.*, p. 1.

²⁴ Letter from A. Ali (Counsel for Afilias) to C. Chalaby (Chairman, ICANN Board) regarding DIDP Request 20180223-1 (23 Feb. 2018), [Ex. **JLK-13**].

update on the investigation to be “beyond the scope” of our DIDP request and therefore did not address our request.²⁵ ICANN further denied disclosure of certain categories of documents.

36. We wrote to the ICANN Board again on 16 April 2018 to request an update on the investigation.²⁶ We also submitted a limited reconsideration request on 23 April 2018 requesting that ICANN reconsider its denied disclosure of certain documents in response to our DIDP request.²⁷ ICANN responded and categorically rejected our requests.²⁸

37. ICANN took the .WEB contention set off hold on 6 June 2018. We submitted questions to ICANN regarding the .WEB registry agreement on 14 June 2018,²⁹ but ICANN refused to even consider our questions.³⁰

38. While I do not know all the terms of NDC’s agreement with VeriSign, that agreement appears inconsistent with the rules set forth in the Guidebook. Unlike traditional financing arrangements, NDC does not appear to be liable for any of the monies used to pay ICANN for .WEB. NDC may have mechanically submitted the electronic bids on 27-28 July, but it did so on VeriSign’s behalf, pursuant to VeriSign’s instruction and using VeriSign’s money. NDC, to our knowledge, never informed anyone that it would be bidding on VeriSign’s behalf, or that it had entered in to some sort of an arrangement with VeriSign to sell, assign, or transfer its application. NDC’s agreement with VeriSign is also unlike more common changes to gTLD

²⁵ Communication to A. Ali (Counsel for Afilias) regarding Response to DIDP Request 20180223-1 (24 Mar. 2018), [Ex. **JLK-14**], p. 1.

²⁶ Letter from A. Ali (Counsel for Afilias) to ICANN Board of Directors (16 Apr. 2018), [Ex. **JLK-15**].

²⁷ Afilias Domains No. 3 Limited Reconsideration Request (23 Apr. 2018), [Ex. **JLK-16**]; *see* Letter from A. Ali (Counsel for Afilias) to ICANN Board of Directors regarding ICANN’s Response to DIDP Request No. 20180223-1 (23 Apr. 2018), [Ex. **JLK-17**].

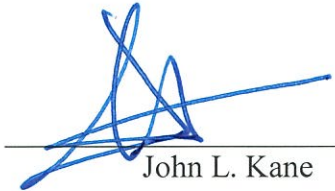
²⁸ Letter from J. LeVee (Jones Day) to A. Ali (Counsel for Afilias) (28 Apr. 2018), [Ex. **JLK-18**].

²⁹ Email from A. de Gramont (Counsel for Afilias) to J. LeVee (Jones Day) (14 June 2018), [Ex. **JLK-19**].

³⁰ Email and attachments from J. LeVee (Jones Day) to A. de Gramont (Counsel for Afilias) (16 June 2018), [Ex. **JLK-20**].

applications. While applicants have substituted parent or other affiliated entities as the applicant, NDC agreed to step aside so that the dominant registry could acquire its next best potential competitor. In other cases, applicants have substituted back-end registry service providers, a change that required re-evaluation and a 30-day notice period. NDC, however, agreed to step aside so that VeriSign could operate .WEB itself, both on the front-end and the back-end. I do not see how such a drastic change to NDC's application could be consistent with ICANN's rules, policies, and procedures. To me, rules of fair play and transparency, as well as the specific requirements of the Guidebook, require that NDC have disclosed that it was selling or assigning its application to VeriSign, or that NDC would be bidding on behalf of VeriSign. If what VeriSign and NDC did is permissible, then I see no point to the detailed process and rules that the ICANN community painstakingly created through years of effort, or the requirements and disclosures of the ICANN auction rules. However, ICANN has done nothing to address NDC's subterfuge, or VeriSign's end-run around the New gTLD Program.

I affirm that the foregoing statement is true and correct to the best of my knowledge and belief.



John L. Kane

Date: 15 October 2018

ANNEX A
TABLE OF NEW GTLD CONTENTION SET RESOLUTIONS

New gTLD	Contention Set Status	Contention Set Resolution Method³¹
AFRICA	Resolved	Private
APARTMENTS	Resolved	Private
APP	Resolved	ICANN Auction (25 Feb. 2015) Winning Price: USD 25,001,000
ART	Resolved	Private
AUCTION	Resolved	Private
AUDIO	Resolved	Private
AUTO	Resolved	Private
BABY	Resolved	ICANN Auction (17 Dec. 2014) Winning Price: USD 3,088,888
BAND	Resolved	Private
BANK	Resolved	Private
BAR	Resolved	Private
BASEBALL	Resolved	Private
BASKETBALL	Resolved	Private
BEAUTY	Resolved	Private
BET	Resolved	Private
BINGO	Resolved	Private
BLOG	Resolved	Private
BOATS	Resolved	Private
BOOK	Resolved	Private
BOX	Resolved	Private
BROADWAY	Resolved	Private
BROKER	Resolved	Private
BUY	Resolved	ICANN Auction (17 Sep. 2014) Winning Price: USD 4,588,888
CAFÉ	Resolved	Private
CAM	Resolved	Private
CARS / CAR	Resolved	Private
CASA	Resolved	Private
CASINO	Resolved	Private
CHARITY	Resolved	Private
CHAT	Resolved	Private
CHURCH	Resolved	Private
CITY	Resolved	Private
CLOCK	Resolved	Private
CLOUD	Resolved	Private

³¹ All auction amounts are in USD and based on information provided by ICANN. See ICANN, New gTLD Auction Results, available at <https://gtdresult.icann.org/applicationstatus/auctionresults> (last visited 26 July 2018).

CLUB	Resolved	Private
COACH	Resolved	Private
COLLEGE	Resolved	Private
CONSTRUCTION	Resolved	Private
CORP	Resolved	ICANN Board Resolution (4 Feb. 2014)
COUNTRY	Resolved	Private
COUPON	Resolved	Private
COUPONS	Resolved	Private
CPA	On-Hold	--
CRICKET	Resolved	Private
CRUISE	Resolved	Private
DATA	Resolved	Private
DDS	Resolved	Private
DEAL	Resolved	Private
DEALS	Resolved	Private
DELIVERY	Resolved	Private
DESI	Resolved	Private
DESIGN	Resolved	Private
DEV	Resolved	Private
DIET	Resolved	Private
DIRECT	Resolved	Private
DISCOUNT	Resolved	Private
DIY	Resolved	Private
DOCS	Resolved	Private
DOCTOR	Resolved	Private
DOG	Resolved	Private
DOT	Resolved	ICANN Auction (19 Nov. 2014) Winning Price: USD 700,000
DRIVE	Resolved	Private
EARTH	Resolved	Private
ECO	Resolved	Private
ENERGY	Resolved	Private
EXPERT	Resolved	Private
EXPRESS	Resolved	Private
FAMILY	Resolved	Private
FASHION	Resolved	Private
FILM	Resolved	Private
FISH	Resolved	Private
FISHING	Resolved	Private
FIT	Resolved	Private
FLOWERS	Resolved	Private
FOOD	Resolved	Private
FOOTBALL	Resolved	Private
FORSALE	Resolved	Private
FORUM	Resolved	Private

FREE	Resolved	Private
FUN	Resolved	Private
FURNITURE	Resolved	Private
FYI	Resolved	Private
GAME / GAMES	Resolved	Private
GARDEN	Resolved	Private
GAY	On-Hold	--
GDN	Resolved	Private
GIFT	Resolved	Private
GIFTS	Resolved	Private
GLOBAL	Resolved	Private
GMBH	Resolved	Private
GOLD	Resolved	Private
GOLF	Resolved	Private
GOO	Resolved	Private
GRATIS	Resolved	Private
GREEN	Resolved	Private
GROCERY	Resolved	Private
GROUP	Resolved	Private
GUARDIAN	Resolved	Private
GUIDE	Resolved	Private
HAIR	Resolved	Private
HEALTH	Resolved	Private
HELP	Resolved	Private
HOCKEY	Resolved	Private
HOME	Resolved	ICANN Board Resolution (4 Feb. 2014)
HOSTING	Resolved	Private
HOT	Resolved	Private
HOTEL	On-Hold	--
HOTELS / HOTEIS	Resolved	ICANN Auction (18 Nov. 2015) Winning Price: USD 2,200,000
IMMO	Resolved	Private
INC	Resolved	Private
INSURANCE	Resolved	Private
JEWELRY	Resolved	Private
JUEGOS	Resolved	Private
KID / KIDS	Active	Private
LATINO	Resolved	Private
LAW	Resolved	Private
LAWYER	Resolved	Private
LEGAL	Resolved	Private
LIFE	Resolved	Private
LIVE	Resolved	Private
LIVING	Resolved	Private
LLC	Resolved	Private

LLP	Resolved	Private
LOANS	Resolved	Private
LOL	Resolved	Private
LOVE	Resolved	Private
LTD	Resolved	Private
LUXURY	Resolved	Private
MAIL	Resolved	ICANN Board Resolution (4 Feb. 2014)
MAP	Resolved	Private
MARKETING	Resolved	Private
MBA	Resolved	Private
MED	Resolved	Private
MEDIA	Resolved	Private
MEMORIAL	Resolved	Private
MERCK	On-Hold	--
MLS	Resolved	ICANN Auction (17 Dec. 2014) Winning Price: USD 3,359,000
MOBILE	Resolved	Private
MOM	Resolved	Private
MONEY	Resolved	Private
MONSTER	Resolved	Private
MOTO	Resolved	Private
MOVIE	Resolved	Private
MUSIC	On-Hold	--
NEWS	Resolved	Private
NOW	Resolved	Private
OKASKA	Resolved	Private
ONE	Resolved	Private
ONLINE	Resolved	Private
PARTY	Resolved	Private
PAY	Resolved	Private
PET / PETS	Resolved	Private
PHD	Resolved	Private
PHONE	Resolved	Private
PHOTOGRAPHY	Resolved	Private
PING	Resolved	ICANN Auction (25 Mar. 2015) Winning Price: USD 1,501,000
PIZZA	Resolved	Private
PLACE	Resolved	Private
PLAY	Resolved	Private
PLUS	Resolved	Private
POKER	Resolved	Private
PROPERTY	Resolved	Private
RACING	Resolved	Private
RADIO	Resolved	Private
REALESTATE	Resolved	Private

REALTY	Resolved	ICANN Auction (22 Oct. 2014) Winning Price: USD 5,588,888
RED	Resolved	Private
RENT	Resolved	Private
RESTAURANT	Resolved	Private
REVIEW	Resolved	Private
RIP	Resolved	Private
RUGBY	Resolved	Private
RUN	Resolved	Private
SALE	Resolved	Private
SALON	Resolved	ICANN Auction (22 Oct. 2014) Winning Price: USD 5,100,575
SARL	Resolved	Private
SAS	Resolved	Private
SAVE	Resolved	Private
SCHOOL	Resolved	Private
SCIENCE	Resolved	Private
SEARCH	Resolved	Private
SECURE	Resolved	Private
SECURITY	Resolved	Private
SEX	Resolved	Private
SHOP	Resolved	ICANN Auction (27 Jan. 2016) Winning Price: USD 41,501,000
SHOPPING	Resolved	Private
SHOW	Resolved	Private
SITE	Resolved	Private
SKI	Resolved	Private
SOCCER	Resolved	Private
SPA	On-Hold	--
SPORT / SPORTS	Resolved	Private
SPOT	Resolved	ICANN Auction (22 Oct. 2014) Winning Price: USD 2,200,000
SRL	Resolved	ICANN Auction (25 Mar. 2015) Winning Price: USD 400,000
STORAGE	Resolved	Private
STORE	Resolved	Private
STREAM	Resolved	Private
STUDIO	Resolved	Private
STYLE	Resolved	Private
SUCKS	Resolved	Private
TALK	Resolved	Private
TAXI	Resolved	Private
TEAM	Resolved	Private
TECH	Resolved	ICANN Auction (17 Sep. 2014) Winning Price: USD 6,760,000

TENNIS	Resolved	Private
THEATER	Resolved	Private
TICKETS	Resolved	Private
TIRES	Resolved	Private
TOUR / TOURS	Resolved	Private
TRADING	Resolved	Private
TUBE	Resolved	Private
UNICOM / UNICORN	Resolved	Private
VIDEO	Resolved	Private
VIP	Resolved	ICANN Auction (17 Sep. 2014) Winning Price: USD 3,000,888
VOTE	Resolved	Private
WEB / WEBS	On-Hold	ICANN Auction (27 July 2016) Winning Price: USD 135,000,000 / USD 1
WEBSITE	Resolved	Private
WEDDING	Resolved	Private
WEIBO	Resolved	Private
WINE	Resolved	Private
WORLD	Resolved	Private
WOW	Resolved	Private
YOGA	Resolved	Private
YOU	Resolved	Private
YUN	Resolved	Private
信息	Resolved	ICANN Auction (4 June 2014) Winning Price: USD 600,000
娱乐	Resolved	Private
广东	Resolved	Private
微博	Resolved	Private
点看 / 點看	Resolved	Private
盛貿飯店/ 盛貿饭店	Resolved	Private
网址	Resolved	Private
网店	Resolved	Private
网站	Resolved	Private

LIST OF EXHIBITS

Exhibit No.	Description
JLK-1	ICANN, <i>gTLD Applicant Guidebook</i> (4 June 2012)
JLK-2	ICANN, New gTLD Application Change Request Process and Criteria, <i>available at</i> https://newgtlds.icann.org/en/applicants/global-support/change-requests (last accessed on 5 Sep. 2018)
JLK-3	ICANN, Base Registry Agreement (31 July 2017)
JLK-4	Email Communications between .WEB Applicants (<i>various dates</i>)
JLK-5	Email from J. Kane to H. Lubsen (7 July 2016)
JLK-6	<i>Ruby Glen, LLC v. ICANN</i> , Case No. 2:16-cv-05505 (C.D. Ca.), Exhibit D to Declaration of Christine Willett in Support of ICANN's Opposition to Plaintiff's <i>Ex Parte</i> Application for Temporary Restraining Order (25 July 2016)
JLK-7	Letter from ICANN to .Web Auction Members (13 July 2016)
JLK-8	Verisign, <i>Verisign Statement Regarding .Web Auction Results</i> (1 Aug. 2016)
JLK-9	Letter from S. Hemphill (Afilias) to A. Atallah (ICANN) (8 Aug. 2016)
JLK-10	Letter from S. Hemphill (Afilias) to A. Atallah (ICANN) (9 Sep. 2016)
JLK-11	Letter from C. Willett (ICANN) to J. Kane (Afilias) (16 Sep. 2016)
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JLK-19	Email from A. de Gramont (Counsel for Afilias) to J. LeVee (Jones Day) (14 June 2018)
JLK-20	Email and attachments from J. LeVee (Jones Day) to A. de Gramont (Counsel for Afilias) (16 June 2018)

EXHIBIT 216

VERISIGN INC/CA

FORM 10-Q (Quarterly Report)

Filed 07/28/16 for the Period Ending 06/30/16

Address	12061 BLUEMONT WAY ATTN: GENERAL COUNSEL RESTON, VA 20190
Telephone	7039483200
CIK	0001014473
Symbol	VRSN
SIC Code	7371 - Computer Programming Services
Industry	Software & Programming
Sector	Technology
Fiscal Year	12/31

**UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549**

FORM 10-Q

(Mark One)

QUARTERLY REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the quarterly period ended June 30, 2016

OR

TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES EXCHANGE ACT OF 1934

For the transition period from _____ to _____

Commission File Number: 000-23593

VERISIGN, INC.

(Exact name of registrant as specified in its charter)

Delaware

(State or other jurisdiction of
incorporation or organization)

12061 Bluemont Way, Reston, Virginia

(Address of principal executive offices)

94-3221585

(I.R.S. Employer
Identification No.)

20190

(Zip Code)

Registrant's telephone number, including area code: (703) 948-3200

Indicate by check mark whether the registrant (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. YES NO

Indicate by check mark whether the registrant has submitted electronically and posted on its corporate Website, if any, every Interactive Data File required to be submitted and posted pursuant to Rule 405 of Regulation S-T (§232.405 of this chapter) during the preceding 12 months (or for such shorter period that the registrant was required to submit and post such files). YES NO

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, a non-accelerated filer, or a smaller reporting company. See the definitions of "large accelerated filer," "accelerated filer" and "smaller reporting company" in Rule 12b-2 of the Exchange Act. (Check one):

Large accelerated filer Accelerated filer Non-accelerated filer Smaller reporting company

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Exchange Act.): YES NO

Indicate the number of shares outstanding of each of the issuer's classes of common stock, as of the latest practicable date:

<u>Class</u>	<u>Shares Outstanding as of July 22, 2016</u>
Common stock, \$.001 par value	106,766,527

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PART I—FINANCIAL INFORMATION

ITEM 1. FINANCIAL STATEMENTS

As required under Item 1—Financial Statements included in this section are as follows:

Financial Statement Description	Page
Condensed Consolidated Balance Sheets as of June 30, 2016 and December 31, 2015	4
Condensed Consolidated Statements of Comprehensive Income for the Three and Six Months Ended June 30, 2016 and 2015	5
Condensed Consolidated Statements of Cash Flows for the Six Months Ended June 30, 2016 and 2015	6
Notes to Condensed Consolidated Financial Statements	7

VERISIGN, INC.
CONDENSED CONSOLIDATED BALANCE SHEETS
(In thousands, except par value)
(Unaudited)

	June 30, 2016	December 31, 2015
<u>ASSETS</u>		
Current assets:		
Cash and cash equivalents	\$ 170,966	\$ 228,659
Marketable securities	1,736,030	1,686,771
Accounts receivable, net	15,086	12,638
Other current assets	22,573	39,856
Total current assets	<u>1,944,655</u>	<u>1,967,924</u>
Property and equipment, net	277,942	295,570
Goodwill	52,527	52,527
Deferred tax assets	13,205	17,361
Other long-term assets	25,844	24,355
Total long-term assets	<u>369,518</u>	<u>389,813</u>
Total assets	<u>\$ 2,314,173</u>	<u>\$ 2,357,737</u>
<u>LIABILITIES AND STOCKHOLDERS' DEFICIT</u>		
Current liabilities:		
Accounts payable and accrued liabilities	\$ 144,361	\$ 188,171
Deferred revenues	699,456	680,483
Subordinated convertible debentures, including contingent interest derivative	632,308	634,326
Total current liabilities	<u>1,476,125</u>	<u>1,502,980</u>
Long-term deferred revenues	288,232	280,859
Senior notes	1,236,272	1,235,354
Deferred tax liabilities	326,112	294,194
Other long-term tax liabilities	114,762	114,797
Total long-term liabilities	<u>1,965,378</u>	<u>1,925,204</u>
Total liabilities	<u>3,441,503</u>	<u>3,428,184</u>
Commitments and contingencies		
Stockholders' deficit:		
Preferred stock—par value \$.001 per share; Authorized shares: 5,000; Issued and outstanding shares: none	—	—
Common stock—par value \$.001 per share; Authorized shares: 1,000,000; Issued shares: 323,941 at June 30, 2016 and 322,990 at December 31, 2015; Outstanding shares: 107,180 at June 30, 2016 and 110,072 at December 31, 2015	324	323
Additional paid-in capital	17,279,468	17,558,822
Accumulated deficit	(18,404,933)	(18,625,599)
Accumulated other comprehensive loss	(2,189)	(3,993)
Total stockholders' deficit	<u>(1,127,330)</u>	<u>(1,070,447)</u>
Total liabilities and stockholders' deficit	<u>\$ 2,314,173</u>	<u>\$ 2,357,737</u>

See accompanying Notes to Condensed Consolidated Financial Statements.

VERISIGN, INC.
CONDENSED CONSOLIDATED STATEMENTS OF COMPREHENSIVE INCOME
(In thousands, except per share data)
(Unaudited)

	Three Months Ended June 30,		Six Months Ended June 30,	
	2016	2015	2016	2015
Revenues	\$ 286,466	\$ 262,539	\$ 568,342	\$ 520,961
Costs and expenses:				
Cost of revenues	48,753	48,221	99,335	96,574
Sales and marketing	19,757	24,329	39,784	46,711
Research and development	14,288	16,347	31,031	33,499
General and administrative	27,401	24,677	55,158	50,975
Total costs and expenses	110,199	113,574	225,308	227,759
Operating income	176,267	148,965	343,034	293,202
Interest expense	(28,859)	(28,503)	(57,663)	(50,520)
Non-operating income (loss), net	1,709	3,201	4,830	(2,354)
Income before income taxes	149,117	123,663	290,201	240,328
Income tax expense	(35,907)	(30,652)	(69,535)	(59,079)
Net income	113,210	93,011	220,666	181,249
Realized foreign currency translation adjustments, included in net income	85	(291)	85	(291)
Unrealized gain on investments	851	147	1,786	234
Realized gain on investments, included in net income	(1)	(69)	(67)	(73)
Other comprehensive income (loss)	935	(213)	1,804	(130)
Comprehensive income	\$ 114,145	\$ 92,798	\$ 222,470	\$ 181,119
Earnings per share:				
Basic	\$ 1.05	\$ 0.80	\$ 2.03	\$ 1.56
Diluted	\$ 0.87	\$ 0.70	\$ 1.68	\$ 1.36
Shares used to compute earnings per share				
Basic	108,067	115,656	108,829	116,394
Diluted	130,588	133,251	131,084	133,546

See accompanying Notes to Condensed Consolidated Financial Statements.

VERISIGN, INC.
CONDENSED CONSOLIDATED STATEMENTS OF CASH FLOWS
(In thousands)
(Unaudited)

	Six Months Ended June 30,	
	2016	2015
Cash flows from operating activities:		
Net income	\$ 220,666	\$ 181,249
Adjustments to reconcile net income to net cash provided by operating activities:		
Depreciation of property and equipment	29,417	31,620
Stock-based compensation	22,891	22,129
Excess tax benefit associated with stock-based compensation	(12,708)	(11,366)
Unrealized (gain) loss on contingent interest derivative on Subordinated Convertible Debentures	(971)	4,311
Payment of contingent interest	(6,544)	(5,225)
Amortization of debt discount and issuance costs	6,590	5,941
Other, net	(1,414)	(1,099)
Changes in operating assets and liabilities		
Accounts receivable	(2,798)	(1,018)
Prepaid expenses and other assets	15,430	7,369
Accounts payable and accrued liabilities	(28,653)	(4,778)
Deferred revenues	26,346	41,247
Net deferred income taxes and other long-term tax liabilities	36,039	37,245
Net cash provided by operating activities	304,291	307,625
Cash flows from investing activities:		
Proceeds from maturities and sales of marketable securities	2,056,607	1,283,367
Purchases of marketable securities	(2,101,863)	(1,747,025)
Purchases of property and equipment	(13,458)	(21,891)
Other investing activities	206	(3,736)
Net cash used in investing activities	(58,508)	(489,285)
Cash flows from financing activities:		
Proceeds from issuance of common stock from option exercises and employee stock purchase plans	8,084	9,014
Repurchases of common stock	(324,235)	(335,885)
Proceeds from borrowings, net of issuance costs	—	492,237
Excess tax benefit associated with stock-based compensation	12,708	11,366
Net cash (used in) provided by financing activities	(303,443)	176,732
Effect of exchange rate changes on cash and cash equivalents	(33)	606
Net decrease in cash and cash equivalents	(57,693)	(4,322)
Cash and cash equivalents at beginning of period	228,659	191,608
Cash and cash equivalents at end of period	\$ 170,966	\$ 187,286
Supplemental cash flow disclosures:		
Cash paid for interest	\$ 57,636	\$ 42,839
Cash paid for income taxes, net of refunds received	\$ 13,994	\$ 14,342

See accompanying Notes to Condensed Consolidated Financial Statements.

VERISIGN, INC.
NOTES TO CONDENSED CONSOLIDATED FINANCIAL STATEMENTS
(Unaudited)

Note 1. Basis of Presentation

Interim Financial Statements

The accompanying unaudited Condensed Consolidated Financial Statements have been prepared by VeriSign, Inc. (“Verisign” or the “Company”) in accordance with the instructions to Form 10-Q pursuant to the rules and regulations of the Securities and Exchange Commission (“SEC”) and, therefore, do not include all information and notes normally provided in audited financial statements. In the opinion of management, all adjustments (consisting of normal recurring accruals and other adjustments) considered necessary for a fair presentation have been included. The results of operations for any interim period are not necessarily indicative of, nor comparable to, the results of operations for any other interim period or for a full fiscal year. These unaudited Condensed Consolidated Financial Statements should be read in conjunction with the Consolidated Financial Statements and related notes contained in Verisign’s fiscal 2015 Annual Report on Form 10-K (the “2015 Form 10-K”) filed with the SEC on February 19, 2016.

Recent Accounting Pronouncements

In May 2014, the Financial Accounting Standards Board (“FASB”) issued Accounting Standards Update (“ASU”) No. 2014-09, *Revenue from Contracts with Customers*, which requires an entity to recognize the amount of revenue to which it expects to be entitled for the transfer of promised goods or services to customers. The ASU will replace most existing revenue recognition guidance in U.S. GAAP when it becomes effective. The new standard will become effective for the Company on January 1, 2018. The standard permits the use of either the retrospective or cumulative effect transition method. The Company is evaluating the effect that ASU 2014-09 will have on its consolidated financial statements and related disclosures. The Company has not yet selected a transition method nor has it determined the effect of the standard on its ongoing financial reporting.

In February 2016, the FASB issued ASU No. 2016-02, *Leases*. The guidance introduces a lessee model that requires most leases to be reported on the balance sheet. This ASU will become effective for the Company on January 1, 2019 and requires the modified retrospective transition method. The Company is currently evaluating the impact of this ASU on its consolidated financial statements and related disclosures.

In March 2016, the FASB issued ASU No. 2016-09, *Improvements to Employee Share-Based Payment Accounting*, which simplifies several aspects of the accounting for share-based payment award transactions, including income tax consequences, classification of awards as either equity or liabilities, and classification on the statement of cash flows. The ASU requires that excess tax benefits and tax deficiencies (the difference between the deduction for tax purposes and the compensation cost recognized for financial reporting purposes) be recognized as income tax expense or benefit in the Consolidated Statement of Comprehensive Income. This change may lead to increased volatility in the provision for income taxes. There are different transition methods for different aspects of the standard. The new standard will be effective for the Company on January 1, 2017 with early adoption permitted. The Company is evaluating the timing of adoption, transition methods and the effect that this ASU will have on its consolidated financial statements and related disclosures.

Note 2. Cash, Cash Equivalents, and Marketable Securities

The following table summarizes the Company's cash, cash equivalents, and marketable securities:

	June 30, 2016	December 31, 2015
	(In thousands)	
Cash	\$ 37,588	\$ 99,027
Money market funds	141,209	137,593
Time deposits	3,932	4,007
Debt securities issued by the U.S. Treasury	1,733,258	1,685,882
Equity securities of public companies	2,772	890
Total	<u>\$ 1,918,759</u>	<u>\$ 1,927,399</u>
Included in Cash and cash equivalents	\$ 170,966	\$ 228,659
Included in Marketable securities	\$ 1,736,030	\$ 1,686,771
Included in Other long-term assets (Restricted cash)	\$ 11,763	\$ 11,969

The fair value of the debt securities held as of June 30, 2016 was \$1.7 billion, including less than \$0.6 million of gross and net unrealized gains. All of the debt securities held as of June 30, 2016 are scheduled to mature in less than one year.

Note 3. Fair Value of Financial Instruments
Assets and Liabilities Measured at Fair Value on a Recurring Basis

The following table summarizes the Company's financial assets and liabilities measured at fair value on a recurring basis as of June 30, 2016 and December 31, 2015 :

	Total Fair Value	Fair Value Measurement Using		
		(Level 1)	(Level 2)	(Level 3)
(In thousands)				
As of June 30, 2016:				
Assets:				
Investments in money market funds	\$ 141,209	\$ 141,209	\$ —	\$ —
Debt securities issued by the U.S. Treasury	1,733,258	1,733,258	—	—
Equity securities of public companies	\$ 2,772	\$ 2,772	\$ —	\$ —
Foreign currency forward contracts (1)	563	—	563	—
Total	\$ 1,877,802	\$ 1,877,239	\$ 563	\$ —
Liabilities:				
Contingent interest derivative on the Subordinated Convertible Debentures	\$ 22,611	\$ —	\$ —	\$ 22,611
Foreign currency forward contracts (2)	65	—	65	—
Total	\$ 22,676	\$ —	\$ 65	\$ 22,611
As of December 31, 2015:				
Assets:				
Investments in money market funds	\$ 137,593	\$ 137,593	\$ —	\$ —
Debt securities issued by the U.S. Treasury	1,685,882	1,685,882	—	—
Equity securities of public companies	890	890	—	—
Foreign currency forward contracts (1)	230	—	230	—
Total	\$ 1,824,595	\$ 1,824,365	\$ 230	\$ —
Liabilities:				
Contingent interest derivative on the Subordinated Convertible Debentures	\$ 30,126	\$ —	\$ —	\$ 30,126
Foreign currency forward contracts (2)	164	—	164	—
Total	\$ 30,290	\$ —	\$ 164	\$ 30,126

(1) Included in Other current assets

(2) Included in Accounts payable and accrued liabilities

The fair value of the Company's investments in money market funds approximates their face value. Such instruments are classified as Level 1 and are included in Cash and cash equivalents. The fair value of the debt securities consisting of U.S. Treasury bills is based on their quoted market prices and are classified as Level 1. Debt securities purchased with original maturities in excess of three months are included in Marketable securities. The fair value of the equity securities of public companies is based on quoted market prices and are classified as Level 1. Investments in equity securities of public companies are included in Marketable securities. The fair value of the Company's foreign currency forward contracts is based on foreign currency rates quoted by banks or foreign currency dealers and other public data sources.

The Company utilizes a valuation model to estimate the fair value of the contingent interest derivative on the subordinated convertible debentures due 2037 ("the Subordinated Convertible Debentures"). The inputs to the model include stock price, bond price, risk free interest rates, volatility, and credit spread observations. As several significant inputs are not observable, the overall fair value measurement of the derivative is classified as Level 3. The volatility and credit spread assumptions used in the calculation are the most significant unobservable inputs. As of June 30, 2016, the valuation of the contingent interest derivative assumed a volatility rate of approximately 26% and a credit spread of approximately 6%. The fair value of the contingent interest derivative would not have significantly changed using a volatility rate of either 21% or 31%, or a credit spread of either 5% or 7%.

The following table summarizes the change in the fair value of the Company's contingent interest derivative on the Subordinated Convertible Debentures during the three and six months ended June 30, 2016 and 2015:

	Three Months Ended June 30,		Six Months Ended June 30,	
	2016	2015	2016	2015
	(In thousands)			
Beginning balance	\$ 22,517	\$ 28,549	\$ 30,126	\$ 26,755
Payment of contingent interest	—	—	(6,544)	(5,225)
Unrealized loss (gain)	94	(2,708)	(971)	4,311
Ending balance	\$ 22,611	\$ 25,841	\$ 22,611	\$ 25,841

On February 15, 2016, the Company paid contingent interest of \$6.5 million in addition to the normal coupon interest to holders of record of the Subordinated Convertible Debentures as of February 1, 2016. In February 2016, the upside trigger on the Subordinated Convertible Debentures was met for the six month interest period ending in August 2016. On August 15, 2016, the Company will pay contingent interest of \$6.8 million in addition to the normal coupon interest to holders of record of the Subordinated Convertible Debentures as of August 1, 2016. The \$ 6.8 million contingent interest payable in August 2016 is included in the balance of the contingent interest derivative on the Subordinated Convertible Debentures as of June 30, 2016 .

The Company's other financial instruments include cash, accounts receivable, restricted cash, and accounts payable. As of June 30, 2016 , the carrying value of these financial instruments approximated their fair value. The fair value of the Company's Subordinated Convertible Debentures was \$ 3.1 billion as of June 30, 2016 . The fair values of the senior notes due 2023 (the "2023 Senior Notes") and the senior notes due 2025 (the "2025 Senior Notes") were \$ 761.3 million and \$512.8 million , respectively, as of June 30, 2016 . The fair values of these debt instruments are based on available market information from public data sources and are classified as Level 2.

Note 4. Other Balance Sheet Items

Other Current Assets

Other current assets consist of the following:

	June 30,	December 31,
	2016	2015
	(In thousands)	
Prepaid expenses	\$ 18,194	\$ 14,823
Income tax receivables	2,104	23,098
Other	2,275	1,935
Total other current assets	\$ 22,573	\$ 39,856

The Income tax receivables as of December 31, 2015 primarily consists of the remaining U.S. federal income tax overpayment from prior years. As of June 30, 2016, substantially all of the remaining overpayment has been used to offset current year income taxes.

Accounts Payable and Accrued Liabilities

Accounts payable and accrued liabilities consist of the following:

	June 30,	December 31,
	2016	2015
	(In thousands)	
Accounts payable	\$ 17,661	\$ 23,298
Accrued employee compensation	40,118	51,851
Customer deposits, net	39,558	48,307
Interest Payable	27,701	27,701
Income taxes payable and other tax liabilities	4,485	16,943
Other accrued liabilities	14,838	20,071
Total accounts payable and accrued liabilities	\$ 144,361	\$ 188,171

Accrued employee compensation primarily consists of liabilities for employee leave, salaries, payroll taxes, employee contributions to the employee stock purchase plan, and incentive compensation. Accrued employee incentive compensation as of December 31, 2015, was paid during the six months ended June 30, 2016. Income taxes payable and other tax liabilities decreased in the six months ended June 30, 2016 as a result of payments made for income taxes in certain non-U.S. jurisdictions. Interest payable includes coupon interest on the Subordinated Convertible Debentures, the 2023 Senior Notes and the 2025 Senior Notes.

Note 5. Stockholders' Deficit

On February 11, 2016, the Company's Board of Directors authorized the repurchase of approximately \$ 611.2 million of its common stock, in addition to the \$ 388.8 million remaining available for repurchase under the previous share repurchase program for a total repurchase authorization of up to \$1.0 billion of its common stock. The share repurchase program has no expiration date. Purchases made under the program could be effected through open market transactions, block purchases, accelerated share repurchase agreements or other negotiated transactions. During the three and six months ended June 30, 2016 the Company repurchased 1.7 million and 3.5 million shares of its common stock, respectively, at an average stock price of \$86.46 and \$84.63, respectively. The aggregate cost of the repurchases in the three and six months ended June 30, 2016 was \$149.9 million and \$299.8 million, respectively. As of June 30, 2016, \$765.9 million remained available for further repurchases under the share repurchase program.

During the six months ended June 30, 2016, the Company placed 0.3 million shares, at an average stock price of \$80.92, and for an aggregate cost of \$24.4 million, into treasury stock for purposes related to tax withholding upon vesting of Restricted Stock Units ("RSUs").

Since inception the Company has repurchased 216.8 million shares of its common stock for an aggregate cost of \$7.8 billion, which is presented as a reduction of Additional paid-in capital.

Note 6. Calculation of Earnings per Share

The following table presents the computation of weighted-average shares used in the calculation of basic and diluted earnings per share:

	Three Months Ended June 30,		Six Months Ended June 30,	
	2016	2015	2016	2015
	(In thousands)			
Weighted-average shares of common stock outstanding	108,067	115,656	108,829	116,394
Weighted-average potential shares of common stock outstanding:				
Conversion spread related to Convertible Debentures	21,872	16,973	21,472	16,392
Unvested RSUs, stock options, and ESPP	649	622	783	760
Shares used to compute diluted earnings per share	130,588	133,251	131,084	133,546

The calculation of diluted weighted average shares outstanding, excludes potentially dilutive securities, the effect of which would have been anti-dilutive, as well as performance based RSUs granted by the Company for which the relevant performance criteria have not been achieved. The number of potential shares excluded from the calculation was not significant in any period presented.

Note 7. Stock-based Compensation

Stock-based compensation is classified in the Condensed Consolidated Statements of Comprehensive Income in the same expense line items as cash compensation. The following table presents the classification of stock-based compensation:

	Three Months Ended June 30,		Six Months Ended June 30,	
	2016	2015	2016	2015
	(In thousands)			
Cost of revenues	\$ 1,747	\$ 1,741	\$ 3,588	\$ 3,480
Sales and marketing	1,457	1,818	3,090	3,117
Research and development	1,587	1,691	3,290	3,412
General and administrative	6,341	6,751	12,923	12,120
Total stock-based compensation expense	\$ 11,132	\$ 12,001	\$ 22,891	\$ 22,129

The following table presents the nature of the Company's total stock-based compensation:

	Three Months Ended June 30,		Six Months Ended June 30,	
	2016	2015	2016	2015
	(In thousands)			
RSUs	\$ 8,625	\$ 9,210	\$ 17,758	\$ 17,504
Performance-based RSUs	2,285	2,385	4,662	3,838
ESPP	822	1,113	1,670	2,194
Capitalization (Included in Property and equipment, net)	(600)	(707)	(1,199)	(1,407)
Total stock-based compensation expense	\$ 11,132	\$ 12,001	\$ 22,891	\$ 22,129

Note 8. Debt and Interest Expense

The following table presents the components of the Company's interest expense:

	Three Months Ended June 30,		Six Months Ended June 30,	
	2016	2015	2016	2015
	(In thousands)			
Contractual interest on Subordinated Convertible Debentures	\$ 10,156	\$ 10,156	\$ 20,312	\$ 20,312
Contractual interest on Senior Notes	15,234	15,234	30,469	24,271
Amortization of debt discount on the Subordinated Convertible Debentures	2,744	2,527	5,433	5,004
Credit facility fees and other interest expense	725	586	1,449	933
Total interest expense	\$ 28,859	\$ 28,503	\$ 57,663	\$ 50,520

Note 9. Non-operating Income (Loss), Net

The following table presents the components of Non-operating income (loss), net:

	Three Months Ended June 30,		Six Months Ended June 30,	
	2016	2015	2016	2015
	(In thousands)			
Unrealized (loss) gain on contingent interest derivative on Subordinated Convertible Debentures	\$ (94)	\$ 2,708	\$ 971	\$ (4,311)
Interest income	1,522	373	2,564	632
Other, net	281	120	1,295	1,325
Total non-operating income (loss), net	\$ 1,709	\$ 3,201	\$ 4,830	\$ (2,354)

Unrealized gains and losses on the contingent interest derivative on the Subordinated Convertible Debentures reflect the change in value of the derivative that results primarily from changes in the Company's stock price.

Note 10. Income Taxes

The following table presents income tax expense and the effective tax rate:

	Three Months Ended June 30,		Six Months Ended June 30,	
	2016	2015	2016	2015
	(Dollars in thousands)			
Income tax expense	\$ 35,907	\$ 30,652	\$ 69,535	\$ 59,079
Effective tax rate	24%	25%	24%	25%

The effective tax rate for the three and six months ended June 30, 2016 and 2015 is lower than the statutory federal rate of 35% primarily due to tax benefits from foreign income taxed at lower rates, partially offset by state income taxes.

Deferred tax liabilities as of June 30, 2016 reflect the use of a portion of U.S. foreign tax credits during the six months ended June 30, 2016, and an increase in the deferred tax liability related to the Subordinated Convertible Debentures.

Note 11. Subsequent Event

Subsequent to June 30, 2016, the Company incurred a commitment to pay approximately \$130.0 million for the future assignment of contractual rights, which are subject to third-party consent. The payment is expected to occur during the third quarter of 2016.

ITEM 2. MANAGEMENT'S DISCUSSION AND ANALYSIS OF FINANCIAL CONDITION AND RESULTS OF OPERATIONS

You should read the following discussion in conjunction with the interim unaudited Condensed Consolidated Financial Statements and related notes.

This Quarterly Report on Form 10-Q contains forward-looking statements within the meaning of Section 27A of the Securities Act of 1933, as amended, and Section 21E of the Securities Exchange Act of 1934, as amended (the "Exchange Act"). These forward-looking statements involve risks and uncertainties, including, among other things, statements regarding our anticipated costs and expenses and revenue mix. Forward-looking statements include, among others, those statements including the words "expects," "anticipates," "intends," "believes" and similar language. Our actual results may differ significantly from those projected in the forward-looking statements. Factors that might cause or contribute to such differences include, but are not limited to, those discussed in the section titled "Risk Factors" in Part II, Item 1A of this Quarterly Report on Form 10-Q. You should also carefully review the risks described in other documents we file from time to time with the Securities and Exchange Commission, including the Quarterly Reports on Form 10-Q or Current Reports on Form 8-K that we file in 2016 and our 2015 Form 10-K, which was filed on February 19, 2016, which discuss our business in greater detail. You are cautioned not to place undue reliance on the forward-looking statements, which speak only as of the date of this Quarterly Report on Form 10-Q. We undertake no obligation to publicly release any revisions to the forward-looking statements or reflect events or circumstances after the date of this document.

Overview

We are a global provider of domain name registry services and internet security, enabling internet navigation for many of the world's most recognized domain names and providing protection for websites and enterprises around the world. Our Registry Services ensure the security, stability and resiliency of key internet infrastructure and services, including the .com and .net domains, two of the internet's root servers, and the operation of the root zone maintainer function for the core of the internet's DNS. Our product suite also includes Security Services, consisting of DDoS Protection Services, iDefense Services, and Managed DNS Services. Revenues from Security Services are not significant in relation to our consolidated revenues.

As of June 30, 2016, we had approximately 143.2 million names in the domain name base for .com and .net, our principal registries. The number of domain names registered is largely driven by continued growth in online advertising, e-commerce, and the number of internet users, which is partially driven by greater availability of internet access, as well as marketing activities carried out by us and third-party registrars. Growth in the number of domain names under our management may be hindered by certain factors, including overall economic conditions, competition from ccTLDs, the introduction of new gTLDs, and ongoing changes in the internet practices and behaviors of consumers and businesses. Factors such as the evolving practices and preferences of internet users, and how they navigate the internet, as well as the motivation of domain name registrants and how they will manage their investment in domain names, can negatively impact our business and the demand for new domain name registrations and renewals.

Business Highlights and Trends

- We recorded revenues of \$286.5 million and \$568.3 million during the three and six months ended June 30, 2016. This represents an increase of 9%, as compared to the same periods in 2015.
- We recorded operating income of \$176.3 million and \$343.0 million during the three and six months ended June 30, 2016. This represents an increase of 18% and 17%, respectively, as compared to the same periods in 2015.
- We added 0.8 million net new names during the second quarter, ending with 143.2 million names in the domain name base for .com and .net, which represents a 7% increase over the base at the end of the second quarter in 2015.
- During the three months ended June 30, 2016, we processed 8.6 million new domain name registrations for .com and .net as compared to 8.7 million for the same period in 2015.
- The final .com and .net renewal rate for the first quarter of 2016 was 74.4% compared with 73.4% for the same quarter in 2015. Renewal rates are not fully measurable until 45 days after the end of the quarter.
- During the three months ended June 30, 2016, we repurchased 1.7 million shares of our common stock under the share repurchase program for \$149.9 million. As of June 30, 2016, \$765.9 million remained available for further repurchases under our share repurchase program.

- Through July 27, 2016, we repurchased an additional 0.5 million shares for \$42.3 million under our share repurchase program.
- We generated cash flows from operating activities of \$304.3 million during the six months ended June 30, 2016, compared to \$307.6 million in the same period last year.
- On July 28, 2016, we announced an increase in the annual fee for the .net domain name registration from \$7.46 to \$8.20, effective February 1, 2017, per our agreement with ICANN.

Pursuant to our agreements with ICANN, we make available on our website (at www.Verisign.com/zone) files containing all active domain names registered in the .com and .net registries. At the same website address, we make available a summary of the active zone count registered in the .com and .net registries and the number of .com and .net domain names in the domain name base. The domain name base is the active zone plus the number of domain names that are registered but not configured for use in the respective top level domain zone file plus the number of domain names that are in a client or server hold status. These files and the related summary data are updated at least once per day. The update times may vary each day. The number of domain names provided in this Form 10-Q are as of midnight of the date reported. Information available on, or accessible through, our website is not incorporated herein by reference.

Results of Operations

The following table presents information regarding our results of operations as a percentage of revenues:

	Three Months Ended June 30,		Six Months Ended June 30,	
	2016	2015	2016	2015
Revenues	100.0 %	100.0 %	100.0 %	100.0 %
Costs and expenses:				
Cost of revenues	17.0	18.4	17.5	18.5
Sales and marketing	6.9	9.3	7.0	9.0
Research and development	5.0	6.2	5.5	6.4
General and administrative	9.6	9.4	9.7	9.8
Total costs and expenses	38.5	43.3	39.7	43.7
Operating income	61.5	56.7	60.3	56.3
Interest expense	(10.1)	(10.9)	(10.1)	(9.7)
Non-operating income (loss), net	0.6	1.2	0.8	(0.5)
Income before income taxes	52.0	47.0	51.0	46.1
Income tax expense	(12.5)	(11.7)	(12.2)	(11.3)
Net income	39.5 %	35.3 %	38.8 %	34.8 %

Revenues

Revenues related to our Registry Services are primarily derived from registrations for domain names in the .com and .net domain name registries. We also derive revenues from operating domain name registries for several other TLDs and from providing back-end registry services to a number of TLD registry operators, all of which are not significant in relation to our consolidated revenues. For domain names registered with the .com and .net registries we receive a fee from third-party registrars per annual registration that is fixed pursuant to our agreements with ICANN. Individual customers, called registrants, contract directly with third-party registrars or their resellers, and the third-party registrars in turn register the domain names with Verisign. Changes in revenues are driven largely by changes in the number of new domain name registrations and the renewal rate for existing registrations as well as the impact of new and prior price increases, to the extent permitted by ICANN and the DOC. New registrations and the renewal rate for existing registrations are impacted by continued growth in online advertising, e-commerce, and the number of internet users, as well as marketing activities carried out by us and third-party registrars. We increased the annual fee for a .net domain name registration from \$6.18 to \$6.79 on February 1, 2015, and from \$6.79 to \$7.46 on February 1, 2016. On July 28, 2016, we announced an increase in the annual fee for the .net domain name registration from \$7.46 to \$8.20, effective February 1, 2017. The annual fee for a .com domain name registration is fixed at \$7.85 for the duration of the current .com Registry Agreement through November 30, 2018, except that prices may be raised by up to 7% each year due to the imposition of any new Consensus Policy or documented extraordinary expense resulting from an attack or threat of attack on the Security and Stability (each as defined in the .com Registry Agreement) of the DNS, subject to approval of the DOC. We offer promotional marketing programs for our registrars based upon market conditions and the business environment in which the registrars operate. All fees paid to us for .com and .net registrations are in U.S. dollars.

Revenues from Security Services are not significant in relation to our total consolidated revenues.

A comparison of revenues is presented below:

	Three Months Ended June 30,			Six Months Ended June 30,		
	2016	% Change	2015	2016	% Change	2015
(Dollars in thousands)						
Revenues	\$ 286,466	9%	\$ 262,539	\$ 568,342	9%	\$ 520,961

The following table compares domain name base for *.com* and *.net* managed by our Registry Services business:

	June 30, 2016	% Change	June 30, 2015
Domain name base for <i>.com</i> and <i>.net</i>	143.2 million	7%	133.5 million

Revenues increased by \$ 23.9 million and \$47.4 million during the three and six months ended June 30, 2016, respectively, as compared to the same periods last year, primarily due to an increase in revenues from the operation of the registries for the *.com* and *.net* TLDs. The increase in revenues from the operation of the registries for the *.com* and *.net* TLDs was driven by a 7% increase in the domain name base for *.com* and *.net* and an increase in the *.net* domain name registration fees in February 2015 and 2016.

Growth in the domain name base has been primarily driven by continued internet growth and marketing activities carried out by us and third-party registrars. During the second half of 2015 and the first quarter of 2016 we experienced an increased volume of new domain name registrations primarily from our registrars in China. The volume of these new registrations has been inconsistent and periodic compared to prior periods, and by the end of the first quarter of 2016, reverted back to a more normalized registration pace. However, ongoing economic uncertainty, competitive pressure from ccTLDs, the introduction of new gTLDs, ongoing changes in internet practices and behaviors of consumers and business, as well as the motivation of existing domain name registrants and how they will manage their investment in domain names, has limited the rate of growth of the domain name base in recent years and may continue to do so in the remainder of 2016 and beyond.

We expect revenues to remain consistent in the second half of 2016, as compared to the six months ended June 30, 2016.

Geographic revenues

We generate revenues in the U.S.; Europe, the Middle East and Africa (“EMEA”); China; and certain other countries including Canada, Australia and Japan.

The following table presents a comparison of our geographic revenues:

	Three Months Ended June 30,			Six Months Ended June 30,		
	2016	% Change	2015	2016	% Change	2015
(Dollars in thousands)						
U.S.	\$ 165,756	4 %	\$ 159,208	\$ 329,799	4 %	\$ 316,716
EMEA	52,710	9 %	48,233	103,665	9 %	95,239
China	32,727	71 %	19,092	63,926	73 %	36,969
Other	35,273	(2)%	36,006	70,952	(2)%	72,037
Total revenues	\$ 286,466		\$ 262,539	\$ 568,342		\$ 520,961

Revenues for our Registry Services business are attributed to the country of domicile and the respective regions in which our registrars are located, however, this may differ from the regions where the registrars operate or where registrants are located. Revenue growth for each region may be impacted by registrars reincorporating, relocating, or from acquisitions or changes in affiliations of resellers. Revenue growth for each region may also be impacted by registrars domiciled in one region, registering domain names in another region. Although revenues continued to grow in the more mature markets of the U.S. and EMEA, China saw the highest growth rate for both the three and six months ended June 30, 2016 due to the increased volume of new registrations during the second half of 2015 and the first quarter of 2016.

Cost of revenues

Cost of revenues consist primarily of salaries and employee benefits expenses for our personnel who manage the operational systems, depreciation expenses, operational costs associated with the delivery of our services, fees paid to ICANN, customer support and training, consulting and development services, costs of facilities and computer equipment used in these activities, telecommunications expense and allocations of indirect costs such as corporate overhead.

A comparison of cost of revenues is presented below:

	Three Months Ended June 30,			Six Months Ended June 30,		
	2016	% Change	2015	2016	% Change	2015
	(Dollars in thousands)					
Cost of revenues	\$ 48,753	1%	\$ 48,221	\$ 99,335	3%	\$ 96,574

Cost of revenues expenses remained consistent during the three months ended June 30, 2016, as compared to the same period last year.

Cost of revenues increased by \$2.8 million during the six months ended June 30, 2016, as compared to the same period last year, primarily due to a \$3.4 million increase in salary and employee benefits expenses. Salary and employee benefits expenses increased primarily due to an increase in average headcount and an increase in bonus expenses.

We expect cost of revenues as a percentage of revenues to remain consistent during the remainder of 2016 compared to the six months ended June 30, 2016.

Sales and marketing

Sales and marketing expenses consist primarily of salaries, sales commissions, sales operations and other personnel-related expenses, travel and related expenses, trade shows, costs of lead generation, costs of computer and communications equipment and support services, facilities costs, consulting fees, costs of marketing programs, such as online, television, radio, print and direct mail advertising costs, and allocations of indirect costs such as corporate overhead.

A comparison of sales and marketing expenses is presented below:

	Three Months Ended June 30,			Six Months Ended June 30,		
	2016	% Change	2015	2016	% Change	2015
	(Dollars in thousands)					
Sales and marketing	\$ 19,757	(19)%	\$ 24,329	\$ 39,784	(15)%	\$ 46,711

Sales and marketing expenses decreased by \$ 4.6 million during the three months ended June 30, 2016, as compared to the same period last year, primarily due to a \$3.3 million decrease in advertising and consulting expenses. Advertising and consulting expenses decreased primarily due to the timing of marketing programs for our Registry Services business and a decrease in expenses related to our Security Services business.

Sales and marketing expenses decreased by \$6.9 million during the six months ended June 30, 2016, as compared to the same period last year, primarily due to a \$5.5 million decrease in advertising and consulting expenses. Advertising and consulting expenses decreased primarily due to the timing of marketing programs for our Registry Services business and a decrease in expenses related to our Security Services business.

We expect sales and marketing expenses as a percentage of revenues to increase during the remainder of 2016 compared to the six months ended June 30, 2016 as the volume of marketing initiatives increases. We expect sales and marketing expenses as a percent of revenues for full year 2016 to be at comparable levels to 2015.

Research and development

Research and development expenses consist primarily of costs related to research and development personnel, including salaries and other personnel-related expenses, consulting fees, facilities costs, computer and communications equipment, support services used in our service and technology development, and allocations of indirect costs such as corporate overhead.

A comparison of research and development expenses is presented below:

	Three Months Ended June 30,			Six Months Ended June 30,		
	2016	% Change	2015	2016	% Change	2015
	(Dollars in thousands)					
Research and development	\$ 14,288	(13)%	\$ 16,347	\$ 31,031	(7)%	\$ 33,499

Research and development expenses decreased by \$2.1 million during the three months ended June 30, 2016, as compared to the same period last year, primarily due to a decrease in salary and employee benefits expenses and allocated overhead expenses resulting from a reduction in headcount.

Research and development expenses decreased by \$2.5 million during the six months ended June 30, 2016, as compared to the same period last year, primarily due to a decrease in salary and employee benefits expenses and allocated overhead expenses resulting from a reduction in headcount.

We expect research and development expenses as a percentage of revenues to remain consistent during the remainder of 2016 compared to the six months ended June 30, 2016.

General and administrative

General and administrative expenses consist primarily of salaries and other personnel-related expenses for our executive, administrative, legal, finance, information technology and human resources personnel, costs of facilities, computer and communications equipment, management information systems, support services, professional services fees, certain tax and license fees, and bad debt expense, offset by allocations of indirect costs such as facilities and shared services expenses to other cost types.

A comparison of general and administrative expenses is presented below:

	Three Months Ended June 30,			Six Months Ended June 30,		
	2016	% Change	2015	2016	% Change	2015
(Dollars in thousands)						
General and administrative	\$ 27,401	11%	\$ 24,677	\$ 55,158	8%	\$ 50,975

General and administrative expenses increased by \$2.7 million during the three months ended June 30, 2016, as compared to the same period last year, primarily due to a \$1.6 million increase in legal expenses and a \$1.4 million increase in salary and employee benefits expenses. Legal expenses increased primarily due to an increase in services performed by external legal counsel. Salary and employee benefits expenses increased primarily due to increases in bonus expenses and average headcount.

General and administrative expenses increased by \$4.2 million during the six months ended June 30, 2016, as compared to the same period last year, primarily due to a \$3.4 million increase in salary and employee benefits expenses, and a \$2.3 million increase in legal expenses, partially offset by a \$1.4 million decrease in depreciation expenses. Salary and employee benefits expenses increased primarily due to increases in bonus expenses and headcount. Legal expenses increased due to an increase in services performed by external legal counsel. Depreciation expense decreased due to a decrease in capital expenditures in recent years.

We expect general and administrative expenses as a percentage of revenues to remain consistent during the remainder of 2016 compared to the six months ended June 30, 2016.

Interest expense

The following table presents the components of Interest expense:

	Three Months Ended June 30,		Six Months Ended June 30,	
	2016	2015	2016	2015
(In thousands)				
Contractual interest on Subordinated Convertible Debentures	\$ 10,156	\$ 10,156	\$ 20,312	\$ 20,312
Contractual interest on Senior Notes	15,234	15,234	30,469	24,271
Amortization of debt discount on the Subordinated Convertible Debentures	2,744	2,527	5,433	5,004
Credit facility fees and other interest expense	725	586	1,449	933
Total interest expense	\$ 28,859	\$ 28,503	\$ 57,663	\$ 50,520

Contractual interest on Senior Notes increased during the six months ended June 30, 2016 due to a \$6.2 million increase in interest expense related to the 2025 Senior Notes which were issued in March 2015. We expect interest expense to remain consistent during the remainder of 2016 as compared to the six months ended June 30, 2016.

Non-operating income (loss), net

The following table presents the components of Non-operating income (loss), net:

	Three Months Ended June 30,		Six Months Ended June 30,	
	2016	2015	2016	2015
(In thousands)				
Unrealized (loss) gain on contingent interest derivative on Subordinated Convertible Debentures	\$ (94)	\$ 2,708	\$ 971	\$ (4,311)
Interest income	1,522	373	2,564	632
Other, net	281	120	1,295	1,325
Total non-operating income (loss), net	<u>\$ 1,709</u>	<u>\$ 3,201</u>	<u>\$ 4,830</u>	<u>\$ (2,354)</u>

Unrealized gains and losses on the contingent interest derivative on the Subordinated Convertible Debentures reflect the change in value of the derivative that results primarily from changes in our stock price. Interest income increased during both the three and six months ended June 30, 2016 primarily due to an increase in interest rates and a higher average invested balance.

Income tax expense

The following table presents income tax expense and the effective tax rate:

	Three Months Ended June 30,		Six Months Ended June 30,	
	2016	2015	2016	2015
(Dollars in thousands)				
Income tax expense	\$ 35,907	\$ 30,652	\$ 69,535	\$ 59,079
Effective tax rate	24%	25%	24%	25%

The effective tax rate for the three and six months ended June 30, 2016 and 2015 was lower than the statutory federal rate of 35% primarily due to tax benefits from foreign income taxed at lower rates, partially offset by state income taxes.

Liquidity and Capital Resources

	June 30, 2016	December 31, 2015
	(In thousands)	
Cash and cash equivalents	\$ 170,966	\$ 228,659
Marketable securities	1,736,030	1,686,771
Total	<u>\$ 1,906,996</u>	<u>\$ 1,915,430</u>

As of June 30, 2016, our principal source of liquidity was \$171.0 million of cash and cash equivalents and \$1.7 billion of marketable securities. The marketable securities primarily consist of debt securities issued by the U.S. Treasury meeting the criteria of our investment policy, which is focused on the preservation of our capital through investment in investment grade securities. The cash equivalents consist of amounts invested in money market funds and U.S. Treasury bills purchased with original maturities of less than 90 days. As of June 30, 2016, all of our debt securities have contractual maturities of less than one year. Our cash and cash equivalents are readily accessible. For additional information on our investment portfolio, see Note 2, "Cash, Cash Equivalents, and Marketable Securities," of our Notes to Condensed Consolidated Financial Statements in Part I, Item I of this Quarterly Report on Form 10-Q.

As of June 30, 2016, the amount of cash and cash equivalents and marketable securities held by foreign subsidiaries was \$1.3 billion. Our intent remains to indefinitely reinvest these funds outside of the U.S. and accordingly, we have not provided deferred U.S. taxes for these funds. In the event funds from foreign operations are needed to fund operations in the U.S. and if U.S. tax has not already been provided, we would be required to accrue and pay additional U.S. taxes in order to repatriate these funds.

As of June 30, 2016, we had \$500.0 million principal amount outstanding of the 5.25% senior unsecured notes due 2025 and \$750.0 million principal amount outstanding of the 4.625% senior unsecured notes due 2023.

As of June 30, 2016, there were no borrowings outstanding under the \$200.0 million unsecured revolving credit facility that will expire in 2020.

As of June 30, 2016, we had \$1.25 billion principal amount outstanding of 3.25% subordinated convertible debentures due 2037. The price of our common stock exceeded the conversion price threshold trigger during the second quarter of 2016. Accordingly, the Subordinated Convertible Debentures are convertible at the option of each holder through September 30, 2016. We do not expect a material amount of the Subordinated Convertible Debentures to be converted in the near term as the trading price of the debentures exceeds the value that is likely to be received upon conversion. However, we cannot provide any assurance that the trading price of the debentures will continue to exceed the value that would be derived upon conversion or that the holders will not elect to convert the Subordinated Convertible Debentures. If a holder elects to convert its Subordinated Convertible Debentures, we are permitted under the Indenture to pursue an exchange in lieu of conversion or to settle the conversion value (as defined in the Indenture) in cash, stock, or a combination thereof. If we choose not to pursue or cannot complete an exchange in lieu of conversion, we currently have the intent and the ability (based on current facts and circumstances) to settle the principal amount of the Subordinated Convertible Debentures in cash. However, if the principal amount of the Subordinated Convertible Debentures that holders actually elect to convert exceeds our cash on hand and cash from operations, we will need to draw cash from existing financing or pursue additional sources of financing to settle the Subordinated Convertible Debentures in cash. We cannot provide any assurances that we will be able to obtain new sources of financing on terms acceptable to us or at all, nor can we assure that we will be able to obtain such financing in time to settle the Subordinated Convertible Debentures that holders elect to convert.

On February 15, 2016, we paid contingent interest of \$6.5 million in addition to the normal coupon interest on our Subordinated Convertible Debentures. In February 2016, the upside trigger on the Subordinated Convertible Debentures was met for the six month interest period ending in August 2016. On August 15, 2016, we will pay contingent interest of \$6.8 million in addition to the normal coupon interest to holders of record of the Subordinated Convertible Debentures as of August 1, 2016. The upside trigger is met if the Subordinated Convertible Debentures' average trading price is at least 150% of par during the 10 trading days before each semi-annual interest period. The upside trigger is tested semi-annually for the following six months. The semi-annual upside contingent interest payment, for a given period, can be approximated by applying the annual rate of 0.5% to the aggregate market value of all outstanding Subordinated Convertible Debentures and dividing by two for that semi-annual period payment amount.

We derive significant tax savings from the Subordinated Convertible Debentures. During the first half of 2016 and 2015, the interest deduction, for income tax purposes, related to our Subordinated Convertible Debentures, excluding contingent interest, was \$87.7 million and \$82.4 million, respectively, compared to coupon interest expense of \$20.3 million for each of the same periods. For income tax purposes, we deduct interest expense on the Subordinated Convertible Debentures calculated at 8.5% of the adjusted issue price, subject to adjustment for actual versus projected contingent interest. The adjusted issue price, and consequently the interest deduction for income tax purposes, grows over the term due to the difference between the

interest deduction taken using a comparable yield of 8.5% on the adjusted issue price, and the coupon rate of 3.25% on the principal amount, compounded annually. The interest deduction taken is subject to recapture upon settlement to the extent that the amount paid (in cash or stock) to settle the Subordinated Convertible Debentures is less than the adjusted issue price. Interest recognized in accordance with GAAP, which is calculated at 8.39% of the liability component of the Subordinated Convertible Debentures, will also grow over the term, but at a slower rate. This difference will result in a continuing increase in the deferred tax liability on our Condensed Consolidated Balance Sheet.

Subsequent to June 30, 2016, we incurred a commitment to pay approximately \$130.0 million for the future assignment of contractual rights, which are subject to third-party consent. The payment is expected to occur during the third quarter of 2016.

We believe existing cash, cash equivalents and marketable securities, and funds generated from operations, together with our borrowing capacity under the unsecured revolving credit facility should be sufficient to meet our working capital, capital expenditure requirements, and to service our debt for at least the next 12 months. We regularly assess our cash management approach and activities in view of our current and potential future needs.

In summary, our cash flows for the six months ended June 30, 2016 and 2015 are as follows:

	Six Months Ended June 30,	
	2016	2015
	(In thousands)	
Net cash provided by operating activities	\$ 304,291	\$ 307,625
Net cash used in investing activities	(58,508)	(489,285)
Net cash (used in) provided by financing activities	(303,443)	176,732
Effect of exchange rate changes on cash and cash equivalents	(33)	606
Net decrease in cash and cash equivalents	<u>\$ (57,693)</u>	<u>\$ (4,322)</u>

Cash flows from operating activities

Our largest source of operating cash flows is cash collections from our customers. Our primary uses of cash from operating activities are for personnel related expenditures, and other general operating expenses, as well as payments related to taxes, interest and facilities.

Net cash provided by operating activities decreased during the six months ended June 30, 2016, primarily due to an increase in cash paid for interest and cash paid to employees and vendors, partially offset by an increase in cash collected from customers. Cash paid for interest increased due to the interest paid on the 2025 Senior Notes and higher contingent interest related to the Subordinated Convertible Debentures. Payments to employees and vendors increased primarily due to the timing of payments. Cash received from customers increased primarily due to an increase in the number of new and renewal domain name registrations during the six months ended June 30, 2016, and the increases in the .net domain name registration fees in February 2016.

Cash flows from investing activities

The changes in cash flows from investing activities primarily relate to purchases, maturities and sales of marketable securities, and purchases of property and equipment.

The decrease in cash flows used in investing activities was primarily due to a decrease in purchases of marketable securities, net of proceeds from sales and maturities, during the first half of 2016, compared to the same period in 2015, and a decrease in purchases of property and equipment and other investing activities.

Cash flows from financing activities

The changes in cash flows from financing activities primarily relate to share repurchases, proceeds from and repayments of borrowings, our employee stock purchase plan, and excess tax benefits from stock-based compensation.

The change in cash (used in) provided by financing activities during the six months ended June 30, 2016 was primarily due to a decrease in proceeds from borrowings as we issued the 2025 Senior Notes in March 2015, partially offset by a decrease in share repurchases.

ITEM 3. QUANTITATIVE AND QUALITATIVE DISCLOSURES ABOUT MARKET RISK

There have been no significant changes in our market risk exposures since December 31, 2015.

ITEM 4. CONTROLS AND PROCEDURES

Based on our management's evaluation, with the participation of our Chief Executive Officer (our principal executive officer) and our Chief Financial Officer (our principal financial officer), as of June 30, 2016, our principal executive officer and principal financial officer have concluded that our disclosure controls and procedures (as defined in Rules 13a-15(e) and 15d-15(e) under the Exchange Act) are effective to ensure that information required to be disclosed by us in reports that we file or submit under the Exchange Act is recorded, processed, summarized and reported within the time periods specified in SEC rules and forms and is accumulated and communicated to our management, including our principal executive officer and principal financial officer, as appropriate, to allow timely decisions regarding required disclosure.

Changes in Internal Control over Financial Reporting

There was no change in our internal control over financial reporting (as such term is defined in Rules 13a-15(f) and 15d-15(f) under the Exchange Act) during the three months ended June 30, 2016 that has materially affected, or is reasonably likely to materially affect, the Company's internal control over financial reporting.

Inherent Limitations of Disclosure Controls and Internal Control over Financial Reporting

Because of their inherent limitations, our disclosure controls and procedures and our internal control over financial reporting may not prevent material errors or fraud. A control system, no matter how well conceived and operated, can provide only reasonable, not absolute, assurance that the objectives of the control system are met. The effectiveness of our disclosure controls and procedures and our internal control over financial reporting is subject to risks, including that the control may become inadequate because of changes in conditions or that the degree of compliance with our policies or procedures may deteriorate.

PART II—OTHER INFORMATION

ITEM 1. LEGAL PROCEEDINGS

Verisign is involved in various investigations, claims and lawsuits arising in the normal conduct of its business, none of which, in its opinion, will have a material adverse effect on its financial condition, results of operations, or cash flows. The Company cannot assure you that it will prevail in any litigation. Regardless of the outcome, any litigation may require the Company to incur significant litigation expense and may result in significant diversion of management attention.

ITEM 1A. RISK FACTORS

In addition to other information in this Form 10-Q, the following risk factors should be carefully considered in evaluating us and our business because these factors currently have a significant impact or may have a significant impact on our business, operating results or financial condition. Actual results could differ materially from those projected in the forward-looking statements contained in this Form 10-Q as a result of the risk factors discussed below and elsewhere in this Form 10-Q and in other filings we make with the SEC.

Risks arising from our agreements governing our Registry Services business could limit our ability to maintain or grow our business.

We are parties to (i) a Cooperative Agreement (as amended) with the DOC with respect to the .com gTLD and certain other aspects of the DNS and (ii) Registry Agreements with ICANN for .com, .net, .name and other gTLDs including our IDN gTLDs. As substantially all of our revenues are derived from our Registry Services business, limitations in these agreements could have a material impact on our business.

Pricing. Under the terms of the Cooperative Agreement with the DOC and the .com Registry Agreement with ICANN, we are generally restricted from increasing the price of registrations or renewals of .com domain names except that we are entitled to increase the price up to 7%, with the prior approval of the DOC, due to the imposition of any new Consensus Policies or documented extraordinary expense resulting from an attack or threat of attack on the security and stability of the DNS. However, it is uncertain that such circumstances will arise, or if they do, that the DOC will approve our request to increase the price for .com domain name registrations. We also have the right under the Cooperative Agreement to seek the removal of these pricing restrictions if we demonstrate that market conditions no longer warrant such restrictions. However, it is uncertain that such circumstances will arise, or if they do, that the DOC will agree to the removal of these pricing restrictions. In connection with a renewal of the .com Registry Agreement, we can seek an increase of the price for .com domain name registrations. Regardless of whether we seek such an increase, there can be no assurance of the price that DOC will approve in connection with a renewal of the .com Registry Agreement. Under the terms of the .net and .name Registry Agreements with ICANN, we are permitted to increase the price of registrations and renewals in these TLDs up to 10% per year. Additionally, ICANN's registry agreements for the new gTLDs do not contain such pricing restrictions.

Vertical integration. Under the .com, .net and .name Registry Agreements with ICANN, as well as the Cooperative Agreement with the DOC, we are not permitted to acquire, directly or indirectly, control of, or a greater than 15% ownership interest in, any ICANN-accredited registrar. Historically, all gTLD registry operators were subject to this vertical integration prohibition; however, ICANN has established a process whereby registry operators may seek ICANN's approval to remove this restriction, and ICANN has approved such removal in some instances. If we were to seek removal of the vertical integration restrictions contained in our agreements, it is uncertain whether ICANN and/or DOC approval would be obtained. Additionally, ICANN's registry agreement for new gTLDs generally permits such vertical integration, with certain limitations including ICANN's right, but not the obligation, to refer such vertical integration activities to competition authorities. Furthermore, unless prohibited by ICANN as noted above, such vertical integration restrictions do not generally apply to ccTLD registry operators. If registry operators of new or existing gTLDs, or ccTLDs, are able to obtain competitive advantages through such vertical integration, it could materially harm our business.

Termination or non-renewal. Under the Cooperative Agreement (as amended) the DOC must approve any renewal or extension of the .com Registry Agreement. The DOC, under certain circumstances, could refuse to grant its approval to the renewal of the .com Registry Agreement on similar terms, or at all. Any failure of the DOC to approve the renewal of the .com Registry Agreement prior to the expiration of its current term on November 30, 2018 would have a material adverse effect on our business. Under certain circumstances, ICANN could terminate or refuse to renew one or more of our Registry Agreements including those for .com, .net, and our other gTLDs. The Company and ICANN completed the drafting of the Root Zone Maintainer Service Agreement ("RZMA") and the .com Registry Agreement extension amendment (".com Extension"), which extends the expiration date of the .com Registry Agreement to November 30, 2024 and is intended to coincide with the eight year term of the RZMA. In June 2016, ICANN posted on its website the RZMA for public review and the .com Extension for

public comment. We can provide no assurance that the .com Extension or the RZMA will be approved or, if approved, will be in the form described. See the “Industry Regulation” section in Part I, Item 1 of the Company’s Annual Report on Form 10-K for the year ended December 31, 2015, which was filed on February 19, 2016, for further information on the Cooperative Agreement and the RZMA.

Modification or amendment . Our Registry Agreements for new gTLDs, including the Registry Agreements for our IDN gTLDs, include ICANN’s right to amend the agreement without our consent, which could impose unfavorable contract obligations on us that could impact our plans and competitive positions with respect to new gTLDs. At the time of renewal of our .com or .net Registry Agreements, ICANN might also attempt to impose this same unilateral right to amend these registry agreements under certain conditions. ICANN has also included new mandatory obligations on new gTLD registry operators, including us, that may increase the risks and potential liabilities associated with operating new gTLDs. ICANN might seek to impose these new mandatory obligations in our other Registry Agreements under certain conditions.

Legal challenges . Our Registry Agreements have faced, and could continue to face, challenges, including possible legal challenges resulting from our activities or the activities of ICANN, registrars, registrants and others, and any adverse outcome from such challenges could have a material adverse effect on our business.

Consensus Policies . Our Registry Agreements with ICANN require us to implement Consensus Policies. ICANN could adopt Consensus Policies that are unfavorable to us as the registry operator of .com , .net and our other gTLDs, that are inconsistent with our current or future plans, that impose substantial costs on our business, or that affect our competitive position. Such Consensus Policies could have a material adverse effect on our business.

Governmental regulation and the application of new and existing laws in the U.S. and overseas may slow business growth, increase our costs of doing business, create potential liability and have an adverse effect on our business.

Application of new and existing laws and regulations in the U.S. or overseas to the internet and communications industry can be unclear. The costs of complying or failing to comply with these laws and regulations could limit our ability to operate in our current markets, expose us to compliance costs and substantial liability and result in costly and time-consuming litigation. For example, the government of the People’s Republic of China (“PRC”) has indicated that it will issue new regulations, and has begun to enforce existing regulations, that could impose additional costs on our provision of Registry Services in the PRC and could impact the growth or renewal rates of domain name registrations in the PRC. In addition to registry operators, the regulations will require registrars to obtain a government-issued license for each TLD whose domain name registrations they intend to sell directly to registrants. Their failure to obtain the required licenses could also impact the growth of our business in the PRC.

Foreign, federal or state laws could have an adverse impact on our business, financial condition, results of operations and cash flows, and our ability to conduct business in certain foreign countries. For example, laws designed to restrict who can register and who can distribute domain names, the online distribution of certain materials deemed harmful to children, online gambling, counterfeit goods, and cybersquatting; laws designed to require registrants to provide additional documentation or information in connection with domain name registrations; and laws designed to promote cyber security may impose significant additional costs on our business or subject us to additional liabilities. We have contracts pursuant to which we provide services to the U.S. government and they impose compliance costs, including compliance with the Federal Acquisition Regulation, which could be significant to the Company.

Due to the nature of the internet, it is possible that state or foreign governments might attempt to regulate internet transmissions or prosecute us for violations of their laws. We might unintentionally violate such laws, such laws may be modified and new laws may be enacted in the future. In addition, as we launch our IDN gTLDs, we may raise our profile in certain foreign countries thereby increasing the regulatory and other scrutiny of our operations. Any such developments could increase the costs of regulatory compliance for us, affect our reputation, force us to change our business practices or otherwise materially harm our business. In addition, any such new laws could impede growth of or result in a decline in domain name registrations, as well as impact the demand for our services.

Undetected or unknown defects in our service, security breaches, and DDoS attacks could expose us to liability and harm our business and reputation.

Services as complex as those we offer or develop could contain undetected defects or errors. Despite testing, defects or errors may occur in our existing or new services, which could result in compromised customer data, including DNS data, diversion of development resources, injury to our reputation, tort or contract claims, increased insurance costs or increased service costs, any of which could harm our business. Performance of our services could have unforeseen or unknown adverse effects on the networks over which they are delivered as well as, more broadly, on internet users and consumers, and third-party applications and services that utilize our services, which could result in legal claims against us, harming our business. Our failure to identify, remediate and mitigate security breaches or our inability to meet customer expectations in a timely manner

could also result in loss of or delay in revenues, loss of market share, failure to achieve market acceptance, injury to our reputation and increased costs.

In addition to undetected defects or errors, we are also subject to cyber-attacks and attempted security breaches. We retain certain customer and employee information in our data centers and various domain name registration systems. It is critical to our business strategy that our facilities and infrastructure remain secure and are perceived by the marketplace to be secure. The Company, as an operator of critical internet infrastructure, is frequently targeted and experiences a high rate of attacks. These include the most sophisticated forms of attacks, such as advanced persistent threat attacks and zero-hour threats, which means that the threat is not compiled or has been previously unobserved within our observation and threat indicators space until the moment it is launched, and may well target specific unidentified or unresolved vulnerabilities that exist only within the target's operating environment, making these attacks virtually impossible to anticipate and difficult to defend against. The Shared Registration System, the root zone servers, the Root Zone Management System, the TLD name servers and the TLD zone files that we operate are critical to our Registry Services operations. Despite the significant time and money expended on our security measures, we have been subject to a security breach, as disclosed in our Quarterly Report on Form 10-Q for the quarter ended September 30, 2011, and our infrastructure may in the future be vulnerable to physical break-ins, outages resulting from destructive malware, computer viruses, attacks by hackers or nefarious actors or similar disruptive problems, including hacktivism. It is possible that we may have to expend additional financial and other resources to address such problems. Any physical or electronic break-in or other security breach or compromise of the information stored at our data centers or domain name registration systems may cause an outage of or jeopardize the security of information stored on our premises or in the computer systems and networks of our customers. In such an event, we could face significant liability, customers could be reluctant to use our services and we could be at risk for loss of various security and standards-based compliance certifications needed for operation of our businesses, all or any of which could adversely affect our reputation and harm our business. Such an occurrence could also result in adverse publicity and therefore adversely affect the market's perception of the security of e-commerce and communications over the internet as well as of the security or reliability of our services.

Additionally, our networks have been, and likely will continue to be, subject to DDoS attacks. While we have adopted mitigation techniques, procedures and strategies to defend against such attacks, there can be no assurance that we will be able to defend against every attack, especially as the attacks increase in size and sophistication. Any attack, even if only partially successful, could disrupt our networks, increase response time, negatively impact our ability to meet our contracted service level obligations, and generally hamper our ability to provide reliable service to our Registry Services customers and the broader internet community. Further, we sell DDoS protection services to our Security Services customers. Although we increase our knowledge of and develop new techniques in the identification and mitigation of attacks through the protection of our Security Services customers, the DDoS protection services share some of the infrastructure used in our Registry Services business. Therefore the provision of such services might expose our critical Registry Services infrastructure to temporary degradations or outages caused by DDoS attacks against those customers, in addition to any directed specifically against us and our networks.

Changes to the present multi-stakeholder model of internet governance could materially and adversely impact our business.

The internet is governed under a multi-stakeholder model comprising civil society, the private sector including for-profit and not-for-profit organizations such as ICANN, governments including the U.S. government, academia, non-governmental organizations and international organizations. Changes to the present multi-stakeholder model of internet governance could materially and adversely impact our business.

Role of ICANN . ICANN plays a central coordination role in the multi-stakeholder system. ICANN is mandated by the non-binding Affirmation of Commitments ("AOC") between the DOC and ICANN to uphold a private sector-led multi-stakeholder approach to internet governance for the public benefit. If ICANN fails to uphold or significantly redefines the multi-stakeholder model, it could harm our business and our relationship with ICANN. Additionally, the AOC could be terminated or replaced with a different agreement between ICANN and some other authority which may establish new or different procedures for internet governance that may be unfavorable to us. Also, legal, regulatory or other challenges could be brought challenging the legal authority underlying the roles and actions of ICANN.

Role of foreign governments . Some governments and members of the multi-stakeholder community have questioned ICANN's role with respect to internet governance and, as a result, could seek a multilateral oversight body as a replacement. Additionally, the role of ICANN's Governmental Advisory Committee, which is comprised of representatives of national governments, could change, giving governments more control of internet governance. For example, the AOC has established several multi-party review panels and contemplates a greater involvement by foreign governments and governmental authorities in the oversight and review of ICANN. These periodic review panels may take positions that are unfavorable to us. Some governments and governmental authorities outside the U.S. have in the past disagreed, and may in the future disagree, with the actions, policies or programs of ICANN, the U.S. Government and us relating to the DNS.

Role of the U.S. Government . The U.S. Government through the NTIA coordinates the management of important aspects of the DNS including the IANA functions and the root zone. On March 14, 2014, NTIA announced its intent to transition its oversight of the IANA function to the global multi-stakeholder community. NTIA asked ICANN to convene global stakeholders to develop a proposal to transition the current role played by NTIA in the coordination of the DNS. The NTIA is also coordinating a related and parallel transition of related root zone management functions. These related root zone management functions involve our role as Root Zone Maintainer under the Cooperative Agreement. At NTIA's request, we submitted a proposal with ICANN to NTIA as to how best to remove NTIA's administrative role associated with root zone maintenance in a manner that maintains the security, stability and resiliency of the DNS. We have performed the Root Zone Maintainer function as a community service spanning three decades without compensation at the request of the DOC under the Cooperative Agreement. While it is uncertain how the transition of oversight of the IANA functions and related root zone management functions will affect our role as Root Zone Maintainer, it is anticipated that performance of the root zone maintainer function would be conducted by us under a new Root Zone Maintainer Service Agreement with ICANN once our root zone maintainer function obligations under the Cooperative Agreement are completed. Although our Root Zone Maintainer function is separate from our Registry Agreements, there can be no assurance that the transition of the IANA functions, the transition of the related root zone management functions, and associated transition processes will not negatively impact our business.

As a result of these and other risks, internet governance may change in ways that could materially harm our Registry Services business. For example, after the transition, if we perform the root zone maintainer function under a new agreement, we may be subject to claims challenging the agreement and we may not have immunity from or sufficient indemnification for such claims. If another party is designated to perform the Root Zone Maintainer function, there could be new or increased risks in availability, integrity and publication of the root zone file, which is critical to the operation of the DNS and our operation of our TLDs, including *.com* .

In addition to harming our Registry Services business, changes to internet governance may make it more difficult for us to introduce new services in our Registry Services business and we could also be subject to additional restrictions on how our business is conducted, or to fees or taxes applicable to this business, which may not be equally applicable to our competitors.

We operate two root zone servers and are contracted to perform the Root Zone Maintainer function. Under ICANN's New gTLD program, we face increased risk from these operations.

We operate two of the 13 root zone servers. Root zone servers are name servers that contain authoritative data for the very top of the DNS hierarchy. These servers have the software and DNS configuration data necessary to locate name servers that contain authoritative data for the TLDs. These root zone servers are critical to the functioning of the internet. Under the Cooperative Agreement, we play a key operational role in support of the IANA function as the Root Zone Maintainer. In this role, we provision and publish the authoritative data for the root zone itself multiple times daily and distribute it to all root server operators.

Under its New gTLD Program, ICANN has recommended delegations into the root zone of a large number of new gTLDs. In view of our role as the Root Zone Maintainer, and as a root server operator, we face increased risks should ICANN's delegation of these new gTLDs, which represent unprecedented changes to the root zone in volume and frequency, cause security and stability problems within the DNS and/or for parties who rely on the DNS. Such risks include potential instability of the DNS including potential fragmentation of the DNS should ICANN's delegations create sufficient instability, and potential claims based on our role in the root zone provisioning and delegation process. These risks, alone or in the aggregate, have the potential to cause serious harm to our Registry Services business. Further, our business could also be harmed through security, stability and resiliency degradation if the delegation of new gTLDs into the root zone causes problems to certain components of the DNS ecosystem or other aspects of the global DNS, or other relying parties are negatively impacted as a result of domain name collisions or other new gTLD security issues, such as exposure or other leakage of private or sensitive information.

Additionally, DNSSEC enabled in the root zone and at other levels of the DNS requires new preventative maintenance functions and complex operational practices that did not exist prior to the introduction of DNSSEC. Any failure by us or the IANA functions operator to comply with stated practices, such as those outlined in relevant DNSSEC Practice Statements, introduces risk to DNSSEC relying parties and other internet users and consumers of the DNS, which could have a material adverse impact on our business.

The evolution of internet practices and behaviors and the adoption of substitute technologies may impact the demand for domain names.

Domain names and the domain name system have been used by consumers and businesses to access or disseminate information, conduct ecommerce, and develop an online identity for many years. The growth of technologies such as social media, mobile devices, apps and the dominance of search engines has evolved and changed the internet practices and behaviors of consumers and businesses alike. These changes can impact the demand for domain names by those who purchase domain names for personal, commercial and investment reasons. Factors such as the evolving practices and preferences of internet users

and how they navigate the internet as well the motivation of domain name registrants and how they will monetize their investment in domain names can negatively impact our business. Some domain name registrars and registrants seek to purchase and resell domain names following an increase in their value. Adverse changes in the resale value of domain names could result in a decrease in the demand and/or renewal rates for domain names obtained for resale.

Some domain name registrants use a domain name to access or disseminate information, conduct ecommerce, and develop an online identity. Currently, internet users often navigate to a website either by directly typing its domain name into a web browser, the use of an app on their smart phone or mobile device, the use of a voice recognition technology such as Siri, Cortana, or Echo, or through the use of a search engine. If (i) web browser or internet search technologies were to change significantly; (ii) internet users' preferences or practices shift away from recognizing and relying on web addresses for navigation through the use of new and existing technologies; (iii) internet users were to significantly decrease the use of web browsers in favor of applications to locate and access content; or (iv) internet users were to increasingly use third level domains or alternate identifiers, such as social networking and microblogging sites, in each case the demand for domain names registered by us could decrease. This may trigger current or prospective customers and parties in our target markets to reevaluate their need for registration or renewal of domain names.

Some domain name registrars and registrants seek to generate revenue through advertising on their websites; changes in the way these registrars and registrants are compensated (including changes in methodologies and metrics) by advertisers and advertisement placement networks, such as Google, Yahoo!, Baidu and Bing, have, and may continue to, adversely affect the market for those domain names favored by such registrars and registrants which has resulted in, and may continue to result in, a decrease in demand and/or the renewal rate for those domain names. For example, according to published reports, Google has in the past changed (and may change in the future) its search algorithm, which may decrease site traffic to certain websites and provide less pay-per-click compensation for certain types of websites. This has made such websites less profitable which has resulted in, and may continue to result in, fewer domain registrations and renewals. In addition, as a result of the general economic environment, spending on online advertising and marketing may not increase or may be reduced, which in turn, may result in a further decline in the demand for those domain names.

If any of the above factors negatively impact the renewal of domain names or the demand for new domain names, we may experience material adverse impacts on our business, operating results, financial condition and cash flows.

Many of our target markets are evolving, and if these markets fail to develop or if our products and services are not widely accepted in these markets, our business could be harmed.

We target many new, developing and emerging markets to grow our business. These markets are rapidly evolving, and may not grow. Even if these markets grow, our services may not be widely used or accepted. Accordingly, the demand for our services in these markets is very uncertain. The factors that may affect market acceptance or adoption of our services in these markets include the following:

- regional internet infrastructure development, expansion, penetration and adoption;
- market acceptance and adoption of products and services based upon technologies other than those we use, which are substitutes for our products and services;
- public perception of the security of our technologies and of IP and other networks;
- the introduction and consumer acceptance of new generations of mobile devices, and in particular the use of alternative internet navigation mechanisms other than web browsers;
- increasing cyber threats and the associated customer need and demand for our Security Services offerings;
- government regulations affecting internet access and availability, domain name registrations or the provision of registry services, or e-commerce and telecommunications over the internet;
- preference by markets for the use of their own country's ccTLDs as a substitute or alternative to our TLDs; and
- increased acceptance and use of new gTLDs as substitutes for established gTLDs.

If the market for e-commerce and communications over IP and other networks does not grow or these services are not widely accepted in the market, our business could be materially harmed.

We may face operational and other risks from the introduction of new gTLDs by ICANN and our provision of back-end registry services.

Approximately 1,000 new gTLDs have already been delegated in this initial round of new gTLDs. ICANN plans on offering a second round of new gTLDs after the completion of the initial round, the timing of which is uncertain. As set forth in

the Verisign Labs Technical Report #1130007 version 2.2: New gTLD Security and Stability Considerations released on March 28, 2013, and reiterated in our further publications since then, we continue to believe there are issues regarding the deployment of the new gTLDs that should have been addressed before any new gTLDs were delegated, and despite our and others' efforts, some of these issues have not been addressed by ICANN sufficiently, if at all. For example, domain name collisions have been reported to ICANN, which have resulted in various network interruptions for enterprises as well as confusion and usability issues that have led to phishing attacks. It is anticipated that as additional new gTLDs are delegated more domain name collisions and associated security issues will occur.

We have entered into agreements to provide back-end registry services to other registry operators and applicants for new gTLDs. We may face risks regarding ICANN requirements for mitigating name collisions in the new gTLDs which we operate or for which we provide back-end registry services. For example, the possibility exists that "controlled interruption" periods may disrupt network services or that privacy or secure communications may be impacted as a result of insufficient preparedness by ICANN and the community for the launch of new gTLDs.

Our agreements with ICANN to provide registry services in connection with our new gTLDs, including our IDN gTLDs, and our agreements to provide back-end registry services directly to other applicants and indirectly through reseller relationships expose us to operational and other risks. For example, the increase in the number of gTLDs for which we provide registry services on a standalone basis or as a back-end service provider could further increase costs or increase the frequency or scope of targeted attacks from nefarious actors.

The business environment is highly competitive and, if we do not compete effectively, we may suffer lower demand for our products, price reductions, reduced gross margins and loss of market share.

The internet and communications network services industries are characterized by rapid technological change and frequent new product and service announcements which require us continually to improve the performance, features and reliability of our services, particularly in response to competitive offerings or alternatives to our products and services. In order to remain competitive and retain our market position, we must continually improve our access to technology and software, support the latest transmission technologies, and adapt our products and services to changing market conditions and our customers' and internet users' preferences and practices, or launch entirely new products and services such as new gTLDs in anticipation of, or in response to, market trends. We cannot assure that competing technologies developed by others or the emergence of new industry standards will not adversely affect our competitive position or render our services or technologies noncompetitive or obsolete. In addition, our markets are characterized by announcements of collaborative relationships involving our competitors. The existence or announcement of any such relationships could adversely affect our ability to attract and retain customers. As a result of the foregoing and other factors, we may not be able to compete effectively with current or future competitors, and competitive pressures that we face could materially harm our business.

We face competition in the domain name registry space from other gTLD and ccTLD registries that are competing for the business of entities and individuals that are seeking to obtain a domain name registration and/or establish a web presence. We have applied for new gTLDs including certain IDN gTLDs; however, there is no guarantee that such new gTLDs will be as or more successful than the new gTLDs obtained by our competitors. For example, some of the new gTLDs, including our new gTLDs, may face additional universal acceptance and usability challenges in that current desktop and mobile device software does not ubiquitously recognize these new gTLDs and may be slow to adopt standards or support these gTLDs, even if demand for such products is strong. This is particularly true for IDN gTLDs, but applies to conventional gTLDs as well. As a result of these challenges, it is possible that resolution of domain names within some of these new gTLDs may be blocked within certain state or organizational environments, challenging universal resolvability of these strings and their general acceptance and usability on the internet.

See the "Competition" section in Part I, Item 1 of the Company's Annual Report on Form 10-K for the year ended December 31, 2015, which was filed on February 19, 2016, for further information.

We must establish and maintain strong relationships with registrars and their resellers to maintain their focus on marketing our products and services otherwise our Registry Service business could be harmed.

One registrar accounts for approximately 30% of our revenues. All of our domain name registrations occur through registrars. Registrars and their resellers utilize substantial marketing efforts to increase the demand and/or renewal rates for domain names. Consolidation in the registrar or reseller industry or changes in ownership, management, or strategy among individual registrars or resellers could result in significant changes to their business, operating model and cost structure. Such changes could include reduced marketing efforts or other operational changes that could adversely impact the demand and/or the renewal rates for domain names. With the introduction of new gTLDs, many of our registrars have chosen to, and may continue to choose to, focus their short or long-term marketing efforts on these new offerings and/or reduce the prominence or visibility of our products and services on their e-commerce platforms. Our registrars and resellers not only sell domain name registrations of other competing registries but also sell and support their own services for websites such as email, website hosting, as well as

other services. To the extent that registrars and their resellers focus more on selling and supporting other services and less on the registration and renewal of our TLDs, our revenues could be adversely impacted. Our ability to successfully market our services to, and build and maintain strong relationships with, new and existing registrars or resellers is a factor upon which successful operation of our business is dependent. If we are unable to keep a significant portion of their marketing efforts focused on selling our TLDs as opposed to other competing TLDs or their own services, our business could be harmed.

If we encounter system interruptions or failures, we could be exposed to liability and our reputation and business could suffer.

We depend on the uninterrupted operation of our various systems, secure data centers and other computer and communication networks. Our systems and operations are vulnerable to damage or interruption from:

- power loss, transmission cable cuts and other telecommunications failures;
- damage or interruption caused by fire, earthquake, and other natural disasters;
- attacks, including hacktivism, by miscreants or other nefarious actors;
- computer viruses or software defects;
- physical or electronic break-ins, sabotage, intentional acts of vandalism, terrorist attacks and other events beyond our control;
- risks inherent in or arising from the terms and conditions of our agreements with service providers to operate our networks and data centers;
- state suppression of internet operations; and
- any failure to implement effective and timely remedial actions in response to any damage or interruption.

Most of the computing infrastructure for our Shared Registration System is located at, and most of our customer information is stored in, our facilities in New Castle, Delaware; Dulles, Virginia; and Fribourg, Switzerland. To the extent we are unable to partially or completely switch over to our primary alternate or tertiary sites, any damage or failure that causes interruptions in any of these facilities or our other computer and communications systems could materially harm our business. Although we carry insurance for property damage, we do not carry insurance or financial reserves for such interruptions, or for potential losses arising from terrorism.

In addition, our Registry Services business and certain of our other services depend on the efficient operation of the internet connections to and from customers to our Shared Registration System residing in our secure data centers. These connections depend upon the efficient operation of internet service providers and internet backbone service providers, all of which have had periodic operational problems or experienced outages in the past beyond our scope of control. In addition, if these service providers do not protect, maintain, improve, and reinvest in their networks or present inconsistent data regarding the DNS through their networks, our business could be harmed.

A failure in the operation or update of the root zone servers, the root zone file, the root zone management system, the TLD name servers, or the TLD zone files that we operate, or other network functions, could result in a DNS resolution or other service outage or degradation; the deletion of one or more TLDs from the internet; the deletion of one or more second-level domain names from the internet for a period of time; or a misdirection of a domain name to a different server. A failure in the operation or update of the supporting cryptographic and other operational infrastructure that we maintain could result in similar consequences. A failure in the operation of our Shared Registration System could result in the inability of one or more registrars to register or maintain domain names for a period of time. In the event that a registrar has not implemented back-up services in conformance with industry best practices, the failure could result in permanent loss of transactions at the registrar during that period. Any of these problems or outages could create potential liability, including liability arising from a failure to meet our service level agreements in our Registry Agreements, and could decrease customer satisfaction, harming our business or resulting in adverse publicity that could adversely affect the market's perception of the security of e-commerce and communications over the internet as well as of the security or reliability of our services.

Our operating results may be adversely affected as a result of unfavorable market, economic, social and political conditions.

An unstable global economic, social and political environment, including hostilities and conflicts in various regions both inside and outside the U.S., natural disasters, currency fluctuations, and country specific operating regulations may have a negative impact on demand for our services, our business and our foreign operations. The economic, social and political environment has impacted or may negatively impact, among other things:

- our customers' continued growth and development of their businesses and our customers' ability to continue as going concerns or maintain their businesses, which could affect demand for our products and services;
- current and future demand for our services, including decreases as a result of reduced spending on information technology and communications by our customers;
- price competition for our products and services;
- the price of our common stock;
- our liquidity and our associated ability to execute on any share repurchase plans;
- our ability to service our debt, to obtain financing or assume new debt obligations; and
- our ability to obtain payment for outstanding debts owed to us by our customers or other parties with whom we do business.

In addition, to the extent that the economic, social and political environment impacts specific industry and geographic sectors in which many of our customers are concentrated, that may have a disproportionate negative impact on our business.

Our international operations subject our business to additional economic and political risks that could have an adverse impact on our revenues and business.

A significant portion of our revenues is derived from customers outside the U.S. Doing business in international markets has required and will continue to require significant management attention and resources. We may also need to tailor some of our services for a particular market and to enter into international distribution and operating relationships. We may fail to maintain our ability to conduct business, including potentially material business operations in some international locations, or we may not succeed in expanding our services into new international markets or expand our presence in existing markets. Failure to do so could materially harm our business. Moreover, local laws and customs in many countries differ significantly from those in the U.S. In many foreign countries, particularly in those with developing economies, it is common for others to engage in business practices that are prohibited by our internal policies and procedures or U.S. law or regulations applicable to us. There can be no assurance that our employees, contractors and agents will not take actions in violation of such policies, procedures, laws and/or regulations. Violations of laws, regulations or internal policies and procedures by our employees, contractors or agents could result in financial reporting problems, investigations, fines, penalties, or prohibition on the importation or exportation of our products and services and could have a material adverse effect on our business. In addition, we face risks inherent in doing business on an international basis, including, among others:

- competition with foreign companies or other domestic companies entering the foreign markets in which we operate, as well as foreign governments actively promoting ccTLDs, which we do not operate;
- legal uncertainty regarding liability, enforcing our contracts and compliance with foreign laws;
- tariffs and other trade barriers and restrictions;
- difficulties in staffing and managing foreign operations;
- currency fluctuations;
- potential problems associated with adapting our services to technical conditions existing in different countries;
- difficulty of verifying customer information, including complying with the customer verification requirements of certain countries;
- more stringent privacy policies in some foreign countries;
- additional vulnerability from terrorist groups targeting U.S. interests abroad;
- potentially conflicting or adverse tax consequences;
- reliance on third parties in foreign markets in which we only recently started doing business; and
- potential concerns of international customers and prospects regarding doing business with U.S. technology companies due to alleged U.S. government data collection policies.

We rely on our intellectual property rights to protect our proprietary assets, and any failure by us to protect or enforce, or any misappropriation of, our intellectual property could harm our business.

Our success depends in part on our internally developed technologies and related intellectual property. Despite our precautions, it may be possible for a third party to copy or otherwise obtain and use our intellectual property without authorization. Furthermore, the laws of foreign countries may not protect our proprietary rights in those countries to the same

extent U.S. law protects these rights in the U.S. In addition, it is possible that others may independently develop substantially equivalent intellectual property. If we do not effectively protect our intellectual property, our business could suffer. Additionally, we have filed patent applications with respect to some of our technology in the U.S. Patent and Trademark Office and patent offices outside the U.S. Patents may not be awarded with respect to these applications and even if such patents are awarded, third parties may seek to oppose or otherwise challenge our patents, and such patents' scope may differ significantly from what was requested in the patent applications and may not provide us with sufficient protection of our intellectual property. In the future, we may have to resort to litigation to enforce and protect our intellectual property rights, to protect our trade secrets or to determine the validity and scope of the proprietary rights of others. This type of litigation is inherently unpredictable and, regardless of its outcome, could result in substantial costs and diversion of management attention and technical resources. Some of the software and protocols used in our business are based on standards set by standards setting organizations such as the Internet Engineering Task Force. To the extent any of our patents are considered "standards essential patents," we may be required to license such patents to our competitors on reasonable and non-discriminatory terms.

We also license third-party technology that is used in some of our products and services to perform key functions. These third-party technology licenses may not continue to be available to us on commercially reasonable terms or at all. The loss of or our inability to obtain or maintain any of these technology licenses could hinder or increase the cost of our launching new products and services, entering into new markets and/or otherwise harm our business. Some of the software and protocols used in our Registry Services business are in the public domain or may otherwise become publicly available, which means that such software and protocols are equally available to our competitors.

We rely on the strength of our Verisign brand to help differentiate ourselves in the marketing of our products. Dilution of the strength of our brand could harm our business. We are at risk that we will be unable to fully register, build equity in, or enforce the Verisign logo in all markets where Verisign products and services are sold. In addition, in the U.S. and most other countries' word marks for TLDs have currently not been successfully registered as trademarks. Accordingly, we may not be able to fully realize or maintain the value of these intellectual property assets.

We could become subject to claims of infringement of intellectual property of others, which could be costly to defend and could harm our business.

We cannot be certain that we do not and will not infringe the intellectual property rights of others. Claims relating to infringement of intellectual property of others or other similar claims have been made against us in the past and could be made against us in the future. It is possible that we could become subject to additional claims for infringement of the intellectual property of third parties. The international use of our logo could present additional potential risks for third party claims of infringement. Any claims, with or without merit, could be time consuming, result in costly litigation and diversion of technical and management personnel attention, cause delays in our business activities generally, or require us to develop a non-infringing logo or technology or enter into royalty or licensing agreements. Royalty or licensing agreements, if required, may not be available on acceptable terms or at all. If a successful claim of infringement were made against us, we could be required to pay damages or have portions of our business enjoined. If we could not identify and adopt an alternative non-infringing logo, develop non-infringing technology or license the infringed or similar technology on a timely and cost-effective basis, our business could be harmed.

A third party could claim that the technology we license from other parties infringes a patent or other proprietary right. Litigation between the licensor and a third party or between us and a third party could lead to royalty obligations for which we are not indemnified or for which indemnification is insufficient, or we may not be able to obtain any additional license on commercially reasonable terms or at all.

In addition, legal standards relating to the validity, enforceability, and scope of protection of intellectual property rights in internet-related businesses, including patents related to software and business methods, are uncertain and evolving. Because of the growth of the internet and internet-related businesses, patent applications are continuously being filed in connection with internet-related technology. There are a significant number of U.S. and foreign patents and patent applications in our areas of interest, and we believe that there has been, and is likely to continue to be, significant litigation in the industry regarding patent and other intellectual property rights.

We could become involved in claims, lawsuits or investigations that may result in adverse outcomes.

In addition to possible intellectual property litigation and infringement claims, we are, and may in the future, become involved in other claims, lawsuits and investigations, including with respect to the root zone maintainer agreement now under negotiation with ICANN. Such proceedings may initially be viewed as immaterial but could prove to be material. Litigation is inherently unpredictable, and excessive verdicts do occur. Adverse outcomes in lawsuits and investigations could result in significant monetary damages, including indemnification payments, or injunctive relief that could adversely affect our ability to conduct our business and may have a material adverse effect on our financial condition, results of operations and cash flows. Given the inherent uncertainties in litigation, even when we are able to reasonably estimate the amount of possible loss or range

of loss and therefore record an aggregate litigation accrual for probable and reasonably estimable loss contingencies, the accrual may change in the future due to new developments or changes in approach. In addition, such investigations, claims and lawsuits could involve significant expense and diversion of management's attention and resources from other matters.

We continue to explore new strategic initiatives, the pursuit of any of which may pose significant risks and could have a material adverse effect on our business, financial condition and results of operations.

We are exploring a variety of possible strategic initiatives which may include, among other things, the investment in, and the pursuit of, new revenue streams, services or products, changes to our offerings, initiatives to leverage our patent portfolio, our Security Services business, back-end registry services and IDN gTLDs. In addition, we have evaluated and are pursuing and will continue to evaluate and pursue acquisitions of TLDs that are currently in operation and those that have not yet been awarded as long as they support our growth strategy.

Any such strategic initiative may involve a number of risks, including: the diversion of our management's attention from our existing business to develop the initiative, related operations and any requisite personnel; possible regulatory scrutiny or third-party claims; possible material adverse effects on our results of operations during and after the development process; our possible inability to achieve the intended objectives of the initiative; as well as damage to our reputation if we are unsuccessful in pursuing a strategic initiative. Such initiatives may result in a reduction of cash or increased costs. We may not be able to successfully or profitably develop, integrate, operate, maintain and manage any such initiative and the related operations or employees in a timely manner or at all. Furthermore, under our agreements with ICANN, we are subject to certain restrictions in the operation of *.com*, *.net*, *.name* and other TLDs, including required ICANN approval of new registry services for such TLDs. If any new initiative requires ICANN review or ICANN determines that such a review is required, we cannot predict whether this process will prevent us from implementing the initiative in a timely manner or at all. Any strategic initiative to leverage our patent portfolio will likely increase litigation risks from potential licensees and we may have to resort to litigation to enforce our intellectual property rights.

We depend on key employees to manage our business effectively, and we may face difficulty attracting and retaining qualified leaders.

We operate in a unique competitive and highly regulated environment and we depend on the knowledge, experience, and performance of our senior management team and other key employees in this regard and otherwise. We periodically experience changes in our management team. If we are unable to attract, integrate, retain and motivate these key individuals and additional highly skilled technical, sales and marketing, and other experienced employees, and implement succession plans for these personnel, our business may suffer. For example, our service products are highly technical and require individuals skilled and knowledgeable in unique platforms and software implementation.

Changes in, or interpretations of, tax rules and regulations or our tax positions may adversely affect our effective tax rates.

We are subject to income taxes in both the U.S. and numerous foreign jurisdictions. Significant judgment is required in determining our worldwide provision for income taxes. In the ordinary course of our business, there are many transactions and calculations where the ultimate tax determination is uncertain. We are subject to audit by various tax authorities. In accordance with U.S. GAAP, we recognize income tax benefits, net of required valuation allowances and accrual for uncertain tax positions. For example, we claimed a worthless stock deduction on our 2013 federal income tax return and recorded a net income tax benefit of \$380.1 million. Although we believe our tax estimates are reasonable, the final determination of tax audits and any related litigation could be materially different than that which is reflected in historical income tax provisions and accruals. Should additional taxes be assessed as a result of an audit or litigation, an adverse effect on our results of operations, financial condition and cash flows in the period or periods for which that determination is made could result.

A significant portion of our foreign earnings for the current fiscal year was earned in low tax jurisdictions. Our effective tax rate could fluctuate significantly on a quarterly basis and could be adversely affected to the extent earnings are lower than anticipated in countries where we have lower statutory rates and higher than anticipated in countries where we have higher statutory rates.

Various legislative proposals that would reform U.S. corporate tax laws have been proposed by the Obama administration as well as members of Congress, including proposals that would significantly impact how U.S. multinational corporations are taxed on foreign earnings. We are unable to predict whether these or other proposals will be implemented. Although we cannot predict whether or in what form any proposed legislation may pass, if enacted, such legislation could have a material adverse impact on our tax expense or cash flow.

Our foreign earnings, which are indefinitely reinvested offshore, constitute a majority of our cash, cash equivalents and marketable securities, and there is a high cost associated with a change in our indefinite reinvestment assertion or a repatriation of those funds to the U.S.

A majority of our cash, cash equivalents and marketable securities are held by our foreign subsidiaries. Our foreign earnings are indefinitely reinvested offshore and are not available to be used in the U.S. for working capital needs, debt obligations, acquisitions, share repurchases, dividends or other general corporate purposes. In the event that funds from our foreign operations are needed in the U.S. for any purpose, we would be required to accrue and pay additional U.S. taxes in order to repatriate those funds, which could be significant. Further, if we are unable to indefinitely reinvest our foreign earnings our effective tax rate would increase. These could adversely impact our business valuation and stock price.

Our marketable securities portfolio could experience a decline in market value, which could materially and adversely affect our financial results.

As of June 30, 2016, we had \$1.9 billion in cash, cash equivalents, marketable securities and restricted cash, of which \$1.7 billion was invested in marketable securities. The marketable securities consist primarily of debt securities issued by the U.S. Treasury meeting the criteria of our investment policy, which is focused on the preservation of our capital through the investment in investment grade securities. We currently do not use derivative financial instruments to adjust our investment portfolio risk or income profile.

These investments, as well as any cash deposited in bank accounts, are subject to general credit, liquidity, market and interest rate risks, which may be exacerbated by unusual events, such as the U.S. debt ceiling crisis and the Eurozone crisis, which affected various sectors of the financial markets and led to global credit and liquidity issues. During the 2008 financial crisis, the volatility and disruption in the global credit market reached unprecedented levels. If the global credit market deteriorates again or other events negatively impact the market for U.S. Treasury securities, our investment portfolio may be impacted and we could determine that some of our investments have experienced an other-than-temporary decline in fair value, requiring an impairment charge which could adversely impact our results of operations and cash flows.

We are subject to the risks of owning real property.

We own the land and building in Reston, Virginia, which constitutes our headquarters facility. Ownership of this property, as well as our data centers in Dulles, Virginia and New Castle, Delaware, may subject us to risks, including:

- adverse changes in the value of the properties, due to interest rate changes, changes in the commercial property markets, or other factors;
- ongoing maintenance expenses and costs of improvements;
- the possible need for structural improvements in order to comply with environmental, health and safety, zoning, seismic, disability law, or other requirements;
- the possibility of environmental contamination or notices of violation from federal or state environmental agencies; and
- possible disputes with neighboring owners, tenants, service providers or others.

We have anti-takeover protections that may discourage, delay or prevent a change in control that could benefit our stockholders.

Our amended and restated Certificate of Incorporation and Bylaws contain provisions that could make it more difficult for a third party to acquire us without the consent of our Board of Directors ("Board"). These provisions include:

- our stockholders may take action only at a duly called meeting and not by written consent;
- special meetings of our stockholders may be called only by the chairman of the board of directors, the president, our Board, or the secretary (acting as a representative of the stockholders) whenever a stockholder or group of stockholders owning at least thirty-five percent (35%) in the aggregate of the capital stock issued, outstanding and entitled to vote, and who held that amount in a net long position continuously for at least one year, so request in writing;
- vacancies on our Board can be filled until the next annual meeting of stockholders by a majority of directors then in office; and
- our Board has the ability to designate the terms of and issue new series of preferred stock without stockholder approval.

In addition, Section 203 of the General Corporation Law of Delaware prohibits a publicly held Delaware corporation from engaging in a business combination with an interested stockholder, generally a person which together with its affiliates owns or within the last three years has owned 15% or more of our voting stock, for a period of three years after the date of the transaction in which the person became an interested stockholder, unless in the same transaction the interested stockholder acquired 85% ownership of our voting stock (excluding certain shares) or the business combination is approved in a prescribed manner. Section 203 therefore may impact the ability of an acquirer to complete an acquisition of us after a successful tender offer and accordingly could discourage, delay or prevent an acquirer from making an unsolicited offer without the approval of our Board.

We have a considerable number of common shares subject to future issuance.

As of June 30, 2016, we had one billion authorized common shares, of which 107.2 million shares were outstanding. In addition, of our authorized common shares, 12.7 million common shares were reserved for issuance pursuant to outstanding equity and employee stock purchase plans (“Equity Plans”), and 36.4 million shares were reserved for issuance upon conversion of our 3.25% Junior Subordinated Convertible Debentures due 2037 (“Subordinated Convertible Debentures”). As a result, we keep substantial amounts of our common stock available for issuance upon exercise or settlement of equity awards outstanding under our Equity Plans and/or the conversion of Subordinated Convertible Debentures into our common stock. Issuance of all or a large portion of such shares would be dilutive to existing security holders, could adversely affect the prevailing market price of our common stock and could impair our ability to raise additional capital through the sale of equity securities.

Our financial condition and results of operations could be adversely affected if we do not effectively manage our indebtedness.

We have a significant amount of outstanding debt, and we may incur additional indebtedness in the future. Our substantial indebtedness, including any future indebtedness, requires us to dedicate a significant portion of our cash flow from operations or to arrange alternative liquidity sources to make principal and interest payments, when due, or to repurchase or settle our debt, if triggered, by certain corporate events, certain events of default, or conversion. It could also limit our flexibility in planning for or reacting to changes in our business and our industry, or make required capital expenditures and investments in our business; make it difficult or more expensive to refinance our debt or obtain new debt; trigger an event of default; and increase our vulnerability to adverse changes in general economic and industry conditions. Some of our debt contains covenants which may limit our operating flexibility, including restrictions on share repurchases, dividends, prepayment or repurchase of debt, acquisitions, disposing of assets, if we do not continue to meet certain financial ratios. Any rating assigned to our debt securities could be lowered or withdrawn by a rating agency, which could make it more difficult or more expensive for us to obtain additional debt financing in the future. The settlement amount, contingent interest, and potential recapture of income tax deductions related to our Subordinated Convertible Debentures can be substantial, and can increase significantly based on changes in our stock price. The occurrence of any of the foregoing factors could have a material adverse effect on our business, cash flows, results of operations and financial condition.

ITEM 2. UNREGISTERED SALES OF EQUITY SECURITIES AND USE OF PROCEEDS

The following table presents the share repurchase activity during the three months ended June 30, 2016 :

	Total Number of Shares Purchased	Average Price Paid per Share	Total Number of Shares Purchased as Part of Publicly Announced Plans or Programs (1)	Approximate Dollar Value of Shares That May Yet Be Purchased Under the Plans or Programs (1)
	(Shares in thousands)			
April 1 – 30, 2016	550	\$ 89.22	550	\$ 866.7 million
May 1 – 31, 2016	576	\$ 85.40	576	\$ 817.5 million
June 1 – 30, 2016	608	\$ 84.95	608	\$ 765.9 million
	<u>1,734</u>		<u>1,734</u>	

(1) Effective February 11, 2016, our Board of Directors authorized the repurchase of approximately \$611.2 million of our common stock, in addition to the \$388.8 million of our common stock remaining available for repurchase under the previous share repurchase program, for a total repurchase authorization of up to \$1.0 billion of our common stock. The share repurchase program has no expiration date. Purchases made under the program could be effected through open market transactions, block purchases, accelerated share repurchase agreements or other negotiated transactions.

ITEM 5. OTHER INFORMATION

On July 27, 2016, our Board of Directors amended our Bylaws to implement the changes discussed in the Company's proxy statement for the 2016 Annual Meeting of Stockholders. The amended Bylaws were effective upon approval by the Board of Directors.

The Bylaws were amended to provide for "proxy access" by eligible stockholders. Specifically, the Bylaws permit a stockholder, or a group of up to twenty stockholders, that has continuously owned at least 3% of the Company's outstanding stock entitled to vote in the election of directors for at least three years, to nominate and include in the Company's proxy materials for an annual meeting of stockholders up to the greater of two directors or 20% of the number of the directors then in office provided that the nominating stockholder(s) and nominee(s) satisfy the requirements described in the provision. (Article I, Section 14). As a result of these amendments, if any stockholder intends to include a director nominee in the proxy statement for the Company's 2017 Annual Meeting of Stockholders, the stockholder must notify the Secretary of the Company in writing and the notice must be delivered to the Secretary at the principal executive office of the Company not earlier than the close of business on November 30, 2016, nor later than the close of business on December 30, 2016. The nomination must otherwise comply with the applicable requirements of the Bylaws.

In addition, the Bylaws were amended to, among other things:

- Conform the definition of stock ownership used in the provisions on stockholder-requested special meetings to the definition used in the proxy access bylaw. (Article I, Section 2)
- Clarify the methods for giving notice for meetings of stockholders and Board of Directors meetings. (Article I, Section 4 and Article II, Section 11)
- Implement majority voting in uncontested director elections with plurality voting retained for contested elections. (Article I, Section 10 and Article II, Section 3)
- Add provisions requiring all director nominees, regardless of whether nominees are nominated by the Board or a stockholder, to provide certain information and representations. (Article I, Section 12)
- Include an advance notice provision regarding nominating persons for election to the Board and proposing other business to be considered at annual and special stockholder meetings. For annual meetings, this provision requires a stockholder to provide notice and certain information about the stockholder and the nominee or item of business generally not later than the close of business on the 90th day nor earlier than the close of business on the 120th day prior to the first anniversary of the previous year's annual meeting of stockholders. (Article I, Section 13) As a result of the amendments, if any stockholder intends to nominate a director candidate or propose other business for consideration at the Company's 2017 Annual Meeting of Stockholders (not including a proposal intended for inclusion in the Company's proxy statement in accordance with the SEC's Rule 14a-8 under the Securities Exchange Act of 1934), the stockholder must notify the Secretary of the Company in writing and the notice must be delivered to the Secretary at the principal executive office of the Company not earlier than the close of business on February 9, 2017, nor later than the close of business on March 11, 2017. The notice also must comply with the applicable requirements of the Bylaws.
- Clarify the Board's ability to use the methods in Delaware General Corporation Law Section 141(f) when the Board is taking action by unanimous consent in lieu of a meeting, which includes the use of electronic transmission. (Article II, Section 14)
- Conform provisions relating to Board committees and subcommittees to amendments to the Delaware General Corporation Law set to take effect on August 1, 2016. (Article II, Section 17)
- Clarify the Board's ability to delegate authority to officers, employees and agents outside the Bylaws. (Article III, Section 1)
- Remove inoperative language about stockholder action by written consent without a meeting of stockholders.
- Other miscellaneous wording changes throughout the document to make corrections, to clarify language and to conform the language in the Bylaws to that of the Certificate or the Delaware General Corporation Law.

This description of the amendments to the Bylaws is qualified in its entirety by reference to the text of the Bylaws filed as Exhibit 3.02 to this Form 10-Q.

ITEM 6. EXHIBITS

As required under Item 6—Exhibits, the exhibits filed as part of this report are provided in this separate section. The exhibits included in this section are as follows:

Exhibit Number	Exhibit Description
3.02	Bylaws of VeriSign, Inc.
31.01	Certification of Principal Executive Officer pursuant to Exchange Act Rule 13a-14(a).
31.02	Certification of Principal Financial Officer pursuant to Exchange Act Rule 13a-14(a).
32.01	Certification of Principal Executive Officer pursuant to Exchange Act Rule 13a-14(b) and Section 1350 of Chapter 63 of Title 18 of the U.S. Code (18 U.S.C. 1350). *
32.02	Certification of Principal Financial Officer pursuant to Exchange Act Rule 13a-14(b) and Section 1350 of Chapter 63 of Title 18 of the U.S. Code (18 U.S.C. 1350). *
101.INS	XBRL Instance Document
101.SCH	XBRL Taxonomy Extension Schema
101.CAL	XBRL Taxonomy Extension Calculation Linkbase
101.DEF	XBRL Taxonomy Extension Definition Linkbase
101.LAB	XBRL Taxonomy Extension Label Linkbase
101.PRE	XBRL Taxonomy Extension Presentation Linkbase

* As contemplated by SEC Release No. 33-8212, these exhibits are furnished with this Quarterly Report on Form 10-Q and are not deemed filed with the SEC and are not incorporated by reference in any filing of VeriSign, Inc. under the Securities Act of 1933 or the Securities Exchange Act of 1934, whether made before or after the date hereof and irrespective of any general incorporation language in such filings.

BYLAWS
of
VERISIGN, INC.

ARTICLE I
Stockholders

Section 1. Annual Meeting. An annual meeting of the stockholders of the corporation, for the election of the directors to succeed those whose terms expire and for the transaction of such other business as may properly come before the meeting, shall be held at such place, on such date and at such time as the Board of Directors shall each year fix.

Section 2. Special Meetings. (a) Special meetings of the stockholders, for any purpose or purposes prescribed in the notice of the meeting, shall be held at such place, on such date, and at such time as determined by the Board of Directors and may be called only by (i) the Board of Directors pursuant to a resolution adopted by a majority of the total number of directors authorized by resolutions (whether or not there exist any vacancies in previously authorized directorships at the time any such resolution is presented to the Board of Directors for adoption), (ii) the Chairman of the Board of Directors, (iii) the President or (iv) the Secretary whenever a stockholder or group of stockholders Owning (as defined below) at least thirty-five percent (35%) in the aggregate of the capital stock issued, outstanding and entitled to vote, and who held that amount in a net long position continuously for at least one year (the "Eligibility Criteria"), so request in writing. Business transacted at special meetings shall be confined to the purpose or purposes stated in the notice of the meeting.

In the case of clause (iv) of the immediately preceding sentence, each such written request must be signed by each stockholder making the request and delivered to the Secretary at the principal executive office of the corporation and shall set forth (a) a brief description of the business desired to be brought before the special meeting of the stockholders, including the complete text of any resolutions to be presented at the special meeting of the stockholders with respect to such business, and the reasons for conducting such business at the meeting; (b) the date of request; (c)(i) if any stockholder making the request is a registered holder of the corporation's stock, the name, address and ownership information, as they appear on the corporation's books, of each such stockholder and (ii) if any stockholder making the request is not a registered holder of the corporation's stock, proof of satisfaction by each such stockholder of the Eligibility Criteria which shall be substantially similar to the proof specified by Rule 14a-8(b)(2)(i) or (ii) under the Securities Exchange Act of 1934 (the "Exchange Act"), as amended from time to time, in each case, including a written agreement to update and supplement such information upon the occurrence of any changes thereto; (d) a representation that each requesting stockholder intends to appear in person or by proxy at the special meeting of the stockholders to transact the business specified; and (e) a representation that each requesting stockholder intends to hold the shares of the corporation's stock set forth in the written request through the date of the special meeting of the stockholders; provided that, if any such requesting stockholder (x) fails to satisfy the Eligibility Criteria or to follow one of the procedural requirements described in clauses (a) through (e) of this sentence (the "Procedural Requirements"), the corporation shall not be obligated to call a special meeting unless the remaining requesting stockholders continue to satisfy the Eligibility Criteria and the Procedural Requirements or (y) fails to hold the required number of shares through the date of the special meeting (a "Non Performing Holder"), the corporation may cancel the special meeting (if previously called but not yet held) unless the remaining requesting stockholders have not failed to hold such shares through such date and continue to satisfy the Eligibility Criteria; provided, further, that the corporation may disregard future requests to call special meetings from each Non Performing Holder for the following two calendar years. Following receipt by the Secretary of a written request of stockholders that complies with the requirements set forth in this Section 2 (a "Special Meeting Request"), the Secretary shall call a special meeting of the stockholders.

(b) Revocation of Special Meeting Request. A stockholder may revoke a Special Meeting Request at any time by written revocation. Following such revocation, the Board of Directors, in its discretion, may cancel the special meeting unless, in the case of a Special Meeting Request, any remaining requesting stockholders continue to satisfy the Eligibility Criteria and the Procedural Requirements. For purposes of this Section 2, written revocation shall mean delivering a notice of revocation to the Secretary.

(c) Limitations. The Secretary shall not call a special meeting in response to a Special Meeting Request if (i) an identical or substantially similar item (as determined by the Board of Directors, a “Similar Item”) is included or will be included in the corporation’s notice of meeting as an item of business to be brought before a meeting of stockholders that will be held not later than ninety (90) days after the delivery date of the Special Meeting Request (the “Delivery Date”); (ii) the Delivery Date is during the period commencing ninety (90) days prior to the date of the next annual meeting of stockholders and ending on the date of the next annual meeting of stockholders; (iii) a Similar Item was presented at any meeting of stockholders held within one hundred and eighty (180) days prior to the Delivery Date; (iv) the Special Meeting Request relates to an item of business that is not a proper subject for stockholder action under applicable law; or (v) such Special Meeting Request was made in a manner that involved a violation of Regulation 14A under the Exchange Act or other applicable law. For purposes of this Section 2, the election of directors shall be deemed to be a Similar Item with respect to all items of business involving the election or removal of directors.

For the purposes of this Section 2, a stockholder or beneficial owner is deemed to “Own” only those outstanding shares of capital stock as to which the person possesses both (A) the full voting and investment rights pertaining to the shares and (B) the full economic interest in (including the opportunity for profit and risk of loss on) such shares, except that the number of shares calculated in accordance with clauses (A) and (B) shall not include any shares (1) sold by such person in any transaction that has not been settled or closed, (2) borrowed by the person for any purposes or purchased by the person pursuant to an agreement to resell, or (3) subject to any option, warrant, forward contract, swap, contract of sale, or other derivative or similar agreement entered into by the person, whether the instrument or agreement is to be settled with shares or with cash based on the notional amount or value of outstanding shares of capital stock, if the instrument or agreement has, or is intended to have, or if exercised would have, the purpose or effect of (x) reducing in any manner, to any extent or at any time in the future, the person’s full right to vote or direct the voting of the shares, and/or (y) hedging, offsetting, or altering to any degree any gain or loss arising from the full economic ownership of the shares by the person. The terms “Owned,” “Owning” and other variations of the word “Own,” when used with respect to a stockholder or beneficial owner, have correlative meanings. For purposes of clauses (1) through (3), the term “person” includes its affiliates. A stockholder or beneficial owner “Owns” shares held in the name of a nominee or other intermediary so long as the person retains the right to instruct how the shares are voted with respect to the election of directors and the right to direct the disposition thereof and possesses the full economic interest in the shares. The person’s Ownership of shares is deemed to continue during any period in which the person has delegated any voting power by means of a proxy, power of attorney, or other instrument or arrangement that is revocable at any time by the stockholder.

Section 3. Place of Meetings. All meetings of stockholders shall be held at the principal office of the corporation unless a different place is fixed by the person or persons calling the meeting and stated in the notice of the meeting.

Section 4. Notices of Meetings and Adjourned Meetings. A written notice of each annual or special meeting of the stockholders stating the place, date, and hour thereof, shall be given by the Secretary (or the person or persons calling the meeting), not less than 10 nor more than 60 days before the date of the meeting, to each stockholder entitled to such notice, and, if mailed, shall be given by depositing it postage prepaid in the United States mail, directed to each stockholder at his or her address as it appears on the records of the corporation. Notices of all special meetings of stockholders shall state the purpose or purposes for which the meeting is called. An affidavit of the Secretary, Assistant Secretary, or transfer agent of the corporation that the notice has been given shall, in the absence of fraud, be prima facie evidence of the facts stated therein. No notice need be given to any person with whom communication is unlawful or to any person who has waived such notice in the manner permitted by Section 229 of the Delaware General Corporation Law (the “DGCL”). When a meeting is adjourned to another time and place, notice need not be given of the adjourned meeting if the time and place thereof are announced at the meeting at which the adjournment is taken except that, if the adjournment is for more than 30 days or if, after the adjournment, a new record date is fixed for the adjourned meeting, a notice of the adjourned meeting shall be given as provided in this Section 4.

Section 5. Quorum. At any meeting of the stockholders, a quorum for the transaction of business shall consist of one or more individuals appearing in person or represented by proxy and owning or representing a majority of the shares of the corporation then outstanding and entitled to vote thereat, unless or except to the extent that the presence of a larger number may be required by law (including as required from time to time by the DGCL or the Certificate of Incorporation of the corporation (the “Certificate of Incorporation”). Where a separate vote by a class or classes is required, a majority of the shares of such class or classes then outstanding and entitled to vote present in person or by proxy shall constitute a quorum entitled to take action with respect to that vote on that matter. If a quorum shall fail to attend any meeting, the chairman of the meeting or the holders of a majority of the shares of stock entitled to vote thereat who are present, in person or by proxy, may adjourn the meeting to another place, date, or time.

Section 6. Organization. Such person as the Board of Directors may have designated or, in the absence of such a person, the President of the corporation or, in his or her absence, such person as may be chosen by the holders of a majority of the shares entitled to vote thereat who are present, in person or by proxy, shall call to order any meeting of the stockholders and act as chairman of the meeting. In the absence of the Secretary of the corporation, the secretary of the meeting shall be such person as the chairman appoints.

Section 7. Conduct of Business. The chairman of any meeting of stockholders shall determine the order of business and the procedure at the meeting, including such regulation of the manner of voting and the conduct of discussion as seems to him or her in order.

Section 8. Voting. Unless otherwise provided in the Certificate of Incorporation and subject to the provisions of Section 6 of Article IV hereof, each stockholder shall have one vote for each share of stock entitled to vote held by him or her of record according to the records of the corporation. Persons holding stock in a fiduciary capacity shall be entitled to vote the shares so held. Persons whose stock is pledged shall be entitled to vote unless the pledgor in a transfer on the books of the corporation has expressly empowered the pledgee to vote the pledged shares, in which case only the pledgee or his or her proxy shall be entitled to vote. If shares stand of record in the names of two or more persons or if two or more persons have the same fiduciary relationship respecting the shares then, unless the Secretary is given written notice to the contrary and is furnished with a copy of the instrument or order appointing them or creating the relationship wherein it is so provided to the contrary: (a) if only one votes, his or her act binds all; (b) if more than one votes, the act of the majority so voting binds all; and (c) if more than one votes and the vote is evenly split, the effect shall be as provided by law.

Section 9. Proxies. Each stockholder entitled to vote at a meeting of stockholders may authorize another person or any group of persons to act for him or her by proxy, but no such proxy shall be voted or acted upon after three years from its date, unless the proxy provides for a longer period.

Section 10. Action at Meeting.

(a) Voting - General. When a quorum is present at any meeting, action of the stockholders on any matter properly brought before such meeting, other than the election of directors, shall require, and may be effected by, the affirmative vote of the holders of a majority in interest of the stock present or represented by proxy and entitled to vote on the subject matter, except where a different vote is expressly required by law, the Certificate of Incorporation or these Bylaws, in which case such express provision shall govern and control.

(b) Voting - Directors. Except as provided in Section 7 of Article II of these Bylaws, each director shall be elected by the affirmative vote of the Majority of the Votes Cast (as defined herein) with respect to that director at any meeting for the election of directors at which a quorum is present, provided that if as of a date that is five business days in advance of the date the corporation files its definitive proxy statement (regardless of whether or not thereafter revised or supplemented) with the Securities and Exchange Commission ("SEC") the number of nominees exceeds the number of directors to be elected, the directors shall be elected by the vote of a plurality of the votes cast at such meeting. If the Certificate of Incorporation so provides, no ballot shall be required for the election of directors unless requested by a stockholder present or represented at the meeting and entitled to vote in the election. For purposes of this paragraph (b), the term "Majority of the Votes Cast" means, with respect to a nominee for director, that the number of shares voted "for" the election of that nominee must exceed the number of votes cast "against" that nominee.

Section 11. Stockholder Lists. The officer who has charge of the stock ledger of the corporation shall prepare and make available, at least 10 days before every meeting of stockholders, a complete list of stockholders entitled to vote at the meeting, arranged in alphabetical order, and showing the address of each stockholder and the number of shares registered in the name of each stockholder. Such list shall be open to the examination of any stockholder for any purpose germane to the meeting for a period of at least 10 days prior to the meeting during ordinary business hours, at the principal place of business of the corporation. Such list shall also be produced and kept at the time and place of the meeting during the whole time thereof, and may be inspected by any stockholder who is present. The stock ledger shall be the only evidence as to who are the stockholders entitled to examine the stock ledger, the list required by this section or the books of the corporation, or to vote in person or by proxy at any meeting of stockholders.

Section 12. Submission of Information by Director Nominees. (a) To be eligible to be a nominee for election or re-election as a director of the corporation, a person must deliver to the Secretary at the principal executive office of the corporation the following information:

(i) a written representation and agreement, which shall be signed by such person and shall represent and agree that such person: (A) consents to serving as a director if elected and (if applicable) to being named in the corporation's proxy statement and form of proxy as a nominee; (B) is not and will not become a party to any agreement, arrangement or understanding with, and has not given any commitment or assurance to, any person or entity: (1) as to how the person, if elected as a director, will act or vote on any issue or question that has not been disclosed to the corporation, or (2) that could limit or interfere with the person's ability to comply, if elected as a director, with such person's fiduciary duties under applicable law; (C) is not and will not become a party to any agreement, arrangement or understanding with any person or entity other than the corporation with respect to any direct or indirect compensation, reimbursement or indemnification in connection with service or action as a director that has not been disclosed to the corporation; and (D) if elected as a director, will comply with all of the corporation's corporate governance, conflict of interest, confidentiality, and stock ownership and trading policies and guidelines, and any other corporation policies and guidelines applicable to directors (which will be provided to such person promptly following a request therefor); and

(ii) all completed and signed questionnaires required of the corporation's directors (which will be provided to such person promptly following a request therefor).

(b) A nominee for election or re-election as a director of the corporation shall also provide to the corporation such other information as it may reasonably request. The corporation may request such additional information as necessary to permit the corporation to determine the eligibility of such person to serve as a director of the corporation, including information relevant to a determination whether such person can be considered an independent director.

(c) Notwithstanding any other provision of these Bylaws, if a stockholder has submitted notice of an intent to nominate a candidate for election or re-election as a director pursuant to Section 13 of this Article I or Section 14 of this Article I, the questionnaires described in Section 12(a)(ii) above and the additional information described in clause (b) of this Section 12 above shall be considered timely if provided to the corporation promptly upon request by the corporation, but in any event within the time period for delivery of a stockholder's notice pursuant to Section 13 of this Article I or Section 14 of this Article I, respectively, and all information provided pursuant to this Section 12 shall be deemed part of the stockholder's notice submitted pursuant to Section 13 of this Article I or Section 14 of this Article I, respectively.

Section 13. Notice of Stockholder Business: Nominations.

(a) Annual Meeting.

(i) Nominations of persons for election to the Board of Directors and the proposal of business other than nominations to be considered by the stockholders may be made at an annual meeting of stockholders only (A) pursuant to the corporation's notice of meeting (or any supplement thereto), (B) by or at the direction of the Board of Directors (C) by any stockholder of the corporation who is a stockholder of record at the time the notice provided for in this Section 13(a) is delivered to the Secretary of the corporation, who is entitled to vote at the meeting and who complies with the notice procedures set forth in this Section 13(a) or (D) by an Eligible Stockholder (as defined in clause (c) of Section 14 of this Article I) pursuant to the requirements of Section 14 of this Article I. For the avoidance of doubt, the foregoing clauses (C) and (D) shall be the exclusive means for a stockholder to make nominations or propose other business at an annual meeting of stockholders (other than a proposal included in the corporation's proxy statement pursuant to and in compliance with Rule 14a-8 under the Exchange Act).

(ii) For nominations or other business to be properly brought before an annual meeting by a stockholder pursuant to clause (C) of the foregoing paragraph, the stockholder must have given timely notice thereof in writing to the Secretary of the corporation and, in the case of business other than nominations, such business must be a proper subject for stockholder action. To be timely, a stockholder's notice must be delivered to the Secretary at the principal executive office of the corporation not later than the close of business (as defined in clause (c)(ii) of this Section 13) on the 90th day nor earlier than the close of business on the 120th day prior to the first anniversary of the preceding year's annual meeting; provided, however, that in the event that the date of the annual meeting is more than 30 days before or more than 60 days after such anniversary date, or if no annual meeting was held in the preceding year, notice by the stockholder to be timely must be so delivered not earlier than the close of business on the 120th day prior to such annual meeting and not later than the close of business on the later of the 90th day prior to such annual meeting or the 10th day following the date on which public announcement (as defined in clause (c)(ii) of this Section 13) of the date of such meeting is first made by the corporation. In no event shall an adjournment or recess of an annual meeting, or a postponement of an annual meeting for which notice of the meeting has already been given to stockholders or with respect to which there has been a public announcement of the date of the meeting, commence a new time period (or extend any time period) for the giving of a stockholder's notice as described above. Such stockholder's notice shall set forth:

(A) as to each person whom the stockholder proposes to nominate for election or re-election as a director (1) all information relating to such person that is required to be disclosed in solicitations of proxies for election of directors in an election contest, or is otherwise required, in each case pursuant to and in accordance with Regulation 14A under the Exchange Act, and (2) the information required to be submitted by nominees pursuant to clause (a)(i) of Section 12 of this Article I above;

(B) as to any other business that the stockholder proposes to bring before the meeting, a brief description of the business desired to be brought before the meeting, the text of the proposal or business (including the text of any resolutions proposed for consideration and in the event that such business includes a proposal to amend these Bylaws, the language of the proposed amendment), the reasons for conducting such business at the meeting and any substantial interest (within the meaning of Item 5 of Schedule 14A under the Exchange Act) in such business of such stockholder and the beneficial owner (within the meaning of Section 13(d) of the Exchange Act), if any, on whose behalf the proposal is made;

(C) as to the stockholder giving the notice and the beneficial owner, if any, on whose behalf the nomination is made or the other business is proposed:

(1) the name and address of such stockholder, as they appear on the corporation's books, and the name and address of such beneficial owner,

(2) the class or series and number of shares of stock of the corporation which are owned of record by such stockholder and such beneficial owner as of the date of the notice, and a representation that the stockholder will notify the corporation in writing within five business days after the record date for such meeting of the class or series and number of shares of stock of the corporation owned of record by the stockholder and such beneficial owner as of the record date for the meeting, and

(3) a representation that the stockholder (or a qualified representative of the stockholder) intends to appear at the meeting to make such nomination or propose such business;

(D) as to the stockholder giving the notice or, if the notice is given on behalf of a beneficial owner on whose behalf the nomination is made or the other business is proposed, as to such beneficial owner, and if such stockholder or beneficial owner is an entity, as to each director, executive, managing member or control person of such entity (any such individual or control person, a "Control Person"):

(1) the class or series and number of shares of stock of the corporation which are beneficially owned (as defined in clause (c) (ii) of this Section 13) by such stockholder or beneficial owner and by any Control Person as of the date of the notice, and a representation that the stockholder will notify the corporation in writing within five business days after the record date for such meeting of the class or series and number of shares of stock of the corporation beneficially owned by such stockholder or beneficial owner and by any Control Person as of the record date for the meeting,

(2) a description of any agreement, arrangement or understanding with respect to the nomination or other business between or among such stockholder, beneficial owner or Control Person and any other person, including without limitation any agreements that would be required to be disclosed pursuant to Item 5 or Item 6 of Exchange Act Schedule 13D (regardless of whether the requirement to file a Schedule 13D is applicable) and a representation that the stockholder will notify the corporation in writing within five business days after the record date for such meeting of any such agreement, arrangement or understanding in effect as of the record date for the meeting,

(3) a description of any agreement, arrangement or understanding (including without limitation any derivative or short positions, profit interests, options, hedging transactions, and borrowed or loaned shares) that has been entered into as of the date of the stockholder's notice by, or on behalf of, such stockholder, beneficial owner or Control Person, the effect or intent of which is to mitigate loss, manage risk or benefit from changes in the share price of any class or series of the corporation's stock, or maintain, increase or decrease the voting power of the stockholder, beneficial owner or Control Person with respect to securities of the corporation, and a representation that the stockholder will notify the corporation in writing within five business days after the record date for such meeting of any such agreement, arrangement or understanding in effect as of the record date for the meeting,

(4) a representation whether the stockholder or the beneficial owner, if any, will engage in a solicitation, within the meaning of Exchange Act Rule 14a-1(l), with respect to the nomination or other business and, if so, the name of each participant (as defined in Item 4 of Schedule 14A under the Exchange Act) in such solicitation and whether such person intends or is part of a group which intends to deliver a proxy statement and/or form of proxy to holders of at least

fifty percent (50%) of the corporation's stock entitled to vote generally in the election of directors in the case of a nomination and to holders of at least the percentage of the corporation's stock required to approve or adopt the business to be proposed, in the case of a proposal.

(iii) Notwithstanding anything in clause (ii) of this Section 13(a) or clause (b) of this Section 13 to the contrary, if the record date for determining the stockholders entitled to vote at any meeting of stockholders is different from the record date for determining the stockholders entitled to notice of the meeting, a stockholder's notice required by this Section 13 shall set forth a representation that the stockholder will notify the corporation in writing within five business days after the record date for determining the stockholders entitled to vote at the meeting, or by the opening of business on the date of the meeting (whichever is earlier), of the information required under clauses (ii)(C)(2) and (ii)(D)(1)-(3) of this Section 13(a), and such information when provided to the corporation shall be current as of the record date for determining the stockholders entitled to vote at the meeting.

(iv) This Section 13(a) shall not apply to a proposal proposed to be made by a stockholder if the stockholder has notified the corporation of his or her intention to present the proposal at an annual or special meeting only pursuant to and in compliance with Rule 14a-8 under the Exchange Act and such proposal has been included in a proxy statement that has been prepared by the corporation to solicit proxies for such meeting.

(v) Notwithstanding anything in this Section 13(a) to the contrary, in the event that the number of directors to be elected to the Board of Directors at an annual meeting is increased and there is no public announcement by the corporation naming all of the nominees for directors or specifying the size of the increased Board of Directors made by the corporation at least 10 days prior to the last day a stockholder may deliver a notice in accordance with clause (ii) of this Section 13(a), a stockholder's notice required by this Section 13(a) shall also be considered timely, but only with respect to nominees for any new positions created by such increase, if it shall be delivered to the Secretary of the corporation at the principal executive office of the corporation not later than the close of business on the 10th day following the day on which such public announcement is first made by the corporation.

(b) Special Meeting. Only such business shall be conducted at a special meeting of stockholders as shall have been brought before the meeting pursuant to the corporation's notice of meeting. Nominations of persons for election to the Board of Directors may be made at a special meeting of stockholders at which directors are to be elected pursuant to the corporation's notice of meeting (i) by or at the direction of the Board of Directors, (ii) provided that one or more directors are to be elected at such meeting, by any stockholder of the corporation who is a stockholder of record at the time the notice provided for in this Section 13(b) is delivered to the Secretary of the corporation, who is entitled to vote at the meeting and upon such election and who delivers a written notice setting forth the information required by clause (a) of this Section 13 and provides the additional information required by clause (a) of Section 12 of this Article I above, or (iii) in the case of a stockholder-requested special meeting, by any stockholder of the corporation pursuant to clause (a)(iv) of Section 2 of this Article I. In the event the corporation calls a special meeting of stockholders for the purpose of electing one or more directors to the Board of Directors, any stockholder entitled to vote in such election of directors may nominate a person or persons (as the case may be) for election to such position(s) as specified in the corporation's notice of meeting, if the notice required by this Section 13(b) shall be delivered to the Secretary at the principal executive office of the corporation not earlier than the close of business on the 120th day prior to such special meeting and not later than the close of business on the later of the 90th day prior to such special meeting or the 10th day following the date on which public announcement of the date of the special meeting and of the nominees proposed by the Board of Directors to be elected at such meeting is first made by the corporation. In no event shall an adjournment, recess or postponement of a special meeting commence a new time period (or extend any time period) for the giving of a stockholder's notice as described above.

(c) General.

(i) Except as otherwise required by law, only such persons who are nominated in accordance with the procedures set forth in this Section 13 shall be eligible to be elected or re-elected at any meeting of stockholders of the corporation to serve as directors and only such other business shall be conducted at a meeting of stockholders as shall have been brought before the meeting in accordance with the procedures set forth in this Section 13. Except as otherwise required by law, each of the Chairman of the Board of Directors, the Board of Directors or the chairman of the meeting shall have the power to determine whether a nomination or any other business proposed to be brought before the meeting was made or proposed, as the case may be, in accordance with the procedures set forth in this Section 13. If any proposed nomination or other business is not in compliance with this Section 13, then except as otherwise required by law, the chairman of the meeting shall have the power to declare that such nomination shall be disregarded or that such other business shall not be transacted. Notwithstanding the foregoing provisions of this Section 13, unless otherwise required by law, or otherwise determined by the Chairman of the Board of Directors, the Board of Directors or the chairman of the meeting, if the stockholder does not provide

the information required under Section 12 of this Article I above or clauses (a)(ii)(C)(2) and (a)(ii)(D)(1)-(3) of this Section 13 to the corporation within the time frames specified herein, or if the stockholder (or a qualified representative of the stockholder) does not appear at the annual or special meeting of stockholders of the corporation to present a nomination or other business, such nomination shall be disregarded and such other business shall not be transacted, notwithstanding that proxies in respect of such vote may have been received by the corporation. For purposes of these Bylaws, to be considered a qualified representative of a stockholder, a person must be a duly authorized officer, manager or partner of such stockholder or authorized by a writing executed by such stockholder (or a reliable reproduction or electronic transmission of the writing) delivered to the corporation prior to the making of such nomination or proposal at such meeting stating that such person is authorized to act for such stockholder as proxy at the meeting of stockholders.

(ii) For purposes of this Section 13, the “close of business” shall mean 6:00 p.m. local time at the principal executive office of the corporation on any calendar day, whether or not the day is a business day, and a “public announcement” shall mean disclosure in a press release reported by the Dow Jones News Service, Associated Press or a comparable national news service or in a document publicly filed by the corporation with the SEC pursuant to Sections 13, 14 or 15(d) of the Exchange Act. For purposes of clause (a)(ii)(D)(1) of this Section 13, shares shall be treated as “beneficially owned” by a person if the person beneficially owns such shares, directly or indirectly, for purposes of Section 13(d) of the Exchange Act and Regulations 13D and 13G thereunder or has or shares pursuant to any agreement, arrangement or understanding (whether or not in writing): (A) the right to acquire such shares (whether such right is exercisable immediately or only after the passage of time or the fulfillment of a condition or both), (B) the right to vote such shares, alone or in concert with others and/or (C) investment power with respect to such shares, including the power to dispose of, or to direct the disposition of, such shares.

Section 14. Proxy Access for Director Nominations.

(a) Subject to the terms and conditions of these Bylaws, in connection with an annual meeting of stockholders at which directors are to be elected, the corporation (i) shall include in its proxy statement and on its form of proxy the names of, and (ii) shall include in its proxy statement the “Additional Information” (as defined below) relating to, a number of nominees specified pursuant to clause (b) of this Section 14 below (the “Authorized Number”) for election to the Board of Directors submitted pursuant to this Section 14 (each, a “Stockholder Nominee”), if:

(i) the Stockholder Nominee satisfies the eligibility requirements in this Section 14;

(ii) the Stockholder Nominee is identified in a timely notice (the “Stockholder Notice”) that satisfies this Section 14 and is delivered by a stockholder that qualifies as, or is acting on behalf of, an Eligible Stockholder (as defined below);

(iii) the Eligible Stockholder satisfies the requirements in this Section 14 and expressly elects at the time of the delivery of the Stockholder Notice to have the Stockholder Nominee included in the corporation’s proxy materials; and

(iv) the additional requirements of these Bylaws are met.

(b) The maximum number of Stockholder Nominees appearing in the corporation’s proxy materials with respect to an annual meeting of stockholders (the “Authorized Number”) shall not exceed the greater of (i) two or (ii) twenty percent (20%) of the number of directors in office as of the last day on which a Stockholder Notice may be delivered pursuant to this Section 14 with respect to the annual meeting, or if such amount is not a whole number, the closest whole number (rounding down) below twenty percent (20%); provided that the Authorized Number shall be reduced (i) by any Stockholder Nominee whose name was submitted for inclusion in the corporation’s proxy materials pursuant to this Section 14 but whom the Board of Directors decides to nominate as a Board of Directors nominee, and (ii) by any nominees who were previously elected to the Board of Directors as Stockholder Nominees at any of the preceding two annual meetings and who are nominated for election at the annual meeting by the Board of Directors as a Board of Directors nominee. In the event that one or more vacancies for any reason occurs after the date of the Stockholder Notice but before the annual meeting and the Board of Directors resolves to reduce the size of the Board of Directors in connection therewith, the Authorized Number shall be calculated based on the number of directors in office as so reduced.

(c) To qualify as an “Eligible Stockholder,” a stockholder or a group as described in this Section 14(c) must:

(i) Own and have Owned (as defined below), continuously for at least three years as of the date of the Stockholder Notice, a number of shares (as adjusted to account for any stock dividend, stock split, subdivision, combination, reclassification or recapitalization of the shares of capital stock issued, outstanding and entitled to vote generally in the

election of directors (for purposes of this Section 14, "Voting Capital Stock") that represents at least three percent (3%) of the outstanding shares of Voting Capital Stock as of the date of the Stockholder Notice (the "Required Shares"); and

(ii) thereafter continue to Own the Required Shares through such annual meeting of stockholders.

For purposes of satisfying the ownership requirements of this Section 14(c), a group of not more than twenty (20) stockholders and/or beneficial owners may aggregate the number of shares of Voting Capital Stock that each group member has individually Owned continuously for at least three years as of the date of the Stockholder Notice if all other requirements and obligations for an Eligible Stockholder set forth in this Section 14 are satisfied by and as to each stockholder or beneficial owner comprising the group whose shares are aggregated. No shares may be attributed to more than one Eligible Stockholder, and no stockholder or beneficial owner, alone or together with any of its affiliates, may individually or as a member of a group qualify as or constitute more than one Eligible Stockholder under this Section 14. A group of any two or more funds shall be treated as only one stockholder or beneficial owner for this purpose if they are (A) under common management and investment control or (B) under common management and funded primarily by a single employer. For the purposes of this Section 14, the term "affiliate" or "affiliates" shall have the meanings ascribed thereto under the rules and regulations promulgated under the Exchange Act.

(d) For purposes of this Section 14:

(i) The terms "Own," "Owned," "Owning" and other variations of the word "Own" when used with respect to a stockholder or beneficial owner shall have the same meanings as defined in Section 2 of this Article I.

(ii) A stockholder or beneficial owner's Ownership of shares shall be deemed to continue during any period in which the person has loaned the shares if the person has the power to recall the loaned shares on not more than five business days' notice.

(e) For purposes of this Section 14, the "Additional Information" referred to in clause (a) of this Section 14 that the corporation will include in its proxy statement is:

(i) the information set forth in the Schedule 14N provided with the Stockholder Notice concerning each Stockholder Nominee and the Eligible Stockholder that is required to be disclosed in the corporation's proxy statement by the applicable requirements of the Exchange Act and the rules and regulations thereunder; and

(ii) if the Eligible Stockholder so elects, a written statement of the Eligible Stockholder (or, in the case of a group, a written statement of the group), not to exceed 500 words, in support of its Stockholder Nominee(s), which must be provided at the same time as the Stockholder Notice for inclusion in the corporation's proxy statement for the annual meeting (the "Statement").

Notwithstanding anything to the contrary contained in this Section 14, the corporation may omit from its proxy materials any information or Statement that it, in good faith, believes is untrue in any material respect (or omits a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading) or would violate any applicable law, rule, regulation or listing standard. Nothing in this Section 14 shall limit the corporation's ability to solicit against and include in its proxy materials its own statements relating to any Eligible Stockholder or Stockholder Nominee.

(f) The Stockholder Notice shall set forth all information, representations and agreements required under clause (a)(ii) of Section 13 of this Article I above, including the information required with respect to (i) any nominee for election as a director, (ii) any stockholder giving notice of an intent to nominate a candidate for election, and (iii) any stockholder, beneficial owner or other person on whose behalf the nomination is made under this Section 14. In addition, such Stockholder Notice shall include:

(i) a copy of the Schedule 14N that has been or concurrently is filed with the SEC under the Exchange Act;

(ii) a written statement of the Eligible Stockholder (and in the case of a group, the written statement of each stockholder or beneficial owner whose shares are aggregated for purposes of constituting an Eligible Stockholder), which statement(s) shall also be included in the Schedule 14N filed with the SEC: (A) setting forth and certifying to the number of shares of Voting Capital Stock the Eligible Stockholder Owns and has Owned (as defined in clause (d) of this Section 14) continuously for at least three years as of the date of the Stockholder Notice, and (B) agreeing to continue to Own such shares through the annual meeting;

(iii) the written agreement of the Eligible Stockholder (and in the case of a group, the written agreement of each stockholder or beneficial owner whose shares are aggregated for purposes of constituting an Eligible Stockholder) addressed to the corporation, setting forth the following additional agreements, representations, and warranties:

(A) it shall provide (1) within five business days after the date of the Stockholder Notice, one or more written statements from the record holder(s) of the Required Shares and from each intermediary through which the Required Shares are or have been held, in each case during the requisite three-year holding period, specifying the number of shares that the Eligible Stockholder Owns, and has Owned continuously in compliance with this Section 14, (2) within five business days after the record date for the annual meeting both the information required under clause (a)(ii)(D)(1) of Section 13 of this Article I and notification in writing verifying the Eligible Stockholder's continuous Ownership of the Required Shares, in each case, as of such date, and (3) immediate notice to the corporation if the Eligible Stockholder ceases to own any of the Required Shares prior to the annual meeting;

(B) it (1) acquired the Required Shares in the ordinary course of business and not with the intent to change or influence control at the corporation, and does not presently have this intent, (2) has not nominated and shall not nominate for election to the Board of Directors at the annual meeting any person other than the Stockholder Nominee(s) being nominated pursuant to this Section 14, (3) has not engaged and shall not engage in, and has not been and shall not be a participant (as defined in Item 4 of Exchange Act Schedule 14A) in, a solicitation within the meaning of Exchange Act Rule 14a-1(l), in support of the election of any individual as a director at the annual meeting other than its Stockholder Nominee or a nominee of the Board of Directors, and (4) shall not distribute to any stockholder any form of proxy for the annual meeting other than the form distributed by the corporation; and

(C) it will (1) assume all liability stemming from any legal or regulatory violation arising out of the Eligible Stockholder's communications with the stockholders of the corporation or out of the information that the Eligible Stockholder provided to the corporation, (2) indemnify and hold harmless the corporation and each of its directors, officers and employees individually against any liability, loss or damages in connection with any threatened or pending action, suit or proceeding, whether legal, administrative or investigative, against the corporation or any of its directors, officers or employees arising out of the nomination or solicitation process pursuant to this Section 14, (3) comply with all laws, rules, regulations and listing standards applicable to its nomination or any solicitation in connection with the annual meeting, (4) file with the SEC any solicitation or other communication by or on behalf of the Eligible Stockholder relating to the corporation's annual meeting of stockholders, one or more of the corporation's directors or director nominees or any Stockholder Nominee, regardless of whether the filing is required under Exchange Act Regulation 14A, or whether any exemption from filing is available for such materials under Regulation 14A under the Exchange Act, and (5) at the request of the corporation, promptly, but in any event within five business days after such request, (or by the day prior to the day of the annual meeting, if earlier) provide to the corporation such additional information as reasonably requested by the corporation; and

(iv) in the case of a nomination by a group, the designation by all group members of one group member that is authorized to act on behalf of all members of the group with respect to the nomination and matters related thereto, including withdrawal of the nomination and the written agreement, representation, and warranty of the Eligible Stockholder that it shall provide within five business days after the date of the Stockholder Notice, documentation reasonably satisfactory to the corporation demonstrating that the number of stockholders and/or beneficial owners within such group does not exceed twenty (20), including whether a group of funds qualifies as one stockholder or beneficial owner within the meaning of clause (c) of this Section 14.

All information provided pursuant to this Section 14(f) shall be deemed part of the Stockholder Notice for purposes of this Section 14.

(g) To be timely under this Section 14, the Stockholder Notice must be delivered by a stockholder to the Secretary of the corporation at the principal executive office of the corporation not later than the close of business (as defined in clause (c)(ii) of Section 13 of this Article I) on the 120th day nor earlier than the close of business on the 150th day prior to the first anniversary of the date or approximate date (as stated in the corporation's proxy materials) the definitive proxy statement was first released to stockholders in connection with the preceding year's annual meeting of stockholders; provided, however, that in the event the annual meeting is more than 30 days before or after the anniversary of the previous year's annual meeting, or if no annual meeting was held in the preceding year, to be timely, the Stockholder Notice must be so delivered not earlier than the close of business on the 150th day prior to such annual meeting and not later than the close of business on the later of the 120th day prior to such annual meeting or the 10th day following the day on which public announcement (as defined in clause (c)(ii) of Section 13 of this Article I) of the date of such meeting is first made by the corporation. In no event shall an adjournment or recess of an annual meeting, or a postponement of an annual meeting for which notice has been given or with

respect to which there has been a public announcement of the date of the meeting, commence a new time period (or extend any time period) for the giving of the Stockholder Notice as described above.

(h) Within the time period for delivery of the Stockholder Notice, for each Stockholder Nominee, all written and signed representations and agreements and all completed and signed questionnaires required pursuant to clause (a) of Section 12 of this Article I, including consent to being named in the corporation's proxy statement and form of proxy as a nominee, shall be delivered to the Secretary of the corporation at the principal executive office of the corporation. The Stockholder Nominee must promptly, but in any event within five business days after such request, provide to the corporation such other information as it may reasonably request. The corporation may request such additional information as necessary to permit the Board of Directors to determine if each Stockholder Nominee satisfies the requirements of this Section 14.

(i) In the event that any information or communications provided by the Eligible Stockholder or any Stockholder Nominees to the corporation or its stockholders is not, when provided, or thereafter ceases to be, true, correct and complete in all material respects (including omitting a material fact necessary to make the statements made, in light of the circumstances under which they were made, not misleading), such Eligible Stockholder or Stockholder Nominee, as the case may be, shall promptly notify the Secretary and provide the information that is required to make such information or communication true, correct, complete and not misleading; it being understood that providing any such notification shall not be deemed to cure any defect or limit the corporation's right to omit a Stockholder Nominee from its proxy materials as provided in this Section 14.

(j) Notwithstanding anything to the contrary contained in this Section 14, the corporation may omit from its proxy materials any Stockholder Nominee, and such nomination shall be disregarded and no vote on such Stockholder Nominee shall occur, notwithstanding that proxies in respect of such vote may have been received by the corporation, if:

(i) the Eligible Stockholder or Stockholder Nominee breaches any of its agreements, representations, or warranties set forth in the Stockholder Notice (or otherwise submitted pursuant to this Section 14), any of the information in the Stockholder Notice (or otherwise submitted pursuant to this Section 14) was not, when provided, true, correct and complete, or the Eligible Stockholder or applicable Stockholder Nominee otherwise fails to comply with its obligations pursuant to these Bylaws, including, but not limited to, its obligations under this Section 14;

(ii) the Stockholder Nominee (A) is not independent under any applicable listing standards, any applicable rules of the SEC, and any publicly disclosed standards used by the Board of Directors in determining and disclosing the independence of the corporation's directors, (B) is or has been, within the past three years, an officer or director of a competitor, as defined in Section 8 of the Clayton Antitrust Act of 1914, as amended, (C) is a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses) or has been convicted in a criminal proceeding (excluding traffic violations and other minor offenses) within the past 10 years or (D) is subject to any order of the type specified in Rule 506(d) of Regulation D promulgated under the Securities Act of 1933, as amended;

(iii) the corporation has received a notice (whether or not subsequently withdrawn) that a stockholder intends to nominate any candidate for election to the Board of Directors pursuant to the advance notice requirements for stockholder nominees for director in clause (a)(i)(C) of Section 13 of this Article I; or

(iv) the election of the Stockholder Nominee to the Board of Directors would cause the corporation to violate the Certificate of Incorporation of the corporation, these Bylaws, any applicable law, rule, regulation or listing standard.

(k) An Eligible Stockholder submitting more than one Stockholder Nominee for inclusion in the corporation's proxy materials pursuant to this Section 14 shall rank such Stockholder Nominees based on the order that the Eligible Stockholder desires such Stockholder Nominees to be selected for inclusion in the corporation's proxy materials and include such assigned rank in its Stockholder Notice submitted to the corporation. In the event that the number of Stockholder Nominees submitted by Eligible Stockholders pursuant to this Section 14 exceeds the Authorized Number, the Stockholder Nominees to be included in the corporation's proxy materials shall be determined in accordance with the following provisions: one Stockholder Nominee who satisfies the eligibility requirements in this Section 14 shall be selected from each Eligible Stockholder for inclusion in the corporation's proxy materials until the Authorized Number is reached, going in order of the amount (largest to smallest) of shares of the corporation each Eligible Stockholder disclosed as Owned in its Stockholder Notice submitted to the corporation and going in the order of rank (highest to lowest) assigned to each Stockholder Nominee by such Eligible Stockholder. If the Authorized Number is not reached after one Stockholder Nominee who satisfies the eligibility requirements in this Section 14 has been selected from each Eligible Stockholder, this selection process shall continue as many times as necessary, following the same order each time, until the Authorized Number is reached. Following such determination, if any Stockholder Nominee who satisfies the eligibility requirements in this Section 14 thereafter is

nominated by the Board of Directors, thereafter is not included in the corporation's proxy materials or thereafter is not submitted for director election for any reason (including the Eligible Stockholder's or Stockholder Nominee's failure to comply with this Section 14), no other nominee or nominees shall be included in the corporation's proxy materials or otherwise submitted for election as a director at the applicable annual meeting in substitution for such Stockholder Nominee.

(l) Any Stockholder Nominee who is included in the corporation's proxy materials for a particular annual meeting of stockholders but withdraws from or becomes ineligible or unavailable for election at the annual meeting for any reason, including for the failure to comply with any provision of these Bylaws (provided that in no event shall any such withdrawal, ineligibility or unavailability commence a new time period (or extend any time period) for the giving of a Stockholder Notice), shall be ineligible to be a Stockholder Nominee pursuant to this Section 14 for the next two annual meetings.

(m) Notwithstanding the foregoing provisions of this Section 14, unless otherwise required by law or otherwise determined by the Chairman of the Board of Directors, the Board of Directors or the chairman of the meeting, if the stockholder delivering the Stockholder Notice (or a qualified representative of the stockholder, as defined in clause (c)(i) of Section 13 of this Article I) does not appear at the annual meeting of stockholders of the corporation to present its Stockholder Nominee or Stockholder Nominees, such nomination or nominations shall be disregarded, notwithstanding that proxies in respect of the election of the Stockholder Nominee or Stockholder Nominees may have been received by the corporation. Without limiting the Board of Directors' power and authority to interpret any other provisions of these Bylaws, the Board of Directors (and any other person or body authorized by the Board of Directors) shall have the power and authority to interpret this Section 14 and to make any and all determinations necessary or advisable to apply this Section 14 to any persons, facts or circumstances, in each case, acting in good faith. This Section 14 shall be the exclusive method for stockholders to include nominees for director election in the corporation's proxy materials.

ARTICLE II

Directors

Section 1. Powers. The business and affairs of the corporation shall be managed by or under the direction of the Board of Directors, which may exercise all such powers of the corporation and do all such lawful acts and things as are not by law or these Bylaws directed or required to be exercised or done by the stockholders.

Section 2. Number of Directors. The Board of Directors shall consist of one or more members. The number of directors shall be no less than six (6) and no more than nine (9), the number thereof to be fixed from time to time by resolution of the Board of Directors.

Section 3. Election and Tenure. Each director shall be elected by the vote specified in clause (b) of Section 10 of Article I or as provided in Section 7 of this Article II. Each director shall serve until his or her successor is elected and qualified, or until his or her earlier resignation or removal.

Section 4. Qualification. No director need be a stockholder.

Section 5. Removal. Any director or the entire Board of Directors may be removed with or without cause, by the holders of a majority of the shares then entitled to vote at an election of the directors except as otherwise provided by law.

Section 6. Resignation. Any director of the corporation may resign at any time by giving written notice to the Board of Directors, to the Chairman of the Board of Directors, if any, to the President, or to the Secretary, and any member of a committee may resign therefrom at any time by giving notice as aforesaid or to the chairman or secretary of such committee. Any such resignation shall take effect at the time (or upon the happening of an event) specified therein, or, if the time (or event) be not specified, upon receipt thereof; and unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective.

Section 7. Vacancies and Newly Created Directorships. Vacancies and newly created directorships resulting from any increase in the authorized number of directors may be filled (a) by the stockholders at any meeting, (b) by a majority of the directors then in office, although less than a quorum, or (c) by a sole remaining director. Whenever the holders of any class or classes of stock or series thereof are entitled to elect one or more Directors by the Certificate of Incorporation, vacancies and newly created directorships of such class or classes or series may be filled by a majority of the Directors elected by such class, classes or series then in office or by the sole remaining director so elected. When one or more directors shall resign from the Board of Directors, effective at a future date, a majority of directors who are entitled to act on the filling of

such vacancy or vacancies and who are then in office, including those who have so resigned, shall have power to fill such vacancy or vacancies by vote to take effect when such resignation or resignations shall become effective.

Section 8. Annual Meeting. The first meeting of each newly elected Board of Directors may be held without notice immediately after an annual meeting of stockholders (or a special meeting of stockholders held in lieu of an annual meeting) at the same place as that at which such meeting of stockholders was held; or such first meeting may be held at such place and time as shall be fixed by the consent in writing of all the directors, or may be called in the manner hereinafter provided with respect to the call of special meetings.

Section 9. Regular Meetings. Regular meetings of the directors may be held at such times and places as shall from time to time be fixed by resolution of the Board of Directors, and no notice need be given of regular meetings held at times and places so fixed, provided, however, that any resolution relating to the holding of regular meetings shall remain in force only until the next annual meeting of stockholders and that, if at any meeting of Directors at which a resolution is adopted fixing the times or place or places for any regular meetings any Director is absent, no meeting shall be held pursuant to such resolution without notice to or waiver by such absent Director pursuant to Section 11 of this Article II.

Section 10. Special Meetings. Special meetings of the directors may be called by the Chairman of the Board of Directors, if any, the President, or by at least one-third of the directors then in office (rounded up to the nearest whole number), and shall be held at the place and on the date and hour designated in the call thereof.

Section 11. Notices. Notices of any special meeting of the directors shall be given to each director by the Secretary or an Assistant Secretary (a) by mailing to him or her, postage prepaid, and addressed to him or her at his or her address as registered on the books of the corporation, or if not so registered at his or her last known home or business address, a written notice of such meeting at least 4 days before the meeting, (b) by delivering such notice by hand or by telegram, telecopy, telex, facsimile or electronic transmission (including without limitation e-mail) to him or her at least 48 hours before the meeting, or (c) by giving such notice in person or by telephone at least 48 hours in advance of the meeting. Any notice given personally or by telephone, telegram, telecopy, telex, facsimile or electronic transmission (including without limitation e-mail) may be communicated either to the director or to a person at the office of the director who the person giving the notice has reason to believe will promptly communicate it to the director. In the absence of the Secretary or an Assistant Secretary, such notice may be given by the officer or one of the directors calling the meeting. Notice need not be given to any director who has waived notice in accordance with Section 229 of the DGCL. A notice or waiver of notice of a meeting of the directors need not specify the business to be transacted at or the purpose of the meeting.

Section 12. Quorum. At any meeting of the directors, a majority of the authorized number of directors shall constitute a quorum for the transaction of business. If a quorum shall not be present at any meeting of the Board of Directors, a majority of those present (or, if not more than two directors are present, any director present) may adjourn the meeting from time to time to another place, date or time, without notice other than announcement at the meeting prior to adjournment, until a quorum shall be present.

Section 13. Participation in Meetings by Conference Telephone. One or more members of the Board of Directors, or any committee thereof, may participate in a meeting of such Board of Directors or committee by means of conference telephone or other communications equipment by means of which all persons participating in the meeting can hear each other, and participation in a meeting pursuant to this Section 13 shall constitute presence in person at such meeting.

Section 14. Conduct of Business; Action by Written Consent. At any meeting of the Board of Directors at which a quorum is present, business shall be transacted in such order and manner as the Board of Directors may from time to time determine, and all matters shall be determined by the vote of a majority of the directors present, except as otherwise provided in these Bylaws or required by law. Without limiting the manner by which a consent of directors may be given under Section 141(f) of the DGCL, action may be taken by the Board of Directors, or any committee thereof, without a meeting if all members of the Board of Directors or committee, as the case may be, consent thereto in writing, and the writing or writings are filed with the records of proceedings of the Board of Directors or committee.

Section 15. Place of Meetings. The Board of Directors may hold its meetings, and have an office or offices, within or without the State of Delaware.

Section 16. Compensation. The Board of Directors shall have the authority to fix stated salaries for directors for their service in such capacity and to provide for payment of a fixed sum and expenses of attendance, if any, for attendance at each regular or special meeting of the Board of Directors. The Board of Directors shall also have the authority to provide for payment of a fixed sum and expenses of attendance, if any, payable to members of committees for attending committee

meetings. Nothing herein contained shall preclude any director from serving the corporation in any other capacity and receiving compensation for such services.

Section 17. Committees. (a) The Board of Directors, by resolution passed by a majority of the number of directors required at the time to constitute a full Board of Directors as fixed in or determined pursuant to these Bylaws as then in effect, may from time to time designate one or more committees, each committee to consist of one or more of the directors of the corporation. The Board of Directors may designate one or more directors as alternate members of any committee, who may replace any absent or disqualified member at any meeting of the committee. In the absence or disqualification of a member of a committee, the member or members thereof present at any meeting and not disqualified from voting, whether or not he or she or they constitute a quorum, may unanimously appoint another member of the Board of Directors to act at the meeting in the place of any such absent or disqualified member. Any such committee, to the extent provided in the resolution of the Board of Directors, shall have and may exercise all the powers and authority of the Board of Directors in the management of the business and affairs of the corporation, and may authorize the seal of the corporation to be affixed to all papers which may require it; but no such committee shall have such power or authority in reference to amending the Certificate of Incorporation (except that a committee may, to the extent authorized in the resolution or resolutions providing for the issuance of shares of stock adopted by the Board of Directors as provided in Subsection (a) of Section 151 of the DGCL, fix the designations and any preferences or rights of such shares relating to dividends, redemption, dissolution, any distribution of assets of the corporation or conversion into, or the exchange of such shares for, shares of any other class or classes or any other series of the same or any other class or classes of stock of the corporation or fix the number of shares in a series of stock or authorize the increase or decrease in the shares of any series), adopting an agreement of merger or consolidation under Sections 251, 252, 254, 255, 256, 257, 258, 263, or 264 of the DGCL, recommending to the stockholders the sale, lease or exchange of all or substantially all of the corporation's property or assets, recommending to the stockholders a dissolution of the corporation or a revocation of a dissolution, or amending the Bylaws of the corporation. Such a committee may, to the extent expressly provided in the resolution of the Board of Directors, have the power or authority to declare a dividend or to authorize the issuance of stock or to adopt a certificate of ownership and merger pursuant to Section 253 of the DGCL.

(b) At any meeting of any committee or subcommittee of a committee, a majority of the directors then serving on such committee of the Board of Directors or subcommittee of a committee shall constitute a quorum for the transaction of business by the committee or subcommittee, unless the Certificate of Incorporation, these Bylaws, a resolution of the Board of Directors or a resolution of a committee that created the subcommittee requires a greater or lesser number, provided that in no case shall a quorum be less than 1/3 of the directors then serving on the committee or subcommittee. The vote of the majority of the members of a committee or subcommittee present at a meeting at which a quorum is present shall be the act of the committee or subcommittee, unless the Certificate of Incorporation, these Bylaws, a resolution of the Board of Directors or a resolution of a committee that created the subcommittee requires a greater number.

(c) Each committee, except as otherwise provided by resolution of the Board of Directors, shall fix the time and place of its meetings within or without the State of Delaware, shall adopt its own rules and procedures, and shall keep a record of its acts and proceedings and report the same from time to time to the Board of Directors.

(d) Unless otherwise provided in the Certificate of Incorporation, these Bylaws or the resolution of the Board of Directors designating the committee, a committee may create one or more subcommittees, each subcommittee to consist of one or more members of the committee, and delegate to a subcommittee any or all of the powers and authority of the committee.

ARTICLE III

Officers

Section 1. Officers and Their Election. The officers of the corporation shall be a Chief Executive Officer, a President, a Secretary, a Chief Financial Officer and such Vice Presidents, Assistant Secretaries, Assistant Chief Financial Officers and other officers as the Board of Directors may from time to time determine and elect or appoint. The Board of Directors may appoint one of its members to the office of Chairman of the Board of Directors and another of its members to the office of Vice-Chairman of the Board of Directors and from time to time define the powers and duties of these and other officers, employees or agents of the corporation notwithstanding any other provisions of these Bylaws. All officers shall be elected by the Board of Directors and shall serve at the will of the Board of Directors. Any officer may, but need not, be a director. Two or more offices may be held by the same person. All officers shall perform such duties and have such powers as the Board of Directors shall designate by resolution, or in the absence of such resolution, as set forth in these Bylaws. The Board of Directors may from time to time delegate the powers or duties of any officer to any other officers or agents, notwithstanding the foregoing provisions of this Article III.

Section 2. Term of Office. The Chief Executive Officer, the President, the Chief Financial Officer and the Secretary shall hold office until his or her successor is elected and qualified or until his or her earlier resignation or removal.

Section 3. Vacancies. Any vacancy at any time existing in any office may be filled by the Board of Directors.

Section 4. Chairman of the Board of Directors. The Board of Directors may, in its discretion, elect a Chairman of the Board of Directors from among its members. He or she may be the Chief Executive Officer of the corporation if so designated by the Board of Directors, and he or she shall preside at all meetings of the Board of Directors at which he or she is present and shall exercise and perform such other powers and duties as may from time to time be assigned to him or her by the Board of Directors or prescribed by the Bylaws.

Section 5. Chief Executive Officer. The Board of Directors may elect a Chief Executive Officer of the corporation who may also be the Chairman of the Board of Directors or President of the corporation or both. It shall be his or her duty and he or she shall have the power to see that all orders and resolutions of the Board of Directors are carried into effect. He or she shall from time to time report to the Board of Directors all matters within his or her knowledge which the interests of the corporation may require to be brought to its notice.

Section 6. President. If there is no Chief Executive Officer, the President shall be the chief executive officer of the corporation except as the Board of Directors may otherwise provide. The President shall perform such duties and have such powers additional to the foregoing as the Board of Directors shall designate.

Section 7. Vice Presidents. In the absence or disability of the President, his or her powers and duties shall be performed by the vice president, if only one, or, if more than one, by the one designated for the purpose by the Board of Directors. Each vice president shall perform such duties and have such powers additional to the foregoing as the Board of Directors shall designate.

Section 8. Chief Financial Officer. The Chief Financial Officer shall be the treasurer of the corporation and shall keep full and accurate accounts of receipts and disbursements in books belonging to the corporation and shall deposit all monies and other valuable effects in the name and to the credit of the corporation in such depositories as shall be designated by the Board of Directors or in the absence of such designation in such depositories as he or she shall from time to time deem proper. The Chief Financial Officer (or any Assistant Chief Financial Officer) shall sign all stock certificates as treasurer of the corporation. He or she shall disburse the funds of the corporation as shall be ordered by the Board of Directors, taking proper vouchers for such disbursements. He or she shall promptly render to the Chief Executive Officer and to the Board of Directors such statements of his or her transactions and accounts as the Chief Executive Officer and Board of Directors respectively may from time to time require. The Chief Financial Officer shall perform such duties and have such powers additional to the foregoing as the Board of Directors may designate.

Section 9. Assistant Chief Financial Officers. In the absence or disability of the Chief Financial Officer, his or her powers and duties shall be performed by the Assistant Chief Financial Officer, if only one, or if more than one, by the one designated for the purpose by the Board of Directors. Each Assistant Chief Financial Officer shall perform such duties and have such powers additional to the foregoing as the Board of Directors shall designate.

Section 10. Secretary. The Secretary shall issue notices of all meetings of stockholders, of the Board of Directors and of committees thereof where notices of such meetings are required by law or these Bylaws. He or she shall record the proceedings of the meetings of the stockholders and of the Board of Directors and shall be responsible for the custody thereof in a book to be kept for that purpose. He or she shall also record the proceedings of the committees of the Board of Directors unless such committees appoint their own respective secretaries. Unless the Board of Directors shall appoint a transfer agent and/or registrar, the Secretary shall be charged with the duty of keeping, or causing to be kept, accurate records of all stock outstanding, stock certificates issued and stock transfers. He or she shall sign such instruments as require his or her signature. The Secretary shall have custody of the corporate seal and shall affix and attest such seal on all documents whose execution under seal is duly authorized. In his or her absence at any meeting, an Assistant Secretary or the Secretary pro tempore shall perform his or her duties thereat. He or she shall perform such duties and have such powers additional to the foregoing as the Board of Directors shall designate.

Section 11. Assistant Secretaries. In the absence or disability of the Secretary, his or her powers and duties shall be performed by the Assistant Secretary, if only one, or, if more than one, by the one designated for the purpose by the Board of Directors. Each Assistant Secretary shall perform such duties and have such powers additional to the foregoing as the Board of Directors shall designate.

Section 12. Salaries. The salaries and other compensation of officers, agents and employees shall be fixed from time to time by or under authority from the Board of Directors. No officer shall be prevented from receiving a salary or other compensation by reason of the fact that he or she is also a director of the corporation.

Section 13. Removal. The Board of Directors may remove any officer, either with or without cause, at any time.

Section 14. Bond. The corporation may secure the fidelity of any or all of its officers or agents by bond or otherwise.

Section 15. Resignations. Any officer of the corporation may resign at any time by giving written notice to the Board of Directors, to the Chairman of the Board of Directors, if any, to the Chief Executive Officer or to the Secretary of the corporation. Any such resignation shall take effect at the time specified therein, or, if the time be not specified, upon receipt thereof; and unless otherwise specified therein, the acceptance of such resignation shall not be necessary to make it effective.

ARTICLE IV

Capital Stock

Section 1. Stock Certificates; Uncertificated Shares. The shares of capital stock of the corporation shall be represented by certificates, provided that the Board of Directors may provide by resolution or resolutions that some or all of any or all classes or series of its stock may be uncertificated shares. Any such resolution shall not apply to shares represented by a certificate until such certificate is surrendered to the corporation (or the transfer agent or registrar, as the case may be). Notwithstanding the adoption of such a resolution, every holder of stock represented by certificates and upon request every holder of uncertificated shares shall be entitled to have a certificate signed by, or in the name of, the corporation by the Chairman or Vice-Chairman of the Board of Directors or the President or a Vice President, and by the Chief Financial Officer (in his or her capacity as treasurer) or an Assistant Chief Financial Officer (in his or her capacity as assistant treasurer), or the Secretary or an Assistant Secretary, certifying the number of shares owned by him or her in the corporation. Any or all of the signatures on the certificate may be a facsimile. In case any officer, transfer agent, or registrar who has signed or whose facsimile signature has been placed upon a certificate shall have ceased to be such officer, transfer agent or registrar before the certificate is issued, such certificate may nevertheless be issued by the corporation with the same effect as if he or she were such officer, transfer agent or registrar at the date of issue.

Section 2. Classes of Stock. If the corporation shall be authorized to issue more than one class of stock or more than one series of any class, the face or back of each certificate issued by the corporation to represent such class or series shall either (a) set forth in full or summarize the powers, designations, preferences and relative, participating, optional or other special rights of each class of stock or series thereof and the qualifications, limitations or restrictions thereof, or (b) contain a statement that the corporation will furnish a statement of the same without charge to each stockholder who so requests. Within a reasonable time after the issuance or transfer of uncertificated shares, the corporation shall send to the registered holder thereof such written notice as may be required by law as to the information required by law to be set forth or stated on stock certificates.

Section 3. Transfer of Stock. Shares of stock shall be transferable only upon the books of the corporation pursuant to applicable law and such rules and regulations as the Board of Directors shall from time to time prescribe. The Board of Directors may at any time or from time to time appoint a transfer agent or agents or a registrar or registrars for the transfer or registration of shares of stock. Except where a certificate, or uncertificated shares, are issued in accordance with Section 5 of Article IV of these Bylaws, one or more outstanding certificates representing in the aggregate the number of shares involved shall be surrendered for cancellation before a new certificate, or uncertificated shares, are issued representing such shares.

Section 4. Holders of Record. Prior to due presentment for registration of transfer the corporation may treat the holder of record of a share of its stock as the complete owner thereof exclusively entitled to vote, to receive notifications and otherwise entitled to all the rights and powers of a complete owner thereof, notwithstanding notice to the contrary.

Section 5. Stock Certificates. The Board of Directors may direct that a new stock certificate or certificates, or uncertificated shares, be issued in place of any certificate or certificates theretofore issued by the corporation alleged to have been lost, stolen, or destroyed upon the making of an affidavit of that fact by the person claiming the certificate of stock to be lost, stolen or destroyed. When authorizing such issue of a new certificate or certificates, or uncertificated shares, the Board of Directors may, in its discretion and as a condition precedent to the issuance thereof, require the owner of such lost, stolen or destroyed certificate or certificates or his or her legal representative, to give the corporation a bond sufficient to indemnify it

against any claim that may be made against the corporation on account of the alleged loss, theft, or destruction, of such certificates or the issuance of such new certificate or certificates, or uncertificated shares.

Section 6. Record Date. In order that the corporation may determine the stockholders entitled to notice of or to vote at any meeting of stockholders, or to receive payment of any dividend or other distribution or allotment of any rights or to exercise any rights in respect of any change, conversion or exchange of stock or for the purpose of any other lawful action other than stockholder action by written consent, the Board of Directors may fix a record date, which record date shall not precede the date on which the resolution fixing the record date is adopted and which record date shall not be more than 60 nor less than 10 days before the date of any meeting of stockholders, nor more than 60 days prior to the time for such other action as hereinbefore described; provided, however, that if no record date is fixed by the Board of Directors, the record date for determining stockholders entitled to notice of or to vote at a meeting of stockholders shall be at the close of business on the day next preceding the day on which notice is given or, if notice is waived, at the close of business on the day next preceding the day on which the meeting is held, and, for determining stockholders entitled to receive payment of any dividend or other distribution or allotment of rights or to exercise any rights of change, conversion or exchange of stock or for any other purpose, the record date shall be at the close of business on the day on which the Board of Directors adopts a resolution relating thereto. A determination of stockholders of record entitled to notice of or to vote at a meeting of stockholders shall apply to any adjournment of the meeting; provided, however, that the Board of Directors may fix a new record date for the adjourned meeting.

ARTICLE V

Miscellaneous Provisions

Section 1. Interested Directors and Officers. (a) No contract or transaction between the corporation and one or more of its directors or officers, or between the corporation and any other corporation, partnership, association, or other organization in which one or more of its directors or officers are directors or officers, or have a financial interest, shall be void or voidable solely for this reason, or solely because the director or officer is present at or participates in the meeting of the Board of Directors or committee thereof which authorizes the contract or transaction, or solely because his or her or their votes are counted for such purpose, if:

(i) the material facts as to his or her relationship or interest and as to the contract or transaction are disclosed or are known to the Board of Directors or the committee, and the Board of Directors or committee in good faith authorizes the contract or transaction by the affirmative vote of a majority of the disinterested directors, even though the number of disinterested directors is less than a quorum; or

(ii) the material facts as to his or her relationship or interest and as to the contract or transaction are disclosed or are known to the stockholders entitled to vote thereon, and the contract or transaction is specifically approved in good faith by vote of the stockholders; or

(iii) the contract or transaction is fair as to the corporation as of the time it is authorized, approved or ratified, by the Board of Directors, a committee thereof, or the shareholders.

(b) Common or interested directors may be counted in determining the presence of a quorum at a meeting of the Board of Directors or of a committee which authorizes the contract or transaction.

Section 2. Indemnification.

(a) Right to Indemnification. The corporation shall indemnify and hold harmless each person who was or is made a party or is threatened to be made a party to or is otherwise involved in any action, suit or proceeding, whether civil, criminal, administrative or investigative (hereinafter a "proceeding"), by reason of the fact that he or she is or was a director or an officer of the corporation or is or was serving at the request of the corporation as a director, officer, employee or agent of another corporation or of a partnership, joint venture, trust or other enterprise, including service with respect to an employee benefit plan (hereinafter an "indemnitee"), whether the basis of such proceeding is alleged action in an official capacity as a director, officer, employee or agent or in any other capacity while serving as a director or officer, to the fullest extent authorized by law, as the same exists or may hereafter be amended (but, in the case of any such amendment, only to the extent that such amendment permits the corporation to provide broader indemnification rights than such law permitted the corporation to provide prior to such amendment), against all expense, liability and loss (including attorneys' fees, judgments, fines, ERISA excise taxes or penalties and amounts paid in settlement) reasonably incurred or suffered by such indemnitee in connection therewith; provided, however, that except as provided in Subsection (c) of this Section with respect to proceedings

to enforce rights to indemnification, the corporation shall indemnify any such indemnitee in connection with a proceeding (or part thereof) initiated by such indemnitee only if such proceeding (or part thereof) was authorized by the Board of Directors of the corporation; and provided further that as to any matter disposed of by a compromise payment by such person, pursuant to a consent decree or otherwise, no indemnification either for said payment or for any other expenses shall be provided unless such compromise and indemnification therefor shall be appropriated:

(i) by a majority vote of a quorum consisting of disinterested directors;

(ii) if such a quorum cannot be obtained, then by a majority vote of a committee of the Board of Directors consisting of all the disinterested directors;

(iii) if there are not two or more disinterested directors in office, then by a majority of the directors then in office, provided they have obtained a written finding by special independent legal counsel appointed by a majority of the directors to the effect that, based upon a reasonable investigation of the relevant facts as described in such opinion, the person to be indemnified appears to have acted in good faith in the reasonable belief that his or her action was in the best interests of the corporation (or, to the extent that such matter relates to service with respect to an employee benefit plan, in the best interests of the participants or beneficiaries of such employee benefit plan);

(iv) by the holders of a majority of the shares of stock entitled to vote for the election of directors, which majority may include interested directors and officers; or

(v) by a court of competent jurisdiction.

An “interested” director or officer is one against whom in such capacity the proceeding in question or other proceeding on the same or similar grounds is then pending. The termination of any action, suit or proceeding by judgment, order, settlement, conviction, or upon a plea of nolo contendere or its equivalent, shall not, of itself, create a presumption that the person did not act in good faith and in a manner which he or she reasonably believed to be in or not opposed to the best interests of the corporation, and, with respect to any criminal action or proceeding, had reasonable cause to believe that his or her conduct was unlawful.

(b) Right to Advancement of Expenses. The right to indemnification conferred in Subsection (a) of this Section shall include the right to be paid by the corporation the expenses incurred in defending any such proceeding in advance of its final disposition (hereinafter an “advancement of expenses”); provided, however, that if the DGCL requires, an advancement of expenses incurred by an indemnitee in his or her capacity as a director or officer (and not in any other capacity in which service was or is rendered by such indemnitee, including, without limitation, service to an employee benefit plan) shall be made only upon delivery to the corporation of an undertaking (hereinafter an “undertaking”), by or on behalf of such indemnitee, to repay all amounts so advanced if it shall ultimately be determined by final judicial decision from which there is no further right to appeal (hereinafter a “final adjudication”) that such indemnitee is not entitled to be indemnified for such expenses under this Section or otherwise, which undertaking may be accepted without reference to the financial ability of such person to make repayment.

(c) Right of Indemnitee to Bring Suit. If a claim under Subsection (a) or (b) of this Section is not paid in full by the corporation within 60 days after a written claim has been received by the corporation, except in the case of a claim for an advancement of expenses, in which case the applicable period shall be 20 days, the indemnitee may at any time thereafter bring suit against the corporation to recover the unpaid amount of the claim. If successful in whole or in part in any such suit, or in a suit brought by the corporation to recover an advancement of expenses pursuant to the terms of an undertaking, the indemnitee shall be entitled to be paid also the expense of prosecuting or defending such suit. In (i) any suit brought by the indemnitee to enforce a right to indemnification hereunder (but not in a suit brought by the indemnitee to enforce a right to an advancement of expenses) it shall be a defense that, and (ii) any suit by the corporation to recover an advancement of expenses pursuant to the terms of an undertaking the corporation shall be entitled to recover such expenses upon a final adjudication that, the indemnitee has not met any applicable standard for indemnification set forth in the DGCL. Neither the failure of the corporation (including its Board of Directors, independent legal counsel, or its stockholders) to have made a determination prior to the commencement of such suit that indemnification of the indemnitee is proper in the circumstances because the indemnitee has met the applicable standard of conduct set forth in the DGCL, nor an actual determination by the corporation (including its Board of Directors, independent legal counsel, or its stockholders) that the indemnitee has not met such applicable standard of conduct, shall create a presumption that the indemnitee has not met the applicable standard of conduct or, in the case of such a suit brought by the indemnitee, be a defense to such suit. In any suit brought by the indemnitee to enforce a right to indemnification or to an advancement of expenses hereunder, or by the corporation to recover an

advancement of expenses pursuant to the terms of an undertaking, the burden of proving that the indemnitee is not entitled to be indemnified, or to such advancement of expenses, under this Section or otherwise shall be on the corporation.

(d) Non-exclusivity of Rights. The rights to indemnification and to the advancement of expenses conferred in this Section shall not be exclusive of any other right which any person may have or hereafter acquire under any statute, certificate of incorporation, bylaw, agreement, vote of disinterested directors or otherwise. The corporation's indemnification under this Section 2 of any person who is or was a director or officer of the corporation, or is or was serving, at the request of the corporation, as a director, officer, employee or agent of another corporation, partnership, joint venture, trust or other enterprise, shall be reduced by any amounts such person receives as indemnification (i) under any policy of insurance purchased and maintained on his or her behalf by the corporation, (ii) from such other corporation, partnership, joint venture, trust or other enterprise, or (iii) under any other applicable indemnification provision.

(e) Joint Representation. If both the corporation and any person to be indemnified are parties to an action, suit or proceeding (other than an action or suit by or in the right of the corporation to procure a judgment in its favor), counsel representing the corporation therein may also represent such indemnified person (unless such dual representation would involve such counsel in a conflict of interest in violation of applicable principles of professional ethics), and the corporation shall pay all fees and expenses of such counsel incurred during the period of dual representation other than those, if any, as would not have been incurred if counsel were representing only the corporation; and any allocation made in good faith by such counsel of fees and disbursements payable under this paragraph by the corporation versus fees and disbursements payable by any such indemnified person shall be final and binding upon the corporation and such indemnified person.

(f) Indemnification of Employees and Agents of the Corporation. Except to the extent that rights to indemnification and advancement of expenses of employees or agents of the corporation may be required by any statute, the Certificate of Incorporation, this Section or any other bylaw, agreement, vote of disinterested directors or otherwise, the corporation may, to the extent authorized from time to time by the Board of Directors, grant rights to indemnification and to the advancement of expenses to any employee or agent of the corporation to the fullest extent of the provisions of this Section with respect to the indemnification and advancement of expenses of directors and officers of the corporation.

(g) Insurance. The corporation may maintain insurance, at its expense, to protect itself and any director, officer, employee or agent of the corporation or another corporation, partnership, joint venture, trust or other enterprise against any expense, liability or loss, whether or not the corporation would have the power to indemnify such person against such expense, liability or loss under the DGCL (as currently in effect or hereafter amended), the Certificate of Incorporation or these Bylaws.

(h) Nature of Indemnification Right; Modification of Repeal of Indemnification. Each person who is or becomes a director or officer as described in subsection (a) of this Section 2 shall be deemed to have served or to have continued to serve in such capacity in reliance upon the indemnity provided for in this Section 2. All rights to indemnification (and the advancement of expenses) under this Section 2 shall be deemed to be provided by a contract between the corporation and the person who serves as a director or officer of the corporation at any time while these Bylaws and other relevant provisions of the DGCL and other applicable law, if any, are in effect. Such rights shall continue as to an indemnitee who has ceased to be a director, officer, employee or agent and shall inure to the benefit of the indemnitee's heirs, executors and administrators. Any modification or repeal of this Section 2 shall not adversely affect any right or protection existing under this Section 2 at the time of such modification or repeal.

Section 3. Stock in Other Corporations. Subject to any limitations that may be imposed by the Board of Directors, the President or any person or persons authorized by the Board of Directors may, in the name and on behalf of the corporation, (a) call meetings of the holders of stock or other securities of any corporation or other organization, stock or other securities of which are held by this corporation, (b) act, or appoint any other person or persons (with or without powers of substitution) to act in the name and on behalf of the corporation, or (c) express consent or dissent, as a holder of such securities, to corporate or other action by such other corporation or organization.

Section 4. Checks, Notes, Drafts and Other Instruments. Checks, notes drafts and other instruments for the payment of money drawn or endorsed in the name of the corporation may be signed by any officer or officers or person or persons authorized by the Board of Directors to sign the same. No officer or person shall sign any such instrument as aforesaid unless authorized by the Board of Directors to do so.

Section 5. Corporate Seal. The seal of the corporation shall be circular in form, bearing the name of the corporation, the word "Delaware", and the year of incorporation, and the same may be used by causing it or a facsimile thereof to be impressed or affixed or in any other manner reproduced.

Section 6. Books and Records. The books, accounts and records of the corporation, except as may be otherwise required by law, may be kept outside of the State of Delaware, at such place or places as the Board of Directors may from time to time appoint. Except as may otherwise be provided by law, the Board of Directors shall determine whether and to what extent the books, accounts, records and documents of the corporation, or any of them, shall be open to the inspection of the stockholders.

Section 7. Severability. If any term or provision of the Bylaws, or the application thereof to any person or circumstances or period of time, shall to any extent be invalid or unenforceable, the remainder of the Bylaws shall be valid and enforced to the fullest extent permitted by law.

Section 8. Interpretations. Words importing persons include firms, associations and corporations, all words importing the singular number include the plural number and vice versa, and all words importing the masculine gender include the feminine gender.

Section 9. Amendments. The Board of Directors is expressly empowered to adopt, amend or repeal these Bylaws; provided that the Board of Directors shall not have the power to alter, amend or repeal any bylaw adopted by the stockholders that by its terms may be altered, amended or repealed only by the stockholders. The stockholders also have the power to adopt, amend or repeal the Bylaws of the corporation.

**CERTIFICATION OF PRINCIPAL EXECUTIVE OFFICER PURSUANT TO
EXCHANGE ACT RULE 13a-14(a)/15d-14(a)
AS ADOPTED PURSUANT TO SECTION 302
OF THE SARBANES-OXLEY ACT OF 2002**

I, D. James Bidzos, certify that:

1. I have reviewed this quarterly report on Form 10-Q of VeriSign, Inc.;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
 - a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
 - b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
 - c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
 - d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
 - a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
 - b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Date: July 28, 2016

By: _____ /S/ D. JAMES B IDZOS

D. James Bidzos
Chief Executive Officer

**CERTIFICATION OF PRINCIPAL FINANCIAL OFFICER PURSUANT TO
EXCHANGE ACT RULE 13a-14(a)/15d-14(a)
AS ADOPTED PURSUANT TO SECTION 302
OF THE SARBANES-OXLEY ACT OF 2002**

I, George E. Kilguss, III, certify that:

1. I have reviewed this quarterly report on Form 10-Q of VeriSign, Inc.;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
 - a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
 - b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
 - c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
 - d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer(s) and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
 - a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
 - b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Date: July 28, 2016

By: _____ /S/ GEORGE E. KILGUSS, III
George E. Kilguss, III
Chief Financial Officer

**CERTIFICATION OF PRINCIPAL EXECUTIVE OFFICER PURSUANT TO
18 U.S.C. SECTION 1350
AS ADOPTED PURSUANT TO SECTION 906
OF THE SARBANES-OXLEY ACT OF 2002**

I, D. James Bidzos, Chief Executive Officer of VeriSign, Inc. (the "Company"), do hereby certify, pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that, to my knowledge:

1. the Quarterly Report on Form 10-Q of the Company for the fiscal quarter ended June 30, 2016 , as filed with the Securities and Exchange Commission (the "Report"), fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934; and
2. the information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company.

Date: July 28, 2016

/S/ D. JAMES BIDZOS

D. James Bidzos
Chief Executive Officer

**CERTIFICATION OF PRINCIPAL FINANCIAL OFFICER PURSUANT TO
18 U.S.C. SECTION 1350
AS ADOPTED PURSUANT TO SECTION 906
OF THE SARBANES-OXLEY ACT OF 2002**

I, George E. Kilguss, III, Chief Financial Officer of VeriSign, Inc. (the “Company”), do hereby certify, pursuant to 18 U.S.C. Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002, that, to my knowledge:

1. the Quarterly Report on Form 10-Q of the Company for the fiscal quarter ended June 30, 2016 , as filed with the Securities and Exchange Commission (the “Report”), fully complies with the requirements of Section 13(a) or 15(d) of the Securities Exchange Act of 1934; and
2. the information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company.

Date: July 28, 2016

/S/ G EORGE E. K ILGUSS , III

George E. Kilguss, III
Chief Financial Officer

EXHIBIT 217



August 1, 2016

Verisign Statement Regarding .Web Auction Results

RESTON, Va.--(BUSINESS WIRE)-- VeriSign, Inc. (NASDAQ:VRSN), a global leader in domain names and internet security, today announced the following information pertaining to the .web top-level domain (TLD):

The Company entered into an agreement with Nu Dot Co LLC wherein the Company provided funds for Nu Dot Co's bid for the .web TLD. We are pleased that the Nu Dot Co bid was successful.

We anticipate that Nu Dot Co will execute the .web Registry Agreement with the Internet Corporation for Assigned Names and Numbers (ICANN) and will then seek to assign the Registry Agreement to Verisign upon consent from ICANN.

As the most experienced and reliable registry operator, Verisign is well-positioned to widely distribute .web. Our expertise, infrastructure, and partner relationships will enable us to quickly grow .web and establish it as an additional option for registrants worldwide in the growing TLD marketplace. Our track record of over 19 years of uninterrupted availability means that businesses and individuals using .web as their online identity can be confident of being reliably found online. And these users, along with our global distribution partners, will benefit from the many new domain name choices that .web will offer.

About Verisign

Verisign, a global leader in domain names and internet security, enables internet navigation for many of the world's most recognized domain names and provides protection for websites and enterprises around the world. Verisign ensures the security, stability and resiliency of key internet infrastructure and services, including the .com and .net domains and two of the internet's root servers, as well as performs the root zone maintainer functions for the core of the internet's Domain Name System (DNS). Verisign's Security Services include intelligence-driven Distributed Denial of Service Protection, iDefense Security Intelligence and Managed DNS. To learn more about what it means to be Powered by Verisign, please visit Verisign.com.

VRSNF

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Miranda Weeks, Contact Information Redacted

or

Media Relations:

Deana Alvy, Contact Information Redacted

Source: VeriSign, Inc.

News Provided by Acquire Media

EXHIBIT 218

Exhibit Redacted - Third Party Designated Confidential Information

EXHIBIT 219

CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations

23 February 2016

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Summary

- 01 Since December 2014, a working group of ICANN community members has developed a set of proposed enhancements to ICANN's accountability to the global Internet community. This document is being distributed for the consideration and approval of the working group's 6 Chartering Organizations.
- 02 This effort is integral to the transition of the United States' stewardship of the IANA functions to the global Internet community, reflecting the ICANN community's conclusion that improvements to ICANN's accountability were necessary in the absence of the accountability backstop that the historical contractual relationship with the United States government provided. The accountability improvements set out in this document are not designed to change ICANN's multistakeholder model, the bottom-up nature of policy development, or significantly alter ICANN's day-to-day operations.
- 03 The main elements of the proposal are outlined below, supported by additional annexes and appendices. Together with ICANN's existing structures and groups, these accountability enhancements will ensure ICANN remains accountable to the global Internet community.
 - **A revised Mission Statement** for the ICANN Bylaws that sets out what ICANN does. This Mission Statement clarifies but does not change ICANN's historic mission.
 - An enhanced **Independent Review Process** and redress process with a broader scope and the power to ensure ICANN stays within its Mission.
 - New specific **powers** for the ICANN community that can be enforced when the usual methods of discussion and dialogue have not effectively built consensus, including the powers to:
 - Reject ICANN Budgets, IANA Budgets or Strategic/Operating Plans.
 - Reject changes to ICANN's Standard Bylaws.
 - Approve changes to new Fundamental Bylaws, Articles of Incorporation and ICANN's sale or other disposition of all or substantially all of ICANN's assets.
 - Remove an individual ICANN Board Director.
 - Recall the entire ICANN Board.
 - Initiate a binding Independent Review Process (where a panel decision is enforceable in any court recognizing international arbitration results).
 - Reject ICANN Board decisions relating to reviews of the IANA functions, including the triggering of Post-Transition IANA separation.
 - The rights of inspection and investigation
 - A community Independent Review Process as an enforcement mechanism further to a Board action or inaction.
- 04 All of these community powers can only be exercised after extensive community discussions and debates through processes of **engagement and escalation**. The process of escalation provides many opportunities for the resolution of disagreements between parties before formal action is required.
- 05 The accountability elements outlined above will be supported through:
 - Additions to the ICANN Bylaws to create an **Empowered Community** that is based on a simple legal vehicle designed to act on the instructions of ICANN stakeholder groups when

needed to exercise the Community Powers. The Empowered Community is granted the status of a Designator (a recognized role in law) and has the standing to enforce the Community Powers if needed.

- Core elements of ICANN's governing documents, including the Articles of Incorporation and **Fundamental Bylaws** that can only be changed with agreement between the ICANN community and the ICANN Board.

06 In addition, further proposed changes include:

- Recognition of **ICANN's respect for Human Rights** into the Bylaws.
- Incorporation of ICANN's commitments under the 2009 **Affirmation of Commitments** with the United States Department of Commerce into the Bylaws, where appropriate.
- Improved accountability and diversity standards for ICANN's **Supporting Organizations and Advisory Committees**.
- A commitment to discuss additional accountability improvements and broader accountability enhancements in 2016 that do not need to be in place or committed to prior to the IANA Stewardship Transition. These include:
 - Considering improvements to ICANN's standards for diversity at all levels.
 - Further enhancements to the accountability of ICANN's Supporting Organizations and Advisory Committees, as well as ICANN staff.
 - Improving ICANN's transparency relating to ICANN's Documentary Information Disclosure Policy (DIDP), interactions with governments, whistleblower policy and Board deliberations.
 - Developing and clarifying a Framework of Interpretation for ICANN's Human Rights commitment in the Bylaws.
 - Addressing questions focused on jurisdiction of contracts and dispute settlements.
 - Considering enhancements to the role and function of the ICANN Ombudsman.

07 To develop these recommendations to improve ICANN's accountability, the working group:

- Relied on suggestions and proposals generated inside the working group and by the broader Internet multistakeholder community.
- Conducted three public comment periods to gather feedback on earlier drafts and discussed iterations of its recommendations across the world at ICANN meetings and through online webinars.
- Rigorously "stress tested" ICANN's current and proposed accountability mechanisms to assess their strength against problematic scenarios the organization could potentially face.
- Engaged two external law firms to ensure the legal reliability of the proposed accountability enhancements.
- Made the minimum enhancements to ICANN's accountability necessary to meet the baseline requirements of the community, as required for the IANA Stewardship Transition.
- Met the requirements of the group that developed the IANA Stewardship Transition proposal for the Domain Names community.
- Met the requirements of the U.S. National Telecommunications and Information Agency for the IANA Stewardship Transition.

- 08 Each of the twelve recommendations has a corresponding annex with additional details including a summary, CCWG-Accountability¹ Recommendations, Detailed Explanation of Recommendations, Changes from the 'Third Draft Proposal on Work Stream 1 Recommendations,' Stress Tests Related to this Recommendation, how the recommendation meets the CWG-Stewardship² Requirements, and how the recommendation addresses NTIA Criteria.
- 09 **Note:** Minority statements can be found in Appendix A: Documenting Consensus (Including Minority Views)

¹ Cross Community Working Group on Enhancing ICANN Accountability

² Cross Community Working Group to Develop an IANA Stewardship Transition Proposal on Naming Related Functions

Background

- 10 On 14 March 2014, the U.S. National Telecommunications and Information Administration (NTIA) announced its intent to transition its stewardship of the [Internet Assigned Numbers Authority \(IANA\) Functions](#) to the global multistakeholder community. NTIA asked ICANN to convene an inclusive, global discussion to determine a process for transitioning the stewardship of these functions to the Internet community.
- 11 During initial discussions on how to proceed with the transition process, the ICANN multistakeholder community, recognizing the safety net that the NTIA provides as part of its stewardship role of the IANA Functions, raised concerns about the impact of the transition on ICANN's accountability.
- 12 To address these concerns, the ICANN community requested that ICANN's existing accountability mechanisms be reviewed and enhanced as a key part of the transition process. As a result, the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability) was convened. The CCWG-Accountability's work consists of two tracks:

13 **Work Stream 1:** Focused on mechanisms enhancing ICANN accountability that must be in place or committed to within the time frame of the IANA Stewardship Transition.

14 **Work Stream 2:** Focused on addressing accountability topics for which a timeline for developing solutions and full implementation may extend beyond the IANA Stewardship Transition.

- 15 Any other consensus items that are not required to be in place within the IANA Stewardship Transition timeframe can be addressed in Work Stream 2. There are mechanisms in Work Stream 1 to adequately enforce implementation of Work Stream 2 items, even if they were to encounter resistance from ICANN Management or others.
- 16 The work documented in this Draft Proposal focuses on Work Stream 1, with some references to related activities that are part of Work Stream 2's remit.

Requirements

17 This section provides an overview of the requirements the CCWG-Accountability has to fulfill in developing its recommendations

18 **NTIA Requirements**

19 NTIA [has requested](#) that ICANN “convene a multistakeholder process to develop a plan to transition the U.S. Government stewardship role” with regard to the IANA Functions and related Root Zone management. In making its announcement, the NTIA specified that the transition Proposal must have broad community support and meet the following principles:

- Support and enhance the multistakeholder model.
- Maintain the security, stability, and resiliency of the Internet DNS.
- Meet the needs and expectations of the global customers and partners of the IANA services.
- Maintain the openness of the Internet.

20 NTIA also specified that it would not accept a Proposal that replaces its role with a government-led or an intergovernmental organization solution.

21 Additionally, NTIA also requires that the CCWG-Accountability Proposal clearly document how it worked with the multistakeholder community, which options it considered in developing its Proposal, and how it tested these.

22 Please Refer to Annex 14: NTIA Requirements for the details of how the CCWG-Accountability meets these requirements.

23 **CWG-Stewardship Requirements**

24 In the transmittal letter for the CWG-Stewardship transition plan to the IANA Stewardship Transition Coordination Group (ICG), the CWG-Stewardship noted the following regarding its dependencies on the CCWG-Accountability work in response to an earlier version of this document:

25 “The CWG-Stewardship is significantly dependent and expressly conditioned on the implementation of ICANN-level accountability mechanisms proposed by the Cross Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability). The co-Chairs of the CWG-Stewardship and the CCWG-Accountability have coordinated their efforts and the CWG-Stewardship is confident that the CCWG-Accountability Work Stream 1 recommendations, if implemented as expected, will meet the requirements that the CWG-Stewardship has previously communicated to the CCWG-Accountability. If any element of these level accountability mechanisms is not implemented as contemplated by the CWG-Stewardship, this will require revision.”

26 The CWG-Stewardship requirements of the CCWG-Accountability are detailed on pages 20 – 21 of the CWG-Stewardship Proposal transmitted on 25 June 2015. The Work Stream 1 Proposals from the CCWG-Accountability address all of these conditions.

27 These requirements are:

1. ICANN Budget
 2. ICANN Board and Community Empowerment Mechanisms
 3. IANA Function Review and Separation Process
 4. Customer Standing Committee
 5. Appeals Mechanism
 6. Post-Transition IANA (PTI) Governance
 7. Fundamental Bylaws
- 28 Please refer to Annex 13: CWG-Stewardship Requirements for details on how the CCWG-Accountability meets these requirements.

The CCWG-Accountability's Findings and Recommendations

29 This section provides an overview of the CCWG-Accountability's findings and recommendations regarding Work Stream 1:

30 **Recommendation #1:** Establishing an Empowered Community for Enforcing Community Powers

31 **Recommendation #2:** Empowering the Community through Consensus: Engagement, Escalation, and Enforcement

32 **Recommendation #3:** Standard Bylaws, Fundamental Bylaws and Articles of Incorporation

33 **Recommendation #4:** Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers

34 **Recommendation #5:** Changing Aspects of ICANN's Mission, Commitments, and Core Values

35 **Recommendation #6:** Reaffirming ICANN's Commitment to Respect Internationally Recognized Human Rights as it Carries out its Mission

36 **Recommendation #7:** Strengthening ICANN's Independent Review Process

37 **Recommendation #8:** Improving ICANN's Request for Reconsideration Process

38 **Recommendation #9:** Incorporating the Affirmation of Commitments in ICANN's Bylaws

39 **Recommendation #10:** Enhancing the Accountability of Supporting Organizations and Advisory Committees

40 **Recommendation #11:** Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test 18)

41 **Recommendation #12:** Committing to Further Accountability Work in Work Stream 2

42 Note:

- The language in the Summary, CCWG-Accountability Recommendations, and Changes from the “Third Draft Proposal on Work Stream 1 Recommendations” sections of the Recommendations is copied from the matching Annexes which were approved as consensus positions by the CCWG-Accountability. Only the formatting has been modified to accommodate the structure of the main report.
- The language proposed in recommendations for ICANN Bylaw revisions are conceptual at this stage. The CCWG-Accountability’s external legal counsel and the ICANN legal team will draft final language for these revisions to the Articles of Incorporation and Bylaws (Fundamental and Standard Bylaws).

Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers

43 **Summary**

44 Under California law and the current Bylaws of the Internet Corporation for Assigned Names and Numbers (ICANN), the ICANN Board of Directors has the final responsibility for the activities and affairs of ICANN.

45 With removal of the U.S. National Telecommunications and Information Administration (NTIA) as a perceived enforcement body over ICANN, the CCWG-Accountability requires a method to ensure that decisions produced by community accountability mechanisms can be enforced, including in situations where the ICANN Board may object to the results.

46 The CCWG-Accountability recommends creating a new entity that will act at the direction of the multistakeholder community to exercise and enforce Community Powers. The entity will take the form of a California unincorporated association and be given the role of "Sole Designator" of ICANN Board Directors and will have the ability to directly or indirectly the Community Powers. The entity will be referred to as the "Empowered Community."

47 As permitted under California law, the Empowered Community will have the statutory power to appoint and, with that, the statutory power to remove ICANN Board Directors (whether an individual Director or the entire Board). Other powers, such as the power to approve or reject amendments to the Articles of Incorporation and Bylaws, may be provided to the Empowered Community.

48 The CCWG-Accountability accepts that its statutory power will be limited as described above, and that this is sufficient given:

- The creation of "Fundamental Bylaws" that can only be modified jointly by the ICANN Board and Empowered Community.
- All recommended Work Stream 1 accountability mechanisms are constituted as Fundamental Bylaws.
- The right of inspection is granted to "Decisional Participants" in the Empowered Community.
- The right of investigation is granted to the Decisional Participants in the Empowered Community.

49 The process for the Empowered Community to use a Community Power is outlined in Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement.

50 **CCWG-Accountability Recommendations**

51 The CCWG-Accountability recommends creating an entity that will act at the direction of the community to exercise and enforce Community Powers:

- This entity will take the form of a California unincorporated association and be given the role of Sole Designator of ICANN Board Directors and will have the ability to directly or indirectly enforce the Community Powers. This entity will be referred to as the Empowered Community.

- The Empowered Community will act as directed by participating Supporting Organizations (SOs) and Advisory Committees (ACs), which will be referred to as the Decisional Participants in the Empowered Community.
- The Empowered Community, and the rules by which it is governed, will be constituted in ICANN's Fundamental Bylaws, along with provisions to ensure the Empowered Community cannot be changed or eliminated without its own consent (see Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation).
- The Articles of Incorporation will be amended to clarify that the global public interest will be determined through a bottom-up, multistakeholder process.

52 Additionally, the CCWG-Accountability recommends including in the ICANN Bylaws:

- The right for Decisional Participants in the Empowered Community to inspection as outlined in California Corporations Code 6333, although this specific code reference would not be mentioned in the Bylaws.
- The right of investigation, which includes the adoption of the following audit process: upon three Decisional Participants in the Empowered Community coming together to identify a perceived issue with fraud or gross mismanagement of ICANN resources, ICANN will retain a third-party, independent firm to undertake a specific audit to investigate that issue. The audit report will be made public, and the ICANN Board will be required to consider the recommendations and findings of that report.
- The following limitation associated with the Governmental Advisory Committee (GAC) acting as a Decisional Participant: If the GAC chooses to participate as a Decisional Participant in the Empowered Community, it may not participate as a decision-maker in the Empowered Community's exercise of a Community Power to challenge the ICANN Board's implementation of GAC consensus advice (referred to as the "GAC carve-out").

In such cases, the GAC will still be entitled to participate in the Empowered Community in an advisory capacity in all other aspects of the escalation process, but its views will not count towards or against the thresholds needed to initiate a conference call, convene a Community Forum or exercise the Community Power.

The GAC carve-out preserves the ICANN Board's unique obligation to work with the GAC to try to find a mutually acceptable solution to the implementation of GAC advice supported by consensus – as defined in Recommendation #11: Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test 18) – while protecting the Empowered Community's power to challenge such Board decisions.

53 **Changes from the "Third Draft Proposal on Work Stream 1 Recommendations"**

- Scope and limitations with respect to the right to inspect accounting books and records of ICANN confirmed, emphasizing the difference between DIDP and inspection rights.
- Added inspection rights for accounting books and records and minutes based on a one Decisional Participant threshold.
- Introduced additional suggestion by the ICANN Board regarding investigation right (audits), based on three Decisional Participants in the Empowered Community threshold.

- Confirmed direction for implementation to avoid abusive claims.
- Compromise on Recommendation #11 required the creation of the “GAC carve-out.”

54 **Relevant Annexes**

- Annex 01 – Details on Recommendation #1: Establishing an Empowered Community for enforcing Community Powers
- Annex 03 – Details on Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation
- Annex 04 – Details on Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers

Recommendation #2: Empowering the Community Through Consensus: Engagement, Escalation, and Enforcement

55 **Summary**

56 **Engagement**

57 Today, the Internet Corporation for Assigned Names and Numbers (ICANN) Board of Directors voluntarily consults with the multistakeholder community on a variety of decisions, including the Annual Budget and changes to the ICANN Bylaws. To gather feedback, the ICANN Board uses mechanisms such as public consultations and information sessions to gauge community support and/or identify issues on the topic. These consultation mechanisms are referred to as an “engagement process.”

58 The CCWG-Accountability is recommending that engagement processes for specific ICANN Board actions be constituted in the Fundamental Bylaws. Although the ICANN Board engages voluntarily in these processes today, this recommendation would formally require the ICANN Board to undertake an extensive engagement process (including, at a minimum, a full public consultation process that complies with ICANN rules for public consultations) before taking action on any of the following:

- Approving ICANN's Five-Year Strategic Plan.
- Approving ICANN's Five-Year Operating Plan.
- Approving ICANN's Annual Operating Plan & Budget.
- Approving the Internet Assigned Numbers Authority (IANA) Functions Budget.
- Approving any modifications to Standard or Fundamental Bylaws or the Articles of Incorporation, or approving ICANN's sale or other disposition of all or substantially all of ICANN's assets.
- Making ICANN Board decisions relating to reviews of IANA functions, including the triggering of any Post-Transition IANA (PTI) separation process.

59 If it is determined that there is divergence between the ICANN Board and the community after the engagement process, the Empowered Community (as defined in Recommendation #1:

Establishing an Empowered Community for Enforcing Community Powers) may decide to use a Community Power after the appropriate “escalation process” has been satisfied.

60 The Empowered Community may begin an escalation process to:

- Reject a Five-Year Strategic Plan, Five-Year Operating Plan, Annual Operating Plan & Budget, or the IANA Functions Budget.
- Reject a change to ICANN Standard Bylaws.
- Approve changes to Fundamental Bylaws and/or Articles of Incorporation, and/or approve ICANN's sale or other disposition of all or substantially all of ICANN's assets.
- Remove an individual ICANN Board Director.
- Recall the entire ICANN Board.
- Initiate a binding community Independent Review Process (IRP), where a panel decision is enforceable in any court recognizing international arbitration results, or a non-binding Request for Reconsideration, where the ICANN Board of Directors is obliged to reconsider a recent decision or action/inaction by ICANN's Board or staff.

61 Reject an ICANN Board decision relating to reviews of IANA functions, including the triggering of any PTI separation process.

62 **Escalation**

63 The escalation process can differ, sometimes significantly, from one Community Power to another.

64 One of the most standardized versions of the escalation process is required for all Community Powers to “reject,” remove individual Nominating Committee-nominated Board Directors, or recall the entire Board.

- **This escalation process comprises the following steps:**

1. An individual starts a petition in a Supporting Organization (SO) or Advisory Committee (AC) that is a Decisional Participant in the Empowered Community (see Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers).
 - If the petition is approved by that SO or AC, it proceeds to the next step.
 - If the petition is not approved by that SO or AC, the escalation process is terminated.
2. The SO or AC that approved the petition contacts the other Decisional Participants to ask them to support the petition.
 - At least one additional SO and/or AC must support the petition (for a minimum of two or, for Board recall, three) for a Community Forum to be organized to discuss the issue.
 - If the threshold is not met, the escalation process is terminated.
 - If the threshold is met, a Community Forum is organized to discuss the petition.
3. An open Community Forum of one or two days is organized for any interested stakeholder in the community to participate.
 - The petitioning SO and/or AC will:

- Circulate a detailed rationale for proposing to use the Community Power to all Decisional Participants.
 - Designate a representative(s) to liaise with SOs/ACs to answer questions from the SOs/ACs.
 - If desired, optionally, request that ICANN organize a conference call prior to the Community Forum for the community to discuss the issue.
 - If the ICANN Board and the Empowered Community can resolve their issues before or in the Community Forum, the escalation process is terminated.
 - Otherwise, the Empowered Community must decide if it wishes to use its Community Power.
4. The Empowered Community considers use of a Community Power.
- If the threshold to use a Community Power is not met, or there is more than one objection, then the escalation process is terminated.
 - If the threshold is met for using the Community Power, and there is no more than one objection, the Empowered Community advises the ICANN Board of the decision and directs it to comply with the decision (as outlined in the Fundamental Bylaws for this Community Power).
5. The Empowered Community advises the ICANN Board.
- If the Empowered Community has decided to use its power, it will advise the ICANN Board of the decision and direct the Board to take any necessary action to comply with the decision.

65 **Enforcement**

66 If the ICANN Board refuses or fails to comply with a decision of the Empowered Community using a Community Power (other than a decision to remove an individual Director or the entire ICANN Board pursuant to the Empowered Community's statutory power, as discussed below), the Empowered Community must decide if it wishes to begin the enforcement process.

67 The enforcement process can proceed in one of two ways:

- The Empowered Community may initiate mediation and community IRP procedures.
- The Empowered Community may initiate an escalation process to recall the entire ICANN Board.

68 The enforcement process may result in a resolution of the issue. Otherwise, if needed, the result of the enforcement process is enforceable in court.

69 If the ICANN Board refuses or fails to comply with a decision of the Empowered Community to use the statutory power to remove an individual ICANN Director or recall the entire ICANN Board (or with the Empowered Community's appointment of a Director), the Empowered Community could address that refusal by bringing a claim in a court that has jurisdiction; there is no need for the Empowered Community to initiate or undertake other enforcement processes such as mediation or an IRP to enforce the power.

70 **CCWG-Accountability Recommendations**

- 71 Establish a Fundamental Bylaw that requires the ICANN Board to undertake an extensive engagement process (including, at a minimum, a full public consultation process that complies with ICANN rules for public consultations) before taking action on any of the following:
- Approving ICANN's Five-Year Strategic Plan.
 - Approving ICANN's Five-Year Operating Plan.
 - Approving ICANN's Annual Operating Plan & Budget.
 - Approving the IANA Functions Budget.
 - Approving any modification to Standard or Fundamental Bylaws or the Articles of Incorporation, or approving ICANN's sale or other disposition of all or substantially all of ICANN's assets.
 - Making any ICANN Board decision relating to reviews of IANA functions, including the triggering of any PTI separation process.
- 72 Include the engagement, escalation and enforcement processes in the Fundamental Bylaws.
- Note: The escalation processes for each Community Power are outlined in Recommendation #4: Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Powers.

73 **Table: Required Thresholds for the Various Escalation and Enforcement Processes (Based on a Minimum of Five Decisional Participants in the Empowered Community)**

Required Community Powers?	Petition Threshold to convene a Community Forum	Is there consensus support to exercise a Community Power?
74 1. Reject a proposed Operating Plan/Strategic Plan/Budget	75 Two SOs/ACs	76 Four support rejection, and no more than one objection
77 2. Approve a change to Fundamental Bylaws and Articles of Incorporation, and approve ICANN's sale or other disposition of all or substantially all of ICANN's assets	78 N/A	79 Three support approval, and no more than one objection
80 3. Reject changes to Standard Bylaws	81 Two SOs/ACs, including the SO that led the PDP that requires the Bylaw change (if any)	82 Three support rejection, including the SO that led the PDP that requires the Bylaw change (if any), and no more than one objection

Required Community Powers?	Petition Threshold to convene a Community Forum	Is there consensus support to exercise a Community Power?
83 4a. Remove an individual Board Director nominated by an SO or AC (and appointed by the Empowered Community)	84 Majority within nominating SO/AC	85 Invite and consider comments from all SOs/ACs. 3/4 majority within the nominating SO/AC to remove their director
86 4b. Remove an individual Board Director nominated by the Nominating Committee (and appointed by the Empowered Community)	87 Two SOs/ACs	88 Three support, and no more than one objection
89 5. Recall the entire Board of Directors	90 Three SOs/ACs	91 Four support, and no more than one objection ³
92 6. Initiate a binding IRP or a Request for Reconsideration	93 Two SOs/ACs	94 Three support, including the SO(s) that approved the policy recommendations from the PDP which result is being challenged through the IRP (if any), and no more than one objection 95 Require mediation before IRP begins
96 7. Reject an ICANN Board decision relating to reviews of IANA functions, including the triggering of any PTI separation process	97 Two SOs/ACs	98 Four support, and no more than one objection

99 Implementation of the Empowered Community currently anticipates that all of ICANN's SOs, the ALAC and GAC (if the GAC chooses to participate) would participate in the Empowered Community – that is, they will be listed in the Bylaws as the five Decisional Participants.

100 The thresholds presented in this document were determined based on this assessment. If fewer than five of ICANN's SOs and ACs agree to be Decisional Participants, these thresholds for consensus support may be adjusted. Thresholds may also have to be adjusted if ICANN changes to have more SOs or ACs.

101 In the event of the creation (or removal) of SOs/ACs, the corresponding percentage could be used as useful guidelines in refining the thresholds. There would, however, need to be a conscious decision, depending on the circumstances, regarding these adjustments. If such a change were to affect the list of Decisional Participants in the Empowered Community, the

³ A minority of CCWG-Accountability participants prefer to require five SOs and ACs, or allow one objection to block consensus.

change would follow the Fundamental Bylaw change process, which enables such a conscious decision to be undertaken.

102 The CCWG-Accountability also recommends that in a situation where the GAC may not participate as a Decisional Participant because the Community Power is proposed to be used to challenge the Board's implementation of GAC consensus advice and the threshold is set at four in support, the power will still be validly exercised if three are in support and no more than one objects, with the following exception:

- Where the power to be exercised is recalling the entire Board for implementing GAC advice, the reduced threshold would apply only after an IRP has found that, in implementing GAC advice, the Board acted inconsistently with the ICANN Bylaws. If the Empowered Community has brought such an IRP and does not prevail, the Empowered Community may not exercise its power to recall the entire the Board solely on the basis of the matter decided by the IRP. It may, however, exercise that power based on other grounds.

103 **Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”**

- Extended time for certain escalation steps in response to comments. Kept overall timeline similar by combining and removing some steps (mandatory conference call).
- Made it mandatory for petitioning party to reach out to SOs/ACs to socialize relevant information before Community Forum.
- Acknowledged comments regarding the thresholds adjustment in case the number of Decisional Participants is lower (page 12, paragraph 60 of the Third Draft Proposal), by removing this option and replacing it with a lower threshold for approving changes to Fundamental Bylaws. Since the Fundamental Bylaw change process is a requirement for “approval” and not a “rejection” option, this would preserve the requirement for stronger protection of Fundamental Bylaws.
- Determined that the use of the corresponding percentage for thresholds as recommended by the Board can be suggested as a guideline in the event of the creation of new SOs/ACs, but there would need to be a conscious decision, depending on the circumstances. If such a new SO/AC were to become a Decisional Participant in the Empowered Community, this change would require a change to the Fundamental Bylaws and would therefore require approval by the Empowered Community.
- Implemented the compromise for Recommendation #11: Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test 18) that the threshold requirements would be modified if the GAC was a Decisional Participant.

104 **Relevant Annexes**

105 Annex 02 – Details on Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, and Enforcement

106 Annex 03 – Details on Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation

107 Annex 04 – Details on Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers

Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation

108 **Summary**

109 Currently, the Bylaws of the Internet Corporation for Assigned Names and Numbers (ICANN) have a single mechanism for amendment.

- Any provision of the ICANN Bylaws can be changed by a 2/3 vote of all the Directors on the ICANN Board.
- The ICANN Board is not required to consult the multistakeholder community or the wider public before amending the Bylaws, but has voluntarily done so up to this point.

110 The CCWG-Accountability recommends classifying each ICANN Bylaw as either a "Fundamental Bylaw" or a "Standard Bylaw," with Fundamental Bylaws being more difficult to change.

111 Specifically, the CCWG-Accountability recommends that:

- Public consultations be required on all changes to ICANN Bylaws, both Fundamental and Standard.
- The requirement for public consultations to be added to the ICANN Bylaws as a Fundamental Bylaw to ensure that ICANN must continue to engage with the community in the future.
- Any changes to Fundamental Bylaws require approval from both the ICANN Board and Empowered Community, as outlined in the respective Community Power (as described in Recommendation #4: Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Powers).
- The threshold for ICANN Board approval for changing a Fundamental Bylaw is raised from 2/3 to 3/4.
- Approval for changes to the Articles of Incorporation use the same process required for approving changes to Fundamental Bylaws, including public consultations.

112 Why is the CCWG-Accountability recommending this?

- The CCWG-Accountability felt that it was critical to ensure that the ICANN Bylaws that embody the purpose of the organization (Mission, Commitments and Core Values) and are meant to ensure the accountability of the ICANN Board, cannot be changed by the ICANN Board acting alone.

113 **CCWG-Accountability Recommendations**

114 The CCWG-Accountability recommends:

- Classifying each ICANN Bylaw as either a Fundamental Bylaw or a Standard Bylaw.
- Making the following CCWG-Accountability and CWG-Stewardship Recommendations Fundamental Bylaws:

- The Empowered Community for enforcing Community Powers, including the role of Sole Designator of ICANN's Directors, as described in Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers.
- The escalation and enforcement mechanisms as described in Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement.
- The process for amending Fundamental Bylaws and/or Articles of Incorporation, and for approving ICANN's sale or other disposition of all or substantially all of ICANN's assets as described in Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation.
- The seven Community Powers as described in Recommendation #4: Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Powers.
- The Mission, Commitments and Core Values as described in Recommendation #5: Changing Aspects of ICANN's Mission, Commitments and Core Values.
- The framework for the Independent Review Process (IRP) as described in Recommendation #7: Strengthening ICANN's Independent Review Process.
- The IANA Function Review, Special IANA Function Review and the Separation Process, accountability mechanisms for the IANA naming functions that are required under the CWG-Stewardship Proposal.
- The PTI Governance and Customer Standing Committee (CSC) structures, also required by the CWG-Stewardship Proposal.
- The rights of investigation and inspection as described in Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers.
- Requiring ICANN to conduct public consultations on any proposed changes to Standard Bylaws, Fundamental Bylaws or the Articles of Incorporation.
- Requiring approval for any changes to Fundamental Bylaws and the Articles of Incorporation from both the ICANN Board and the Empowered Community as outlined in the Community Power as described in Recommendation #4: Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Powers.
- Raising the threshold for ICANN Board approval for changing a Fundamental Bylaw or the Articles of Incorporation from 2/3 to 3/4 of all the Directors on the ICANN Board.

115 **Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”**








- Clarified that IANA Function Review (IFR) provisions apply only to the IANA naming functions (CWG-Stewardship requirement).
- Clarified the process for changes of Articles of Incorporation to be similar to process for changes to Fundamental Bylaws, as well as the process for approving ICANN's sale or other disposition of all or substantially all of ICANN's assets.
- Added a specific recommendation that the current Articles of Incorporation be modified to remove the notion of members and reflect the need for an affirmative vote of at least 3/4 of all the Directors on the ICANN Board, as well as approval by the Empowered Community.

116 **Relevant Annexes**

117 Annex 03 – Details on Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation

118 Annex 04 – Details on Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers

Recommendation #4: Ensuring Community Engagement in ICANN Decision-making: Seven New Community Powers

 <p>REJECT BUDGET OR STRATEGIC/ OPERATING PLAN</p>	 <p>REJECT CHANGES TO ICANN STANDARD BYLAWS</p>	 <p>APPROVE CHANGES TO FUNDAMENTAL BYLAWS OR ARTICLES, OR CERTAIN ASSET SALES</p>	
 <p>REMOVE INDIVIDUAL ICANN BOARD DIRECTORS</p>	 <p>RECALL ENTIRE ICANN BOARD</p>	 <p>LAUNCH COMMUNITY INDEPENDENT REVIEW PROCESS OR REQUEST FOR RECONSIDERATION</p>	 <p>REJECT ICANN BOARD DECISIONS RELATING TO IANA FUNCTIONS REVIEWS</p>

119 **Summary**

120 The CCWG-Accountability has recommended seven powers for the community that should be in place to improve ICANN's accountability and ensure community engagement.

121 These "Community Powers" are:

1. Reject a Five-Year Strategic Plan, Five-Year Operating Plan, Annual Operating Plan & Budget or IANA Functions Budget.

2. Reject a change to ICANN Standard Bylaws.
3. Approve a change to Fundamental Bylaws and/or Articles of Incorporation, and/or approve ICANN's sale or other disposition of all or substantially all of ICANN's assets.
4. Remove an individual ICANN Board Director.
5. Recall the entire ICANN Board.
6. Initiate a binding Independent Review Process (IRP) (where a panel decision is enforceable in any court recognizing international arbitration results) or a non-binding Request for Reconsideration (where the ICANN Board of Directors is obliged to reconsider a recent decision or action/inaction by ICANN's Board or staff).
7. Reject an ICANN Board decision relating to reviews of IANA functions, including the triggering of any Post-Transition IANA (PTI) separation process for the IANA naming functions.

122 The Community Powers and associated processes were designed to ensure that no stakeholder can singlehandedly exercise any power, and that under no circumstances, would any individual segment of the community be able to block the use of a power.

123 **CCWG-Accountability Recommendations**

124 The CCWG-Accountability recommends:

- Defining the following Community Powers as Fundamental Bylaws:
 1. Reject a Five-Year Strategic Plan, Five-Year Operating Plan, Annual Operating Plan & Budget or IANA Functions Budget.
 2. Reject a change to ICANN Standard Bylaws.
 3. Approve a change to Fundamental Bylaws and/or Articles of Incorporation, and/or approve ICANN's sale or other disposition of all or substantially all of ICANN's assets.
 4. Remove an individual ICANN Board Director.
 5. Recall the entire ICANN Board.
 6. Initiate a binding IRP (where a panel decision is enforceable in any court recognizing international arbitration results) or a non-binding Request for Reconsideration (where the ICANN Board of Directors is obliged to reconsider a recent decision or action/inaction by ICANN's Board or staff).
 7. Reject ICANN Board decisions relating to reviews of IANA functions, including the triggering of any PTI separation process for the IANA naming functions.
- Adding an ICANN Bylaw that states that if the entire ICANN Board is removed, an Interim Board will be established only as long as is required for the selection/election process for the Replacement Board to take place. Supporting Organizations (SOs), Advisory Committees (ACs), and the Nominating Committee (NOMCOM) will develop replacement processes that ensure the Interim Board will not be in place for more than 120 days. The Interim Board will have the same powers and duties as the Board it replaces. Having a Board in place at all times is critical to the operational continuity of ICANN and is a legal requirement.

- The ICANN Bylaws will state that, except in circumstances in which urgent decisions are needed to protect the security, stability and resilience of the DNS, the Interim Board will consult with the community through the SO and AC leaderships before making major decisions. Where relevant, the Interim Board will also consult through the ICANN Community Forum before taking any action that would mean a material change in ICANN's strategy, policies or management, including replacement of the serving President and CEO.
- Note: Details on what the powers do is presented in greater detail in the following section and the details of how these can be used can be found in Annex 2.
- That there be an exception to rejecting Standard Bylaws in cases where the Standard Bylaw change is the result of a Policy Development Process. The exception would be as follows:
 - Fundamental Bylaws would require that the ICANN Board not combine the approval of ICANN Bylaw changes that are the result of a Policy Development Process with any other Bylaw changes.
 - Fundamental Bylaws would require the ICANN Board to clearly indicate if an ICANN Bylaw change is the result of a Policy Development Process when the Board approves it.
 - Fundamental Bylaws would require that if the change to the ICANN Bylaws is the result of a Policy Development Process, the SO that led the Policy Development Process must formally support holding a Community Forum and exercise the power to reject the Bylaw change. If the SO that led the Policy Development Process that requires the Bylaw change does not support holding a Community Forum or exercising the power to reject the Bylaw, then the Community Power to reject the Bylaw cannot be used.

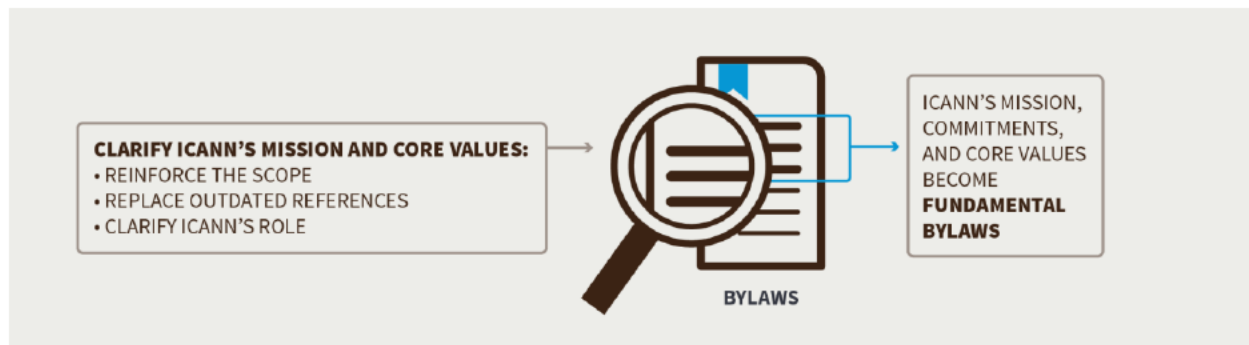
125 **Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”**

- Budget rejection for PTI significantly updated.
- Caretaker budget expanded.
- Indemnification for removal of an ICANN Board Director greatly expanded.
- Escalation steps amended to match process in Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, and Enforcement.
- Scope of community IRP modified to match Recommendation #7: Strengthening ICANN's Independent Review Process.
- “The Power to Approve Changes to Fundamental Bylaws and/or Articles of Incorporation” is now: “The Power to Approve Changes to Fundamental Bylaws and/or Articles of Incorporation and/or Approve ICANN's Sale or Other Disposition of All or Substantially All of ICANN's Assets.”
- “The Power to Initiate a Binding IRP (Where a Panel Decision is Enforceable in any Court Recognizing International Arbitration Results)” now includes the possibility for the Empowered Community to file a Request for Reconsideration.

126 **Relevant Annexes**

- 127 Annex 02 – Details on Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement
- 128 Annex 03 – Details on Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation
- 129 Annex 04 – Details on Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers

Recommendation #5: Changing Aspects of ICANN's Mission, Commitments, and Core Values



130 Summary

131 The CCWG-Accountability is recommending changes to the ICANN Bylaws to assure that the Bylaws reflect the CCWG-Accountability recommendations.

- Note: The language proposed in this recommendation for ICANN Bylaw revisions is conceptual in nature at this stage. External legal counsel and the ICANN legal team will draft final language for these revisions to the Articles of Incorporation and Bylaws.

132 Mission Statement

133 The CCWG-Accountability recommends the following changes to ICANN's "Mission Statement," (Bylaws, Article I, Section 1):

- Clarify that ICANN's Mission is limited to coordinating the development and implementation of policies that are designed to ensure the stable and secure operation of the Domain Name System and are reasonably necessary to facilitate its openness, interoperability, resilience, and/or stability.
- Clarify that ICANN's Mission does not include the regulation of services that use the Domain Name System or the regulation of the content these services carry or provide.
- Clarify that ICANN's powers are "enumerated." Simply, this means that anything that is not articulated in the Bylaws is outside the scope of ICANN's authority.
 - Note: This does not mean ICANN's powers can never evolve. However, it ensures that any changes will be deliberate and supported by the community.

134 **Core Values**

01 The CCWG-Accountability recommends the following changes to ICANN's "Core Values" (Bylaws, Article I, Section 2 and Article II, Section 3):

- Divide ICANN's existing Core Values provisions into "Commitments" and "Core Values."
 - Incorporate ICANN's obligation to "operate for the benefit of the Internet community as a whole, and to carry out its activities in accordance with applicable law and international law and conventions through open and transparent processes that enable competition" into the Bylaws.
 - Note: These obligations are currently contained in ICANN's Articles of Incorporation.
- Designate certain Core Values as "Commitments." ICANN's Commitments will include the values that are fundamental to ICANN's operation, and are intended to apply consistently and comprehensively.

Commitments will include ICANN's obligations to:

- Preserve and enhance the stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet.
 - Limit its activities to those within ICANN's Mission that require, or significantly benefit from, global coordination.
 - Employ open, transparent, bottom-up, multistakeholder processes.
 - Apply policies consistently, neutrally, objectively and fairly, without singling any party out for discriminatory treatment.
- Slightly modify the remaining Core Values to:
 - Reflect various provisions in the Affirmation of Commitments, such as efficiency, operational excellence, and fiscal responsibility.
 - Add an obligation to avoid capture.

135 Although previous CCWG-Accountability draft proposals proposed to modify existing Core Value 5 ("Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment") to drop the phrase "where feasible and appropriate," the CCWG-Accountability has reconsidered this recommendation. While acknowledging that ICANN is not an antitrust authority, on balance the CCWG-Accountability elected to retain the introductory language to ensure that ICANN continues to have the authority, for example, to refer competition-related questions regarding new registry services to competent authorities under the RSEP program and to establish bottom-up policies for allocating top-level domains (e.g., community preference).

136 **Balancing or Reconciliation Test**

137 The CCWG-Accountability recommends modification to the "balancing" language in the ICANN Bylaws to clarify the manner in which this balancing or reconciliation takes place. Specifically:

These Commitments and Core Values are intended to apply in the broadest possible range of circumstances. The Commitments reflect ICANN's fundamental compact with

the global Internet community and are intended to apply consistently and comprehensively to ICANN's activities. The specific way in which Core Values apply, individually and collectively, to each new situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible. In any situation where one Core Value must be reconciled with another, potentially competing Core Value, the balancing must further an important public interest goal within ICANN's Mission that is identified through the bottom-up, multistakeholder process.

138 **Fundamental Bylaws Provisions**

139 The CCWG-Accountability recommends that the revised Mission Statement, Commitments and Core Values be constituted as Fundamental Bylaws. See Recommendation #3: Standard Bylaws, Fundamental Bylaws and Articles of Incorporation.

140 **CCWG-Accountability Recommendations**

141 Modify ICANN's Fundamental Bylaws to implement the following:

142 **Mission**

143 The Mission of the Internet Corporation for Assigned Names and Numbers ("ICANN") is to ensure the stable and secure operation of the Internet's unique identifier systems as described below. Specifically, ICANN:

1. Coordinates the allocation and assignment of names in the root zone of the Domain Name System ("DNS"). In this role, ICANN's scope is to coordinate the development and implementation of policies:
 - For which uniform or coordinated resolution is reasonably necessary to facilitate the openness, interoperability, resilience, security and/or stability of the DNS; and
 - That are developed through a bottom-up, consensus-based multistakeholder process and designed to ensure the stable and secure operation of the Internet's unique names systems.
2. Facilitates coordination of the operation and evolution of the DNS root name server system.
3. Coordinates the allocation and assignment of the top-most level of Internet Protocol ("IP") and Autonomous System ("AS") numbers. In this role, ICANN provides registration services and open access for global number registries as requested by the Internet Engineering Task Force and the Regional Internet Registries and facilitates the development of related global number registry policies by the affected community as agreed with the RIRs.
4. Collaborates with other bodies as appropriate to publish core registries needed for the functioning of the Internet. In this role, with respect to protocol ports and parameters, ICANN's scope is to provide registration services and open access for registries in the public domain requested by Internet protocol development organizations.

144 ICANN shall act strictly in accordance with, and only as reasonably appropriate, to achieve its Mission.

- 145 ICANN shall not impose regulations on services that use the Internet's unique identifiers, or the content that such services carry or provide.
- 146 ICANN shall have the ability to negotiate, enter into and enforce agreements, including Public Interest Commitments ("PICs"), with contracted parties in service of its Mission.
- 147 Note to drafters: In crafting proposed Bylaws language to reflect this Mission Statement, the CCWG wishes the drafters to note the following:
1. The prohibition on the regulation of "content" is not intended to prevent ICANN policies from taking into account the use of domain names as identifiers in various natural languages.
 2. The issues identified in Specification 1 to the Registry Agreement and Specification 4 to the Registrar Accreditation Agreement (the so-called "Picket Fence") are intended and understood to be within the scope of ICANN's Mission. A side-by-side comparison of the formulation of the Picket Fence in the respective agreements is included for reference at the end of this Annex.
 3. For the avoidance of uncertainty only, the language of existing registry agreements and registrar accreditation agreements (including PICs and as-yet unsigned new gTLD Registry Agreements for applicants in the new gTLD round that commenced in 2013) should be grandfathered to the extent that such terms and conditions might otherwise be considered to violate ICANN's Bylaws or exceed the scope of its Mission. This means that the parties who entered/enter into existing contracts intended (and intend) to be bound by those agreements. It means that until the expiration date of any such contract following ICANN's approval of a new/substitute form of Registry Agreement or Registrar Accreditation Agreement, neither a contracting party nor anyone else should be able to bring a case alleging that any provisions of such agreements on their face are ultra vires. It does not, however, modify any contracting party's right to challenge the other party's interpretation of that language. It does not modify the right of any person or entity materially affected (as defined in the Bylaws) by an action or inaction in violation ICANN's Bylaws to seek redress through an IRP. Nor does it modify the scope of ICANN's Mission.
 4. The CCWG-Accountability anticipates that the drafters may need to modify provisions of the Articles of Incorporation to align with the revised Bylaws.

148 **Section 2. Commitments & Core Values**

149 In carrying out its Mission, ICANN will act in a manner that complies with and reflects ICANN's Commitments and respects ICANN's Core Values, both described below.

150 **Commitments**

151 In performing its Mission, ICANN must operate in a manner consistent with its Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions, and applicable local law and through open and transparent processes that enable competition and open entry in Internet-related markets. Specifically, ICANN's action must:

1. Preserve and enhance its neutral and judgment-free administration of the DNS, and the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet.
2. Maintain the capacity and ability to coordinate the DNS at the overall level and to work for the maintenance of a single, interoperable Internet.

3. Respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to matters that are within ICANN's Mission and require or significantly benefit from global coordination.
4. Employ open, transparent and bottom-up, multistakeholder policy development processes, led by the private sector, including business stakeholders, civil society, the technical community, academia, and end users, while duly taking into account the public policy advice of governments and public authorities that (1) seek input from the public, for whose benefit ICANN shall in all events act, (2) promote well-informed decisions based on expert advice, and (3) ensure that those entities most affected can assist in the policy development process.
5. Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, without singling out any particular party for discriminatory treatment.
6. Remain accountable to the Internet Community through mechanisms defined in the Bylaws that enhance ICANN's effectiveness.

152 **Core Values**

153 In performing its Mission, the following Core Values should also guide the decisions and actions of ICANN:

1. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties and the roles of both ICANN's internal bodies and external expert bodies.
2. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.
3. Where feasible and appropriate, depending on market mechanisms to promote and sustain a healthy competitive environment in the DNS market.
4. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest as identified through the bottom-up, multistakeholder policy development process.
 - a. Operating with efficiency and excellence, in a fiscally responsible and accountable manner and at a speed that is responsive to the needs of the global Internet community.
5. While remaining rooted in the private sector, including business stakeholders, civil society, the technical community, academia, and end users, recognizing that governments and public authorities are responsible for public policy and duly taking into account the public policy advice of governments and public authorities.
6. Striving to achieve a reasonable balance between the interests of different stakeholders.

154 These Commitments and Core Values are intended to apply in the broadest possible range of circumstances. The Commitments reflect ICANN's fundamental compact with the global Internet community and are intended to apply consistently and comprehensively to ICANN's activities.

155 The specific way in which Core Values apply, individually and collectively, to each new situation may depend on many factors that cannot be fully anticipated or enumerated. Situations may arise in which perfect fidelity to all Core Values simultaneously is not possible.

156 In any situation where one Core Value must be reconciled with another, potentially competing
Core Value, the balancing must further an important public interest goal within ICANN's Mission
that is identified through the bottom-up, multistakeholder process.

157 Note: Specific recommendations on how to implement these modifications can be found at the
end of the next section.

158 **Changes from the 'Third Draft Proposal on Work Stream 1 Recommendations'**

159 For space considerations the list of changes is not included here. Please consult Annex 5 -
Recommendation #5: Changing Aspects of ICANN's Mission, Commitments and Core Values
for a detailed list of modifications.

160 **Relevant Annexes**

161 Annex 05 – Details on Recommendation #5: Changing Aspects of ICANN's Mission,
Commitments, and Core Values

Recommendation #6: Reaffirming ICANN's Commitment to Respect Internationally Recognized Human Rights as it Carries Out its Mission

162 **Summary**

163 The subject of including a commitment to respect Human Rights in the ICANN Bylaws has been
extensively discussed by the CCWG-Accountability.

164 The CCWG-Accountability sought legal advice on whether, upon the termination of the IANA
Functions Contract between ICANN and the U.S. National Telecommunications and Information
Administration (NTIA), ICANN's specific Human Rights obligations could be called into question.
It was found that, upon termination of the contract, there would be no significant impact on
ICANN's Human Rights obligations. However, the CCWG-Accountability reasoned that a
commitment to respect Human Rights should be included in ICANN's Bylaws in order to comply
with the NTIA criteria to maintain the openness of the Internet.

165 This proposed draft Bylaw on Human Rights would reaffirm ICANN's existing obligations within
its Core Values, and would clarify ICANN's commitment to respect Human Rights.

166 Amendments to the proposed draft Bylaw text since the Second Draft Proposal aimed to prevent
Mission expansion or "Mission creep," and under the proposed draft Bylaw, ICANN commits to
respect internationally recognized Human Rights "within its Core Values."

167 The proposed draft Bylaw does not impose any enforcement duty on ICANN, or any obligation
on ICANN to take action in furtherance of the Bylaw.

168 The proposed draft Bylaw also clarifies that no IRP challenges can be made on the grounds of
this Bylaw until a Framework of Interpretation on Human Rights (FOI-HR) is developed and
approved as part of Work Stream 2 activities. It further clarifies that acceptance of the FOI-HR

will require the same process as for Work Stream 1 recommendations (as agreed for all Work Stream 2 recommendations).

- 169 Additionally, the CCWG-Accountability has identified several work areas that need to be undertaken as part of Work Stream 2 in order to fully operationalize ICANN's commitment to respect Human Rights.

170 **CCWG-Accountability Recommendations**



- Include a Bylaw with the following intent in Work Stream 1 recommendations:

“Within its Core Values, ICANN will commit to respect internationally recognized Human Rights as required by applicable law. This provision does not create any additional obligation for ICANN to respond to or consider any complaint, request, or demand seeking the enforcement of Human Rights by ICANN. This Bylaw provision will not enter into force until (1) a Framework of Interpretation for Human Rights (FOI-HR) is developed by the CCWG-Accountability as a consensus recommendation in Work Stream 2 (including Chartering Organizations’ approval) and (2) the FOI-HR is approved by the ICANN Board using the same process and criteria it has committed to use to consider the Work Stream 1 recommendations.”

- Note: This proposed draft Bylaw will be reviewed by both CCWG-Accountability’s lawyers and ICANN’s legal department and then submitted to the CCWG-Accountability for approval before its submission to the Board for approval.
- Include the following in Work Stream 2 activities:
 - Develop an FOI-HR for the Human Rights Bylaw.
 - Consider which specific Human Rights conventions or other instruments, if any, should be used by ICANN in interpreting and implementing the Human Rights Bylaw.
 - Consider the policies and frameworks, if any, that ICANN needs to develop or enhance in order to fulfill its commitment to respect Human Rights.
 - Consistent with ICANN’s existing processes and protocols, consider how these new frameworks should be discussed and drafted to ensure broad multistakeholder involvement in the process.

- Consider what effect, if any, this Bylaw will have on ICANN's consideration of advice given by the Governmental Advisory Committee (GAC).
- Consider how, if at all, this Bylaw will affect how ICANN's operations are carried out.
- Consider how the interpretation and implementation of this Bylaw will interact with existing and future ICANN policies and procedures.

171 **Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”**

- The CCWG-Accountability considered comments received during the third public comment period, which were overall in favor of including Human Rights language with a few exceptions which included the ICANN Board.
- The CCWG-Accountability engaged with the ICANN Board to specifically address its concerns through discussion and debate in three plenary calls. Additionally, ICANN's legal team and CCWG-Accountability's legal advisors discussed the concerns raised by ICANN legal regarding the possibility of having a significant number of IRP challenges initiated on the grounds of Human Rights claims and the problems this could create without having a Framework of Interpretation in place to properly implement the proposed Bylaw provision.
- The CCWG-Accountability developed compromise text based on a proposal by its legal advisors, which it believed addressed these concerns. The ICANN Board maintained that this compromise text did not address its concerns, but did not provide any specific examples of its concerns regarding the alleged unintended consequences.
- The ICANN Board responded with proposed changes to the draft Bylaw text, which reflected a compromise position and included a commitment to respect Human Rights within ICANN's Core Values, which were accepted by the CCWG-Accountability.

172 **Relevant Annexes**

- 173 Annex 06 – Details on Recommendation #6: Reaffirming ICANN's Commitment to Respect Internationally Recognized Human Rights as it Carries Out its Mission

Recommendation #7: Strengthening ICANN's Independent Review Process

- 174 The purpose of the Independent Review Process (IRP) is to ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws.
- 175 A consultation process undertaken by ICANN produced numerous comments calling for overhaul and reform of ICANN's existing IRP. Commenters called for ICANN to be held to a substantive standard of behavior rather than just an evaluation of whether or not its action was taken in good faith.

- 176 The CCWG-Accountability therefore proposes several enhancements to the IRP to ensure that the process is:
- Transparent, efficient and accessible (both financially and from a standing perspective).
 - Designed to produce consistent and coherent results that will serve as a guide for future actions.
- 177 The CCWG-Accountability also proposes that the IRP:
- Hear and resolve claims that ICANN, through its Board of Directors or staff, has acted (or has failed to act) in violation of its Articles of Incorporation or Bylaws – including any violation of the Bylaws resulting from action taken in response to advice/input from any Supporting Organization (SO) or Advisory Committee (AC).
 - Hear and resolve claims that Post-Transition IANA (PTI), through its Board of Directors or staff, has acted (or has failed to act) in violation of its contract with ICANN and the CWG-Stewardship requirements for issues related to the IANA naming functions.
 - Hear and resolve claims that expert panel decisions are inconsistent with the ICANN Bylaws.
 - Hear and resolve claims that DIDP decisions by ICANN are inconsistent with the ICANN Bylaws.
 - Hear and resolve claims initiated by the Empowered Community with respect to matters reserved to the Empowered Community in the Articles of Incorporation or Bylaws. In such cases, ICANN will bear the costs associated with the Standing Panel, as well as the Empowered Community's legal expenses.
 - Be subject to certain exclusions relating to the results of an SO's policy development process, country code top-level domain delegations/redelegations, numbering resources, and protocols parameters.
- 178 **CCWG-Accountability Recommendations**
- Modifying the Fundamental Bylaws to implement the modifications associated with this recommendation on the IRP which include:
 - Hear and resolve claims that ICANN through its Board of Directors or staff has acted (or has failed to act) in violation of its Articles of Incorporation or Bylaws (including any violation of the Bylaws resulting from action taken in response to advice/input from any AC or SO).
 - Hear and resolve claims that PTI through its Board of Directors or staff has acted (or has failed to act) in violation of its contract with ICANN and the CWG-Stewardship requirements for issues related to the IANA naming functions.
 - Hear and resolve claims that expert panel decisions are inconsistent with ICANN's Bylaws.
 - Hear and resolve claims that DIDP decisions by ICANN are inconsistent with ICANN's Bylaws.
 - Hear and resolve claims initiated by the Empowered Community with respect to matters reserved to the Empowered Community in the Articles of Incorporation or Bylaws.

- A standing judicial/arbitral panel: The IRP should have a standing judicial/arbitral panel tasked with reviewing and acting on complaints brought by individuals, entities, and/or the community who have been materially affected by ICANN's action or inaction in violation of the Articles of Incorporation and/or Bylaws.
 - Composition of Panel and Expertise: Significant legal expertise, particularly international law, corporate governance, and judicial systems/dispute resolution/arbitration is necessary.
 - Diversity: English will be the primary working language with provision of translation services for claimants as needed. Reasonable efforts will be taken to achieve cultural, linguistic, gender, and legal diversity, with an aspirational cap on number of panelists from any single region (based on the number of members of the Standing Panel as a whole).
 - Size of Panel:
 - Standing Panel: Minimum of seven panelists.
 - Decisional Panel: Three panelists.
 - Independence: Panel members must be independent of ICANN, including ICANN SOs and ACs.
 - Recall: Appointments shall be made for a fixed term of five years with no removal except for specified cause (corruption, misuse of position for personal use, etc.). The recall process will be developed by way of the IRP subgroup.
- Initiation of the Independent Review Process: An aggrieved party would trigger the IRP by filing a complaint with the panel alleging that a specified action or inaction is in violation of ICANN's Articles of Incorporation and/or Bylaws, or otherwise within the scope of IRP jurisdiction. The Empowered Community could initiate an IRP with respect to matters reserved to the Empowered Community in the Articles of Incorporation or Bylaws.
- Standing: Any person/group/entity "materially affected" by an ICANN action or inaction in violation of ICANN's Articles of Incorporation and/or Bylaws shall have the right to file a complaint under the IRP and seek redress. The Board's failure to fully implement an Empowered Community decision will be sufficient for the Empowered Community to be materially affected.
- Community Independent Review Process: The CCWG-Accountability recommends giving the Empowered Community the right to present arguments on behalf of the Empowered Community to the IRP Panel. In such cases, ICANN will bear the costs associated with the Standing Panel, as well as the Empowered Community's legal expenses.
- Standard of Review: The IRP Panel, with respect to a particular IRP, shall decide the issue(s) presented based on its own independent interpretation of the ICANN Articles of Incorporation and Bylaws in the context of applicable governing law and prior IRP decisions.
- Accessibility and Cost: The CCWG-Accountability recommends that ICANN bear all the administrative costs of maintaining the system (including panelist salaries), while each party should bear the costs of their own legal advice, except that the legal expenses of the Empowered Community associated with a community IRP will be borne by ICANN. The panel may provide for loser pays/fee shifting in the event it identifies a challenge or defense as frivolous or abusive. ICANN should seek to establish access – for example

access to pro bono representation for community, non-profit complainants and other complainants that would otherwise be excluded from utilizing the process.

- **Implementation:** The CCWG-Accountability proposes that the revised IRP provisions be adopted as Fundamental Bylaws. Implementation of these enhancements will necessarily require additional detailed work. Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a CCWG (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld. The functional processes by which the Empowered Community will act, such as through a council of the chairs of the ACs and SOs, should also be developed. These processes may be updated in the light of further experience by the same process, if required. In addition, to ensure that the IRP functions as intended, the CCWG-Accountability proposes to subject the IRP to periodic community review.
- **Transparency:** The community has expressed concerns regarding the ICANN document/information access policy and implementation. Free access to relevant information is an essential element of a robust IRP, and as such, the CCWG-Accountability recommends reviewing and enhancing ICANN's Documentary Information Disclosure Policy as part of the accountability enhancements in Work Stream 2.

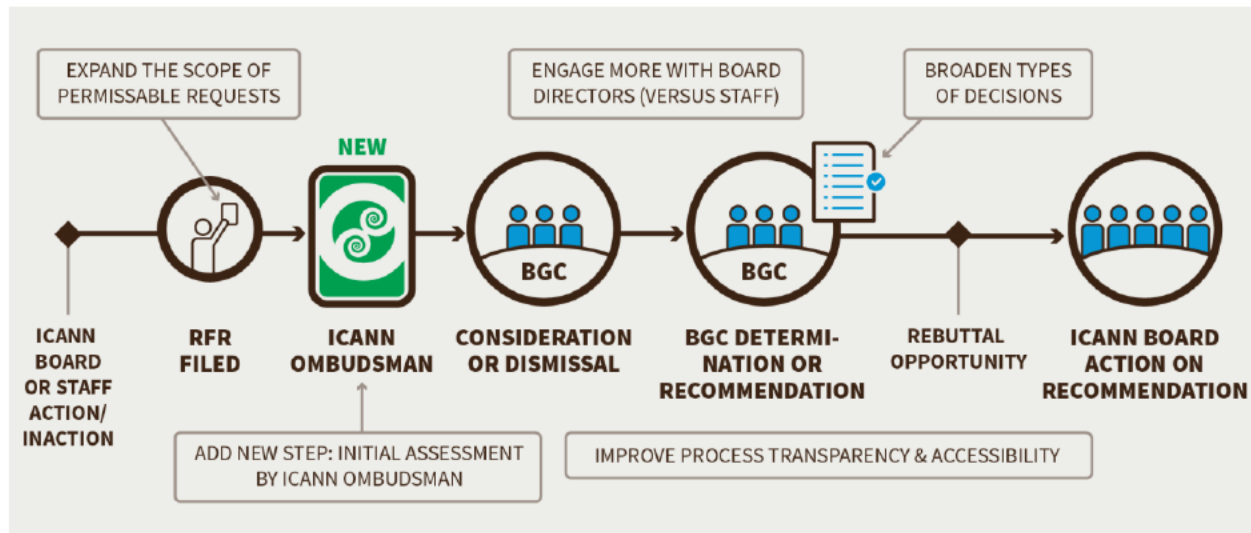
179 **Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”**

- The scope of the IRP will be restricted to the IANA naming functions for claims that PTI through its Board of Directors or staff has acted (or has failed to act) in violation of its contract with ICANN.
- The scope of the IRP will include actions and inactions of PTI by way of the PTI Board being bound to ensure that PTI complies with its contractual obligations with ICANN in the Bylaws. ICANN's failure to enforce material obligations will be appealable by way of the IRP as a Bylaws violation.
- The scope of the IRP will include claims that DIDP decisions by ICANN are inconsistent with ICANN's Bylaws.
- Clarified that ICANN must modify Registry Agreements with gTLD Operators to expand scope of arbitration available thereunder to cover PTI service complaints.
- **Exclusion:** The IRP will not be applicable to protocols parameters.
- **Exclusion:** An IRP cannot be launched that challenges the result(s) of an SO's policy development process (PDP) without the support of the SO that developed such PDP or, in the case of joint PDPs, without the support of all of the SOs that developed such PDP.
- **Limitation:** An IRP challenge of expert panel decisions is limited to a challenge of whether the panel decision is consistent with ICANN's Bylaws.
- The legal expenses of the Empowered Community associated with a community IRP will be borne by ICANN.

180 **Relevant Annexes**

- 181 **Annex 07 – Details on Recommendation #7: Strengthening ICANN's Independent Review Process**

Recommendation #8: Improving ICANN's Request for Reconsideration Process



182 Summary

183 Currently, any person or entity may submit a Request for Reconsideration or review of an ICANN action or inaction as provided for in [Article IV, Section 2 of ICANN's Bylaws](#).

184 The CCWG-Accountability proposes a number of key reforms to ICANN's Request for Reconsideration process, including:

- Expanding the scope of permissible requests.
- Extending the time period for filing a Request for Reconsideration from 15 to 30 days.
- Narrowing the grounds for summary dismissal.
- Making the ICANN Board of Directors responsible for determinations on all requests (rather than a committee handling staff issues).
- Making ICANN's Ombudsman responsible for initial substantive evaluation of the requests.

185 The CCWG-Accountability also proposes several enhancements to transparency requirements and firm deadlines in issuing of determinations, including:

- Recordings/transcripts of Board discussion should be posted at the option of the requestor.
- An opportunity to rebut the Board Governance Committee's (BGC's) final recommendation before a final decision by the ICANN Board should be provided.
- Adding hard deadlines to the process, including an affirmative goal that final determinations of the Board be issued within 75 days from request filing wherever possible, and in no case more than 135 days from the date of the request.

186 ICANN's Document and Information Disclosure Policy (DIDP) will be addressed in Work Stream 2. The CCWG-Accountability recommends that the policy should be improved to accommodate the legitimate need for requestors to obtain internal ICANN documents that are relevant to their requests.

187 **CCWG-Accountability Recommendations**

188 Modify [Article IV, Section 2 of ICANN's Bylaws](#) to reflect the following changes:

- Expanding the scope of permissible requests.
- Extending the time period for filing a Request for Reconsideration from 15 to 30 days.
- Narrowing the grounds for summary dismissal.
- Requiring determinations on all requests to be made by the ICANN Board of Directors (rather than a committee handling staff issues).
- Requiring ICANN's Ombudsman to make the initial substantive evaluation of the requests.
- Requiring recordings/transcripts of Board discussion to be posted at the option of the requestor.
- Providing a rebuttal opportunity to the BGC's final recommendation before a final decision by the ICANN Board.
- Adding hard deadlines to the process, including an affirmative goal that final determinations of the Board be issued within 75 days from request filing wherever possible, and in no case more than 135 days from the date of the request.

189 **Changes from the "Third Draft Proposal on Work Stream 1 Recommendations"**

- Conflicts in timing for Board approval addressed by changing 60 days to 75 days and the total of 120 days to 135 days.

190 **Relevant Annexes**

191 Annex 08 – Details on Recommendation #8: Improving ICANN's Request for Reconsideration Process

Recommendation #9: Incorporating the Affirmation of Commitments in ICANN's Bylaws



192 **Summary**

193 Based on stress test analysis, the CCWG-Accountability recommends incorporating the reviews specified in the Affirmation of Commitments, a 2009 bilateral agreement between ICANN and the U.S. National Telecommunications and Information Administration (NTIA), into the ICANN Bylaws. This will ensure that community reviews remain a central aspect of ICANN's accountability and transparency framework.

194 Specifically, the CCWG-Accountability proposes to:

- Add the relevant ICANN Commitments from the Affirmation of Commitments into the ICANN Bylaws.
- Add the four review processes specified in the Affirmation of Commitments to the ICANN Bylaws, including:
 - Ensuring accountability, transparency, and the interests of global Internet users.
 - Enforcing ICANN's existing policy relating to WHOIS, subject to applicable laws.
 - Preserving security, stability, and resiliency of the Domain Name System (DNS).
 - Promoting competition, consumer trust, and consumer choice.

195 In addition, to support the common goal of improving the efficiency and effectiveness of reviews, ICANN will publish operational standards to be used as guidance by the community, ICANN staff and the Board in conducting future reviews. The community will review these operational standards on an ongoing basis to ensure that they continue to meet the community's needs.

196 **CCWG-Accountability Recommendations**



- 197 The CCWG-Accountability evaluated the contingency of ICANN or NTIA unilaterally withdrawing from the Affirmation of Commitments (see information about Stress Test #14 in the “Detailed Explanation of Recommendations” section, below).
- 198 To ensure continuity of these key commitments, the CCWG-Accountability proposes the following two accountability measures:
- Preserve in the ICANN Bylaws any Relevant ICANN Commitments from the Affirmation of Commitments⁴
 - This includes Sections 3, 4, 7, and 8 of the Affirmation of Commitments. Sections 3, 4, 8a, and 8c would be included in the Core Values section of the ICANN Bylaws.
 - Part of the content of Section 8b of the Affirmation of Commitments (the part relating to the location of ICANN’s principal office), is already covered by ICANN Bylaws Article XVIII. Article XVIII is to be classified as a Standard Bylaw and is not to be moved into the Core Values section with material derived from Affirmation of Commitments Sections 8a and 8c.
 - Section 7 of the Affirmation of Commitments would be inserted as a new Section 8 in Article III, Transparency, of the ICANN Bylaws.
 - Bring the Four Affirmation of Commitments Review Processes into the ICANN Bylaws
 - The following four reviews will be preserved in the reviews section of the Bylaws:
 - Ensuring accountability, transparency, and the interests of global Internet users.
 - Enforcing ICANN’s existing policy relating to WHOIS, subject to applicable laws.
 - Preserving security, stability, and resiliency of the DNS.
 - Promoting competition, consumer trust, and consumer choice.
- 199 After these elements of the Affirmation of Commitments are adopted in the ICANN Bylaws, the following should take place:
- ICANN and NTIA should mutually agree to terminate the Affirmation of Commitments.

⁴ Sections 3, 4, 7, and 8 of the Affirmation of Commitments contain relevant ICANN commitments. The remaining sections in the Affirmation of Commitments are preamble text and commitments of the U.S. Government. As such, they do not contain commitments by ICANN, and cannot usefully be incorporated in the Bylaws.

- New review rules will prevail as soon as the Bylaws have been changed, but care should be taken when terminating the Affirmation of Commitments to not disrupt any Affirmation of Commitments reviews that may be in process at that time. Any in-progress reviews will adopt the new rules to the extent practical. Any planned Affirmation of Commitments review should not be deferred simply because the new rules allow up to five years between review cycles. If the community prefers to do a review sooner than five years from the previous review, that is allowed under the new rules.
- Through its Work Party IRP Implementation Oversight Team (WP-IRP IOT), the CCWG-Accountability will examine the suggestion to include a mid-term review of the Independent Review Process (IRP).
- To support the common goal of improving the efficiency and effectiveness of reviews, ICANN will publish operational standards to be used as guidance by the community, ICANN staff, and the Board in conducting future reviews. The community will review these operational standards on an ongoing basis to ensure that they continue to meet the community's needs.
- These operational standards should include issues such as: composition of Review Teams, Review Team working methods (meeting protocol, document access, role of observers, budgets, decision making methods, etc.), and methods of access to experts. These standards should be developed with the community and should require community input and review to be changed. The standards are expected to reflect levels of detail that are generally not appropriate for governance documents, and should not require a change to the Bylaws to modify. This is an implementation issue aligned with the need for review of the proposed Bylaws text developed by the CCWG-Accountability that has been provided as guidance to legal counsel.

200 A section related to the IANA Function Review and Special IANA Function Review will fit into these new sections of the Bylaws and will be classified as Fundamental Bylaws. Specifications will be based on the requirements detailed by the CWG-Stewardship. It is anticipated that the Bylaw drafting process will include the CWG-Stewardship.

201 **Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”**

- The AoC text for Competition, Consumer Trust & Consumer Choice review is reintroduced.
- All AoC reviews (and the IFR and Special IFR) should be incorporated into the Bylaws.
- The WP-IRP IOT will examine the suggestion to include a mid-term review of the IRP. The ATRT scope will be expanded to suggest a review of the IRP (paragraph 89).
- The representation and number of seats on Review Teams that relate to gTLD reviews will remain unchanged from the Third Draft Proposal (paragraph 54).
- The Board amendment on WHOIS/future Registration Directory Services policy (paragraph 127) should be included.
- The ICANN Articles of Incorporation address ICANN's state of incorporation (or corporate domicile), and the ICANN Bylaws (Article XVIII) address the separate issue of the location of ICANN's principal office. Article XVIII of the ICANN Bylaws will be classified as a Standard Bylaw (see paragraph 5).

- The Board suggestion regarding AoC reviews operational standards to be developed as part of implementation should be included on the understanding that Recommendation #9 would be respected and that this text would address implementation details only (see paragraph 8).
- CCWG-Accountability lawyers advised clarifying “diversity” in paragraph 54 regarding composition of AoC Review Teams. CCWG-Accountability notes that “diversity” considerations could include geography, skills, gender, etc., and that chairs of participating ACs and SOs should have flexibility in their consideration of factors in selecting Review Team members.
- CCWG-Accountability lawyers suggested “the group of chairs can solicit additional nominees or appoint less than 21 members to avoid potential overrepresentation of particular ACs or SOs if some nominate less than 3 members.” The CCWG-Accountability proposed “up to 21”, so it is not actually proposing a fixed number of Review Team members. “Fixed” has been replaced with “limited” in paragraph 54. CCWG-Accountability purposely allowed AC/SO chairs to select additional Review Team members from ACs/SOs that had offered more than 3 candidates. This is to accommodate ACs/SOs that had greater interest in a review, such as the GNSO, which would be the most concerned with reviews of new gTLDs and WHOIS/Directory Services. Therefore, the representation and number of seats on the Review Team will remain unchanged from the Third Draft Proposal.
- Replaced “participants” with “observers” in paragraph 54.

Relevant Annexes

- 202 Annex 09 – Details on Recommendation #9: Incorporating the Affirmation of Commitments Reviews in ICANN’s Bylaws

Recommendation #10: Enhancing the Accountability of Supporting Organizations and Advisory Committees

203 Summary

204 The CCWG-Accountability recommends addressing the accountability of Supporting Organizations (SOs) and Advisory Committees (ACs) in a two-stage approach:

- In Work Stream 1: Include the review of SO and AC accountability mechanisms in the independent structural reviews performed on a regular basis.
- In Work Stream 2: Include the subject of SO and AC accountability as part of the work on the Accountability and Transparency Review process.

205 CCWG-Accountability Recommendations

206 Having reviewed and inventoried the existing mechanisms related to SO and AC accountability, it is clear that the current mechanisms need to be enhanced in light of the new responsibilities associated with the Work Stream 1 recommendations.

207 The CCWG-Accountability recommends the following.

208 **Work Stream 1:**

209 Include the review of SO and AC accountability mechanisms in the independent periodical structural reviews that are performed on a regular basis.

- These reviews should include consideration of the mechanisms that each SO and AC has in place to be accountable to their respective Constituencies, Stakeholder Groups, Regional At-Large Organizations, etc.
- This recommendation can be implemented through an amendment of Section 4 of Article IV of the ICANN Bylaws, which currently describes the goal of these reviews as:

The goal of the review, to be undertaken pursuant to such criteria and standards as the Board shall direct, shall be to determine (i) whether that organization has a continuing purpose in the ICANN structure, and (ii) if so, whether any change in structure or operations is desirable to improve its effectiveness.

- The periodic review of ICANN Accountability and Transparency required under the Affirmation of Commitments is being incorporated into the ICANN Bylaws as part of Work Stream 1. In Recommendation #9: Incorporating the Affirmation of Commitments in ICANN's Bylaws, the Accountability and Transparency Review will include the following among the issues that merit attention in the review:

assessing the role and effectiveness of GAC interaction with the Board and with the broader ICANN community, and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS

210 **Work Stream 2:**

211 Include the subject of SO and AC accountability as part of the Accountability and Transparency Review process.

- Evaluate the proposed "Mutual Accountability Roundtable" to assess its viability and, if viable, undertake the necessary actions to implement it.⁵

⁵ CCWG-Accountability Advisor Willie Currie introduced a short description of the mutual accountability roundtable: *The idea of mutual accountability is that multiple actors are accountable to each other. How might this work in ICANN? It would be necessary to carve out a space within the various forms of accountability undertaken within ICANN that are of the principal-agent variety. So where the new Community Powers construct the community as a principal who calls the Board as agent to account, a line of mutual accountability would enable all ICANN structures to call one another to account. So one could imagine a Mutual Accountability Roundtable that meets at each ICANN meeting, perhaps replacing the current Public Forum. The form would be a roundtable of the Board, CEO, and all Supporting Organizations and Advisory Committees, represented by their chairpersons. The roundtable would designate a chairperson for the roundtable from year to year who would be responsible for facilitating each Mutual Accountability Roundtable. Each Roundtable may pick one or two key topics to examine. Each participant could give an account of how his or her constituency addressed the issue, indicating what worked and didn't work. This could be followed by a discussion on how to improve matters of performance. The purpose would be to create a space for mutual accountability as well as a learning space for improvement.*

- Develop a detailed working plan on enhancing SO and AC accountability taking into consideration the comments made during the public comment period on the Third Draft Proposal.

212 Assess whether the Independent Review Process (IRP) would also be applicable to SO and AC activities.

213 **Changes Made Since the Third Draft Proposal**

- Added: The periodic review of ICANN Accountability and Transparency required under the Affirmation of Commitments is being incorporated into the ICANN Bylaws as part of Work Stream 1. In Recommendation #9: Incorporating the Affirmation of Commitments in ICANN's Bylaws, the Accountability and Transparency Review will include the following among the issues that merit attention in the review:

assessing the role and effectiveness of GAC interaction with the Board and with the broader ICANN community, and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS

- In Work Stream 2 recommendations, added: Develop a detailed working plan on enhancing SO and AC accountability taking into consideration the comments made during the public comment period on the Third Draft Proposal.

214 **Relevant Annexes**

215 Annex 10 – Details on Recommendation #10: Enhancing the Accountability of Supporting Organizations and Advisory Committees

Recommendation #11: Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test 18)

216 Summary

217 Currently, Governmental Advisory Committee (GAC) advice to the ICANN Board has special status as described in the ICANN Bylaws Article XI, Section 2:

j. The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

218 Stress Test #18 considers a scenario where ICANN's GAC would amend its operating procedures to change from consensus decisions (no objections) to majority voting for advice to the ICANN Board. Since the Board must seek a mutually acceptable solution if it rejects GAC advice, concerns were raised that the ICANN Board could be forced to arbitrate among sovereign governments if they were divided in their support for the GAC advice on public policy matters.

219 In addition, if the GAC lowered its decision threshold while also participating in the new Empowered Community (if the GAC chooses to so participate), some stakeholders believe that this could increase government influence over ICANN.

220 In order to mitigate these concerns, the CCWG-Accountability is recommending changes be made to the ICANN Bylaws relating to GAC advice.

221 CCWG-Accountability Recommendations

222 The CCWG-Accountability recommends that the following changes be made to the ICANN Bylaws Article XI, Section 2 (emphasis added):

223 *j. The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. **Any Governmental Advisory Committee advice approved by a full Governmental Advisory Committee consensus, understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection, may only be rejected by a vote of 60% of the Board**, and the Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.*

224 This recommendation is intended only to limit the conditions under which the ICANN Board and GAC must "try to find a mutually acceptable solution," as required in ICANN's current Bylaws. This recommendation shall not create any new obligations for the ICANN Board to

consider, vote upon, or to implement GAC advice, relative to the Bylaws in effect prior to the IANA Stewardship Transition. This recommendation does not create any presumption or modify the standard applied by the Board in reviewing GAC advice.

- 225 The GAC has the autonomy to refine its operating procedures to specify how objections are raised and considered (for example, disallowing a single country to continue an objection on the same issue if no other countries will join in an objection). When transmitting consensus advice to the ICANN Board for which the GAC seeks to receive special consideration, the GAC has the obligation to confirm the lack of any formal objection.
- 226 The CCWG-Accountability recommends inserting a requirement that all ACs provide a rationale for their advice. A rationale must be provided for formal advice provided by an Advisory Committee to the ICANN Board. The Board shall have the responsibility to determine whether the rationale provided is adequate to enable determination of whether following that advice would be consistent with ICANN's Bylaws.
- 227 To address concerns regarding GAC advice that is inconsistent with the ICANN Bylaws, the CCWG-Accountability recommends adding this clarification for legal counsel to consider when drafting Bylaws language:

ICANN cannot take action - based on advice or otherwise – that is inconsistent with its Bylaws. While the GAC is not restricted as to the advice it can offer to ICANN, it is clear that ICANN may not take action that is inconsistent with its Bylaws. Any aggrieved party or the Empowered Community will have standing to bring claims through the IRP that the Board acted (or failed to act) in a manner inconsistent with the ICANN Articles of Incorporation or Bylaws, even if the Board acted on GAC advice.

- 228 Note: The language proposed in recommendations for ICANN Bylaw revisions are conceptual in nature at this stage. The CCWG-Accountability's external legal counsel and the ICANN legal team will draft final language for these revisions to the Articles of Incorporation and Bylaws.

229 **Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”**

- Changed the 2/3rds threshold for the Board rejecting GAC consensus advice to 60%. As part of the compromise, this required changes in Recommendations #1 and #2 to implement a GAC “carve out.”

230 **Relevant Annexes**

- 231 Annex 11 – Details on Recommendation #11: Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test 18)

Recommendation #12: Committing to Further Accountability Work in Work Stream 2

232 **Summary**

233 The CCWG-Accountability Work Stream 2 is focused on addressing those accountability topics for which a timeline for developing solutions may extend beyond the IANA Stewardship Transition.

234 As part of Work Stream 2, the CCWG-Accountability proposes that further enhancements be made to a number of designated mechanisms:

- Considering improvements to ICANN's standards for diversity at all levels.
- Staff accountability.
- Supporting Organizations and Advisory Committee accountability.
- Improving ICANN's transparency with a focus on:
 - Enhancements to ICANN's existing Documentary Information Disclosure Policy (DIDP).
 - Transparency of ICANN's interactions with governments.
 - Improvements to the existing whistleblower policy.
 - Transparency of Board deliberations.
- Developing and clarifying a Framework of Interpretation for ICANN's Human Rights commitment and proposed Draft Bylaw.
- Addressing jurisdiction-related questions, namely: "Can ICANN's accountability be enhanced depending on the laws applicable to its actions?" The CCWG-Accountability anticipates focusing on the question of applicable law for contracts and dispute settlements.
- Considering enhancements to the Ombudsman's role and function.

235 The CCWG-Accountability expects to begin refining the scope of Work Stream 2 during the upcoming [ICANN55 Meeting](#) in March 2016. It is intended that Work Stream 2 recommendations will be published for comments by the end of 2016.

236 The community raised concerns that after the IANA Stewardship Transition, there may be a lack of incentive for ICANN to implement the proposal arising out of Work Stream 2. To prevent this scenario, the CCWG-Accountability recommends that the ICANN Board adopt an Interim Bylaw that would commit ICANN to consider the CCWG-Accountability Work Stream 2 recommendations according to the same process and criteria it has committed to use to consider the Work Stream 1 recommendations. In a [letter](#) dated 13 November 2015, the ICANN Board confirmed its intent to work with the ICANN community and to provide adequate support for work on these issues.

237 **CCWG-Accountability Recommendations**

238 The CCWG-Accountability recommends that the Board adopt an Interim Bylaw that would commit ICANN to consider the CCWG-Accountability consensus recommendations according to the same process and criteria it has committed to use to consider the Work Stream 1

recommendations. The Bylaw would task the group with creating further enhancements to ICANN's accountability limited to the Work Stream 2 list of issues:

- Considering improvements to ICANN's standards for diversity at all levels.
- Staff accountability.
- Supporting Organizations and Advisory Committee accountability.
 - Include the subject of SO and AC accountability as part of the work on the Accountability and Transparency Review process.
 - Evaluate the proposed "Mutual Accountability Roundtable" to assess viability.
 - Propose a detailed working plan on enhancing SO and AC accountability as part of Work Stream 2.
 - Assess whether the IRP would also be applicable to SO and AC activities.
- Improving ICANN's transparency with a focus on:
 - Enhancements to ICANN's existing DIDP.
 - Transparency of ICANN's interactions with governments.
 - Improvements to the existing whistleblower policy.
 - Transparency of Board deliberations.
- Developing and clarifying a Framework of Interpretation for ICANN's Human Rights commitment and proposed Draft Bylaw.
- Addressing jurisdiction-related questions, namely: "Can ICANN's accountability be enhanced depending on the laws applicable to its actions?" The CCWG-Accountability anticipates focusing on the question of applicable law for contracts and dispute settlements.
- Considering enhancements to the Ombudsman's role and function.

239 The CCWG-Accountability notes that further enhancements to ICANN accountability can be accommodated through the accountability review process (see Recommendation #10: Enhancing the Accountability of Supporting Organizations and Advisory Committees) or through specific, ad hoc, cross community working group initiatives.

240 **Changes from the "Third Draft Proposal on Work Stream 1 Recommendations"**

- Interim Bylaws clarifications to address Board's concerns by highlighting that Work Stream 2 will be following similar rules as Work Stream 1: consensus recommendations, endorsement by Chartering Organizations, ability for the Board to engage in special dialogue, 2/3 threshold for such Board decision, etc.
- Edits to the documents will include focus on fact that Work Stream 2 deliberations will be open to all (similar to Work Stream 1).
- List of Work Stream 2 items is "limited to" instead of "related to." A note is added that clarifies that further items beyond this list can be accommodated through regular review cycles, or specific CCWG-Accountability.

- Timeframe discussion: target dates are needed, but hard deadlines would not be appropriate or helpful.
- Agreed to incorporate Public Experts Group (PEG) Advisor input to strengthen the diversity requirement.
- Enhancing the Ombudsman role and function is confirmed as a Work Stream 2 item.
- Re-inserted staff accountability requirement.

241 **Relevant Annexes**

242 Annex 12 – Details on Recommendation #12: Committing to Further Accountability Work in Work Stream 2

Conclusion

- 243 The CCWG-Accountability believes that the set of accountability mechanisms it has proposed, outlined above, empowers the community through the use of the bottom-up, multistakeholder model by relying on of the stakeholders within ICANN's existing and tested community structures. Furthermore, the CCWG-Accountability believes that this community-driven model is appropriate for replacing the accountability inherent in ICANN's historical relationship with the U.S. Government.

Community Powers are an Effective Replacement of the Safety Net Provided by the U.S. Government's Current IANA Stewardship Role

- 244 The CCWG-Accountability believes that the Seven Community Powers, as a package, can effectively replace the safety net that the U.S. Government has provided to date as part of its oversight role. It is recommended that these powers need to be enforced by a court of law only as a last resort. The CCWG-Accountability has based its recommendations on existing structures and recommends:
- Considering the entire community as ICANN's Empowered Community.
 - Ensuring no part of the community has more rights than another part, either by having the ability to push through its individual interests or by blocking community consensus. The CCWG-Accountability has ensured that no Community Powers or statutory rights can be exercised singlehandedly.
 - Ensuring the community can only jointly exercise its powers using a consensus-based model.

The CCWG-Accountability Believes that the Recommended Accountability Frameworks Provided in this Proposal Meet the Requirements of the Domain Names Community and the IANA Stewardship Transition Proposal

- 245 The CCWG-Accountability will seek confirmation from the Cross Community Working Group that developed the IANA Stewardship Transition that this Proposal meets its requirements.
- 246 The CCWG-Accountability believes that its Proposal also meets the requirements NTIA published for the transition and will present its analysis of this in the full Proposal.

List of Annexes & Appendices

- ⊙ **Annex 1** – Recommendation #1: Establishing an Empowered Community for Enforcing Community Powers
- ⊙ **Annex 2** – Recommendation #2: Empowering the Community through Consensus: Engagement, Escalation, Enforcement
- ⊙ **Annex 3** – Recommendation #3: Redefining ICANN’s Bylaws as “Standard Bylaws” and “Fundamental Bylaws”
- ⊙ **Annex 4** – Recommendation #4: Ensuring Community Involvement in ICANN Decision-making: Seven New Community Powers
- ⊙ **Annex 5** – Recommendation #5: Changing aspects of ICANN’s Mission, Commitments, and Core Values
- ⊙ **Annex 6** – Recommendation #6: Reaffirming ICANN’s Commitment to Respect Internationally Recognized Human Rights as it Carries Out its Mission
- ⊙ **Annex 7** – Recommendation #7: Strengthening ICANN’s Independent Review Process
- ⊙ **Annex 8** – Recommendation #8: Improving ICANN’s Request for Reconsideration Process
- ⊙ **Annex 9** – Recommendation #9: Incorporating the Affirmation of Commitments Reviews in ICANN’s Bylaws
- ⊙ **Annex 10** – Recommendation #10: Enhancing the Accountability of Supporting Organizations and Advisory Committees
- ⊙ **Annex 11** – Recommendation #11: Board Obligations with Regard to Governmental Advisory Committee Advice (Stress Test 18)
- ⊙ **Annex 12** – Recommendation #12: Committing to Further Accountability Work in Work Stream 2
- ⊙ **Annex 13** – CWG-Stewardship Requirements of the CCWG-Accountability
- ⊙ **Annex 14** – Meeting NTIA’s Criteria for the IANA Stewardship Transition
- ⊙ **Annex 15** – Stress Testing

- ⊙ **Appendix A** – Documenting Consensus (Including Minority Views)
- ⊙ **Appendix B** – Charter
- ⊙ **Appendix C** – Background & Methodology
- ⊙ **Appendix D** – Engagement and Participation Summaries (Summary and Documenting Public Consultations)
- ⊙ **Appendix E** – Initial Work to Determine Focus of the Work Stream 1 Proposal
- ⊙ **Appendix F** – Legal Counsel
- ⊙ **Appendix G** – Legal Documents
- ⊙ **Appendix H** – Bylaws Drafting process & Implementation Timeline
- ⊙ **Appendix I** – Affirmation of Commitments
- ⊙ **Appendix J** – Glossary
- ⊙ **Appendix K** – Co-Chairs’ Special Appreciation of Staff and Rapporteurs Efforts

EXHIBIT 220

Annex 07 – Recommendation #7: Strengthening ICANN’s Independent Review Process

1. Summary

- 01 The purpose of the Independent Review Process (IRP) is to ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws.
- 02 A consultation process undertaken by ICANN produced numerous comments calling for overhaul and reform of ICANN’s existing IRP. Commenters called for ICANN to be held to a substantive standard of behavior rather than just an evaluation of whether or not its action was taken in good faith.
- 03 The CCWG-Accountability therefore proposes several enhancements to the IRP to ensure that the process is:
 - Transparent, efficient and accessible (both financially and from a standing perspective).
 - Designed to produce consistent and coherent results that will serve as a guide for future actions.
- 04 The CCWG-Accountability also proposes that the IRP:
 - Hear and resolve claims that ICANN, through its Board of Directors or staff, has acted (or has failed to act) in violation of its Articles of Incorporation or Bylaws – including any violation of the Bylaws resulting from action taken in response to advice/input from any Supporting Organization (SO) or Advisory Committee (AC).
 - Hear and resolve claims that Post-Transition IANA (PTI), through its Board of Directors or staff, has acted (or has failed to act) in violation of its contract with ICANN and the CWG-Stewardship requirements for issues related to the IANA naming functions.
 - Hear and resolve claims that expert panel decisions are inconsistent with the ICANN Bylaws.
 - Hear and resolve claims that DIDP decisions by ICANN are inconsistent with the ICANN Bylaws.
 - Hear and resolve claims initiated by the Empowered Community with respect to matters reserved to the Empowered Community in the Articles of Incorporation or Bylaws. In such cases, ICANN will bear the costs associated with the Standing Panel, as well as the Empowered Community’s legal expenses.
 - Be subject to certain exclusions relating to the results of an SO’s policy development process, country code top-level domain delegations/redelegations, numbering resources, and protocols parameters.

2. CCWG-Accountability Recommendations

- Modifying the Fundamental Bylaws to implement the modifications associated with this recommendation on the IRP which include:
 - Hear and resolve claims that ICANN through its Board of Directors or staff has acted (or has failed to act) in violation of its Articles of Incorporation or Bylaws (including any violation of the Bylaws resulting from action taken in response to advice/input from any AC or SO).
 - Hear and resolve claims that PTI through its Board of Directors or staff has acted (or has failed to act) in violation of its contract with ICANN and the CWG-Stewardship requirements for issues related to the IANA naming functions.
 - Hear and resolve claims that expert panel decisions are inconsistent with ICANN's Bylaws.
 - Hear and resolve claims that DIDP decisions by ICANN are inconsistent with ICANN's Bylaws.
 - Hear and resolve claims initiated by the Empowered Community with respect to matters reserved to the Empowered Community in the Articles of Incorporation or Bylaws.
- A standing judicial/arbitral panel: The IRP should have a standing judicial/arbitral panel tasked with reviewing and acting on complaints brought by individuals, entities, and/or the community who have been materially affected by ICANN's action or inaction in violation of the Articles of Incorporation and/or Bylaws.
 - Composition of Panel and Expertise: Significant legal expertise, particularly international law, corporate governance, and judicial systems/dispute resolution/arbitration is necessary.
 - Diversity: English will be the primary working language with provision of translation services for claimants as needed. Reasonable efforts will be taken to achieve cultural, linguistic, gender, and legal diversity, with an aspirational cap on number of panelists from any single region (based on the number of members of the Standing Panel as a whole).
 - Size of Panel:
 - Standing Panel: Minimum of seven panelists.
 - Decisional Panel: Three panelists.
 - Independence: Panel members must be independent of ICANN, including ICANN SOs and ACs.
 - Recall: Appointments shall be made for a fixed term of five years with no removal except for specified cause (corruption, misuse of position for personal use, etc.). The recall process will be developed by way of the IRP subgroup.
- Initiation of the Independent Review Process: An aggrieved party would trigger the IRP by filing a complaint with the panel alleging that a specified action or inaction is in violation of ICANN's Articles of Incorporation and/or Bylaws, or otherwise within the scope of IRP jurisdiction. The Empowered Community could initiate an IRP with respect to matters reserved to the Empowered Community in the Articles of Incorporation or Bylaws.

- **Standing:** Any person/group/entity “materially affected” by an ICANN action or inaction in violation of ICANN’s Articles of Incorporation and/or Bylaws shall have the right to file a complaint under the IRP and seek redress. The Board’s failure to fully implement an Empowered Community decision will be sufficient for the Empowered Community to be materially affected.
- **Community Independent Review Process:** The CCWG-Accountability recommends giving the Empowered Community the right to present arguments on behalf of the Empowered Community to the IRP Panel. In such cases, ICANN will bear the costs associated with the Standing Panel, as well as the Empowered Community’s legal expenses.
- **Standard of Review:** The IRP Panel, with respect to a particular IRP, shall decide the issue(s) presented based on its own independent interpretation of the ICANN Articles of Incorporation and Bylaws in the context of applicable governing law and prior IRP decisions.
- **Accessibility and Cost:** The CCWG-Accountability recommends that ICANN bear all the administrative costs of maintaining the system (including panelist salaries), while each party should bear the costs of their own legal advice, except that the legal expenses of the Empowered Community associated with a community IRP will be borne by ICANN. The panel may provide for loser pays/fee shifting in the event it identifies a challenge or defense as frivolous or abusive. ICANN should seek to establish access – for example access to pro bono representation for community, non-profit complainants and other complainants that would otherwise be excluded from utilizing the process.
- **Implementation:** The CCWG-Accountability proposes that the revised IRP provisions be adopted as Fundamental Bylaws. Implementation of these enhancements will necessarily require additional detailed work. Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a CCWG (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld. The functional processes by which the Empowered Community will act, such as through a council of the chairs of the ACs and SOs, should also be developed. These processes may be updated in the light of further experience by the same process, if required. In addition, to ensure that the IRP functions as intended, the CCWG-Accountability proposes to subject the IRP to periodic community review.
- **Transparency:** The community has expressed concerns regarding the ICANN document/information access policy and implementation. Free access to relevant information is an essential element of a robust IRP, and as such, the CCWG-Accountability recommends reviewing and enhancing ICANN’s Documentary Information Disclosure Policy as part of the accountability enhancements in Work Stream 2.

3. Detailed Explanation of Recommendations

- 05 A consultation process undertaken by ICANN produced numerous comments calling for overhaul and reform of ICANN’s existing IRP. Commenters called for ICANN to be held to a substantive standard of behavior rather than just an evaluation of whether or not its action was taken in good faith. Commenters called for an IRP that was binding rather than merely advisory, and also strongly urged that the process be:
- Transparent, efficient and accessible (both financially and from a standing perspective).

- Designed to produce consistent and coherent results that will serve as a guide for future actions.

06 **Purpose of the Independent Review Process**

07 The purpose of the IRP is to ensure that ICANN does not exceed the scope of its limited technical Mission, and otherwise complies with its Articles of Incorporation and Bylaws. The IRP should:

- Empower the community and affected individuals/entities to prevent “Mission creep,” and enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable, accessible expert review of ICANN actions or inaction.
- Ensure that ICANN is accountable to the community and individuals/entities for actions or inaction outside its Mission or that otherwise violate its Articles of Incorporation or Bylaws.
- Reduce disputes going forward by creating precedent to guide and inform the ICANN Board, staff, Supporting Organizations (SOs) and Advisory Committees (ACs), and the community in connection with policy development and implementation.
- Hear and resolve claims that PTI, through its Board of Directors or staff, has acted (or has failed to act) in violation of its contract with ICANN and the CWG-Stewardship requirements for issues related to the IANA naming functions.

08 **Role of the Independent Review Process**

09 The role of the IRP will be to:

- Hear and resolve claims that ICANN, through its Board of Directors or staff, has acted (or has failed to act) in violation of its Articles of Incorporation or Bylaws (including any violation of the Bylaws resulting from action taken in response to advice/input from any AC or SO).
- Hear and resolve claims that PTI, through its Board of Directors or staff, has acted (or has failed to act) in violation of its contract with ICANN and the CWG-Stewardship requirements for issues related to the IANA naming functions.
 - Per the CWG-Stewardship Final Proposal, ICANN will enter into a contract with PTI that grants PTI the rights and obligations to serve as the IANA Functions Operator for the IANA naming functions, sets forth the rights and obligations of ICANN and PTI, and includes service level agreements for the IANA naming functions.
 - The ICANN Bylaws will require ICANN to enforce its rights under the ICANN-PTI Contract/Statement of Work, to ensure that PTI complies with its contractual obligations. ICANN’s failure to enforce material obligations will constitute a Bylaws violation and be grounds for an IRP by the Empowered Community.
 - The ICANN Bylaws will provide that PTI service complaints of direct customers of the IANA naming functions that are not resolved through mediation may be appealed by way of the IRP, in both cases as provided for in the CWG-Stewardship Final Proposal Annex I, Phase 2.
 - Note that CWG-Stewardship Final Proposal Annex I, Phase 2 also permits PTI Direct Customers to pursue “other applicable legal recourses that may

be available.” ICANN must modify Registry Agreements with gTLD Operators to expand the scope of arbitration available thereunder to cover PTI service complaints and potential inclusion of optional arbitration under agreements with ccTLD registries if developed through the appropriate processes or the development of another alternative dispute resolution mechanism.

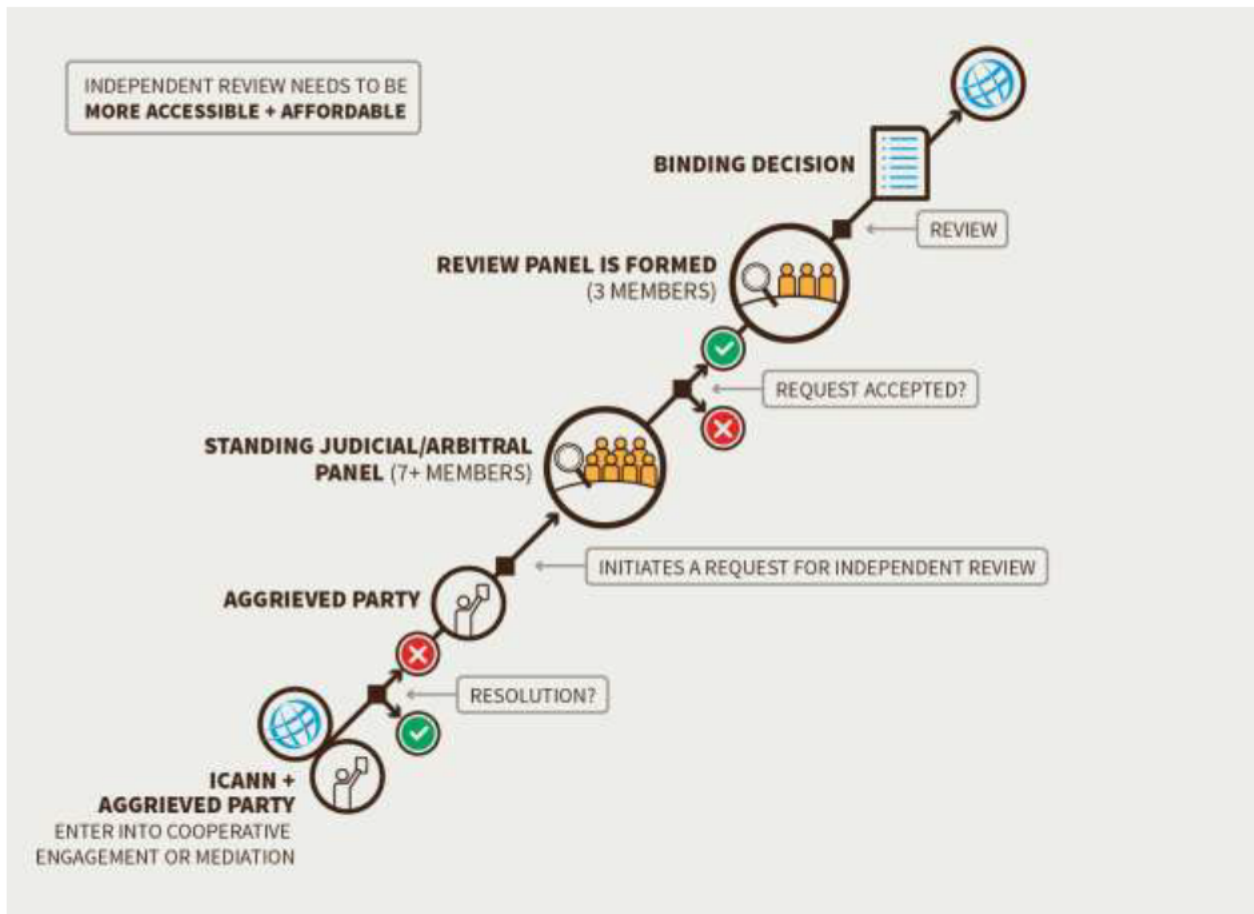
- The standard of review for PTI cases will be an independent assessment of whether there was a material breach of PTI obligations under the contract with ICANN, whether through action or inaction, where the alleged breach has resulted in material harm to the complainant.
- Hear and resolve claims that expert panel decisions are inconsistent with the ICANN Bylaws.
- Hear and resolve claims that DIDP decisions by ICANN are inconsistent with the ICANN Bylaws.
- Hear and resolve claims initiated by the Empowered Community with respect to matters reserved to the Empowered Community in the Articles of Incorporation or Bylaws.

10 **Standing Panel**

- 11 The IRP should have a standing judicial/arbitral panel tasked with reviewing and acting on complaints brought forward by individuals, entities, and/or the community who have been materially affected by ICANN’s action or inaction in violation of the Articles of Incorporation and/or Bylaws.

12 **Initiation of the Independent Review Process**

- 13 An aggrieved party would trigger the IRP by filing a complaint with the panel alleging that a specified action or inaction is in violation of ICANN’s Articles of Incorporation and/or Bylaws, or otherwise within the scope of IRP jurisdiction. The Empowered Community could initiate an IRP with respect to matters reserved to the Empowered Community in ICANN’s Articles of Incorporation or Bylaws.
- 14 When the Empowered Community has decided to pursue an IRP, the decision would be implemented by the chairs of the SOs and ACs who supported the proposal. The chairs of the SOs and ACs who supported the decision to file a community IRP would constitute a “Chairs Council” that would act subject to the direction of those SOs and ACs of the Empowered Community that supported the proposal. The Chairs Council would, by majority vote, act on behalf of the Empowered Community in taking any reasonably necessary ministerial steps to implement the decision to pursue the community IRP, and to delegate and oversee tasks related to the community IRP, including but not limited to, engagement of legal counsel to represent the Empowered Community in the community IRP, approval of court filings, or enforcement of a community IRP award in court if ultimately necessary.



15 Possible Outcomes of the Independent Review Process

16 An IRP would result in a declaration that an action/failure to act *complied* or *did not comply* with ICANN's Articles of Incorporation and/or Bylaws. To the extent permitted by law, IRP decisions shall be binding on ICANN.

- Decisions of a three-member Decisional Panel will be appealable to the full IRP Panel sitting en banc, based on a clear error of judgment or the application of an incorrect legal standard. The standard may be revised or supplemented by way of the IRP Subgroup process, which will be developed.
- This balance between the limited right of appeal and the limitation to the type of decision made is intended to mitigate the potential effect that one key decision of the panel might have on several third parties, and to avoid an outcome that would force the Board to violate its fiduciary duties.
- The limited right to appeal is further balanced by the seven Community Powers, relevant policy development processes, and advice from ACs, each as set forth in the Bylaws.
- IRP panelists shall consider and give precedential effect to prior decisions of other Independent Review Processes that address similar issues.
- Interim (prospective, interlocutory, injunctive, status quo preservation) relief will be available in advance of Board/management/staff actions where a complainant can demonstrate each of the following factors:

- Harm that cannot be cured once a decision has been taken or for which there is no adequate remedy once a decision has been taken.
- Whichever:
 - A likelihood of success on the merits.
 - Sufficiently serious questions going to the merits.
 - A balance of hardships tipping decidedly toward the party seeking the relief.

17 **Standing**

- 18 Any person, group or entity “materially affected” by an ICANN action or inaction in violation of ICANN’s Articles of Incorporation and/or Bylaws shall have the right to file a complaint under the IRP and seek redress.
- 19 They must do so within a certain number of days (to be determined by the IRP Subgroup) after becoming aware of the alleged violation and how it allegedly affects them. The Empowered Community has standing to bring claims involving its rights under the Articles of Incorporation and ICANN Bylaws.
- 20 The ICANN Board’s failure to fully implement an Empowered Community decision will be sufficient for the Empowered Community to be materially affected. Issues relating to joinder and intervention will be determined by the IRP Subgroup, assisted by experts and the initial Standing Panel, based on consultation with the community.

21 **Community Independent Review Process**

- 22 The CCWG-Accountability recommends giving the Empowered Community the right to present arguments on behalf of the Empowered Community to the IRP Panel (see Recommendation #4: Ensuring Community Involvement in ICANN Decision-Making: Seven New Community Power). In such cases, ICANN will bear the costs associated with the Standing Panel as well as the Empowered Community’s legal expenses, although the IRP Subgroup may recommend filing or other fees to the extent necessary to prevent abuse of the process.

23 **Exclusions:**

24 **Challenges the result(s) of a Supporting Organization’s Policy Development Process (PDP)**

- 25 Notwithstanding the foregoing and notwithstanding any required threshold for launching a community IRP, no community IRP that challenges the result(s) of an SO’s PDP may be launched without the support of the SO that approved the policy recommendations from the PDP or, in the case of the result(s) of a Cross Community Working Group (CCWG) chartered by more than one SO, without the support of the SOs that approved the policy recommendations from that CCWG.

26 **Country Code Top-Level Domain Delegation/Redelegation**

27 In its letter dated 15 April 2015, the CWG-Stewardship indicated that “any appeals mechanism developed by the CCWG-Accountability should not cover country code top-level domain delegation/redelegation issues as these are expected to be developed by the country code top-level domain community through the appropriate processes.”

28 As requested by the CWG-Stewardship, decisions regarding country code top-level domain delegations or redelegations would be excluded from standing, until the country code top-level domain community, in coordination with other parties, has developed relevant appeals mechanisms.

29 **Numbering Resources**

30 The Address Supporting Organization (ASO) has likewise indicated that disputes related to Internet number resources should be out of scope for the IRP, since an existing dispute settlement mechanism already exists as part of the ICANN Address Supporting Organization Memorandum of Understanding¹. As requested by the ASO, decisions regarding numbering resources would be excluded from standing.

31 **Protocol Parameters**

32 The Internet Architecture Board (IAB) has likewise indicated that disputes related to protocol parameters should be out of scope for the IRP, since an existing dispute settlement mechanism already exists as part of the ICANN / IANA - IETF MoU. As requested, decisions regarding resources for protocol parameters would be excluded from standing.

33 **Standard of Review**

34 The IRP Panel, with respect to a particular IRP, shall decide the issue(s) presented based on its own independent interpretation of ICANN’s Articles of Incorporation and Bylaws in the context of applicable governing law and prior IRP decisions. The standard of review shall be an objective examination as to whether the complained-of action exceeds the scope of ICANN’s Mission and/or violates ICANN’s Articles of Incorporation and/or Bylaws and prior IRP decisions. Decisions will be based on each IRP panelist’s assessment of the merits of the claimant’s case. The panel may undertake a de novo review of the case, make findings of fact, and issue decisions based on those facts.

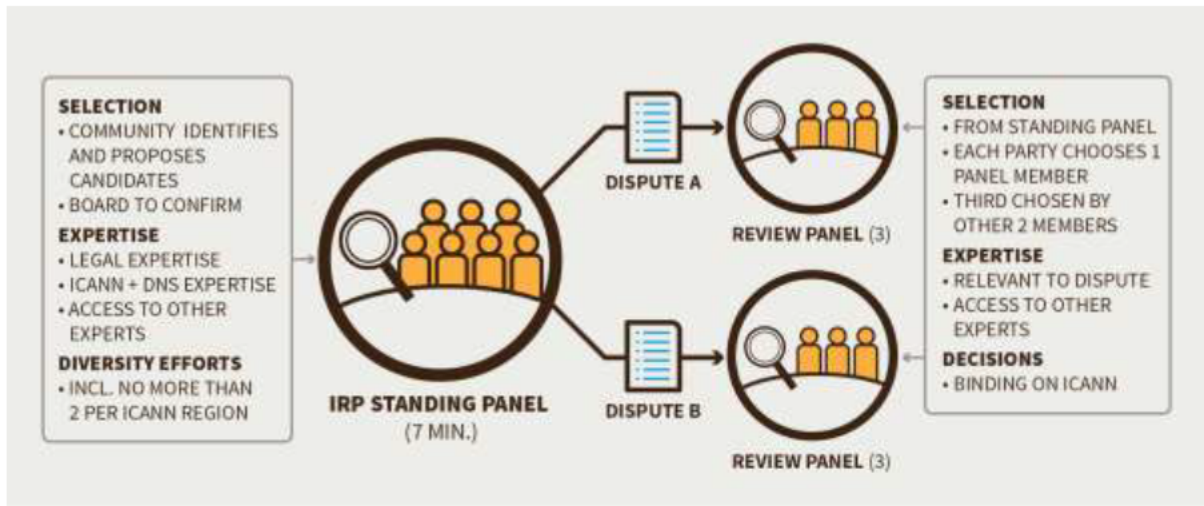
35 With respect to PTI cases, the standard of review will be an independent assessment of whether there was a material breach of PTI obligations under the contract with ICANN, whether through action or inaction, where the alleged breach has resulted in material harm to the complainant.

36 **Composition of Panel and Expertise**

37 Significant legal expertise, particularly international law, corporate governance, and judicial systems/dispute resolution/arbitration, is necessary. Panelists should either already possess expertise about the DNS and ICANN’s policies, practices, and procedures, or commit to develop an expertise through training, at a minimum, on the workings and management of the DNS. Panelists must have access to skilled technical experts upon request. In addition to legal expertise and a strong understanding of the DNS, panelists may confront issues where highly technical, civil society, business, diplomatic, and regulatory skills are needed. To the extent that

¹ <https://archive.icann.org/en/aso/aso-mou-29oct04.htm>

individual Panelists have one or more of these areas of expertise, the process must ensure that this expertise is available upon request.



38 **Diversity**

39 English will be the primary working language with provision of translation services for claimants as needed. Reasonable efforts will be taken to achieve cultural, linguistic, gender, and legal diversity, with an aspirational cap on number of panelists from any single region (based on the number of members of the Standing Panel as a whole).

40 **Size of Panel**

- Standing Panel: Minimum of seven panelists.
- Decisional Panel: Three panelists.

41 **Independence**

42 Panel members must be independent of ICANN, including ICANN SOs and ACs. Members should be compensated at a rate that cannot decline during their fixed term. To ensure independence, term limits should apply (five years, no renewal), and post-term appointment to the ICANN Board, Nominating Committee, or other positions within ICANN will be prohibited for a specified time period. Panelists will have an ongoing obligation to disclose any material relationship with ICANN, SOs, ACs, or any other party in an IRP. Panelists will be supported by a clerk’s office that is separate from ICANN.

43 **Selection and Appointment**

44 The selection of panelists would follow a four-step process:

1. ICANN, in consultation with the community, will initiate a tender process for an organization to provide administrative support for the IRP, beginning by consulting the community on a draft tender document.

2. ICANN will then issue a call for expressions of interest from potential panelists, work with the community and Board to identify and solicit applications from well-qualified candidates with the goal of securing diversity, conduct an initial review and vetting of applications, and work with ICANN and community to develop operational rules for IRP.
3. The community would nominate a slate of proposed panel members.
4. Final selection is subject to ICANN Board confirmation.

45 **Recall**

- 46 Appointments shall be made for a fixed term of five years with no removal except for specified cause (corruption, misuse of position for personal use, etc.). The recall process will be developed by the IRP subgroup.

47 **Settlement Efforts**

- 48 Reasonable efforts, as specified in a published policy, must be made to resolve disputes informally prior to/in connection with filing an IRP case.
- 49 Parties may cooperatively engage informally, but either party may inject an independent dispute resolution facilitator (mediator) after an initial Cooperative Engagement Process (CEP) meeting. Either party can terminate informal dispute resolution efforts (CEP or mediation) if, after a specified period, that party concludes in good faith that further efforts are unlikely to produce agreement.
- 50 The process must be governed by clearly understood and prepublished rules applicable to both parties and be subject to strict time limits. In particular, the CCWG-Accountability will review the CEP as part of Work Stream 2.

51 **Decision-Making**

- 52 In each case, a three-member panel will be drawn from the Standing Panel. Each party will select one panelist, and those panelists will select the third. The CCWG-Accountability anticipates that the Standing Panel would draft, issue for comment, and revise procedural rules. The Standing Panel should focus on streamlined, simplified processes with rules that conform with international arbitration norms and are easy to understand and follow.
- 53 Panel decisions will be based on each IRP Panelist's assessment of the merits of the claimant's case. The panel may undertake a de novo review of the case, make findings of fact, and issue decisions based on those facts. All decisions will be documented and made public, and will reflect a well-reasoned application of the standard to be applied.

54 **Decisions**

- 55 Panel decisions would be determined by a simple majority. Alternatively, this could be included in the category of procedures that the IRP Panel itself should be empowered to set.
- 56 The CCWG-Accountability recommends that IRP decisions be precedential, meaning that IRP Panelists shall consider and give precedential effect to prior IRP decisions. By conferring precedential weight on panel decisions, the IRP can provide valuable guidance for future actions and inaction by ICANN decision-makers. It also reduces the chances of inconsistent treatment of

one claimant over another, based on the specific individuals making up the Decisional Panel in particular cases.

57 The CCWG-Accountability intends that if the panel determines that an action or inaction by the Board or staff is in violation of ICANN's Articles of Incorporation or Bylaws, then that decision is binding and the ICANN Board and staff shall be directed to take appropriate action to remedy the breach. However, the Panel shall not replace the Board's fiduciary judgment with its own judgment.

58 It is intended that judgments of a Decisional Panel or the Standing Panel would be enforceable in the court of the United States and other countries that accept international arbitration results.

59 **Accessibility and Cost**

60 The CCWG-Accountability recommends that ICANN bear all the administrative costs of maintaining the system (including panelist salaries and the costs of technical experts), while each party should bear the costs of their own legal advice, except that the legal expenses of the Empowered Community associated with a community IRP will be borne by ICANN. The panel may provide for loser pays/fee shifting in the event it identifies a challenge or defense as frivolous or abusive. ICANN should seek to establish access – for example access to pro bono representation for community, non-profit complainants, and other complainants that would otherwise be excluded from utilizing the process.

61 The panel should complete work expeditiously, issuing a scheduling order early in the process and in the ordinary course, and should issue decisions within a standard time frame (six months). The panel will issue an update and estimated completion schedule in the event it is unable to complete its work within that period.

62 **Implementation**

63 The CCWG-Accountability proposes that the revised IRP provisions be adopted as Fundamental Bylaws. Implementation of these enhancements will necessarily require additional detailed work. Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a CCWG (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld. The functional processes by which the Empowered Community will act, such as through a council of the chairs of the ACs and SOs, should also be developed. These processes may be updated in the light of further experience by the same process, if required. In addition, to ensure that the IRP functions as intended, the CCWG-Accountability proposes to subject the IRP to periodic community review.

64 **Transparency**

65 The community has expressed concerns regarding the ICANN document/information access policy and implementation. Free access to relevant information is an essential element of a robust IRP, and as such, the CCWG-Accountability recommends reviewing and enhancing the ICANN Documentary Information Disclosure Policy as part of the accountability enhancements in Work Stream 2.

66 All IRP proceedings will be conducted on the record, in public, except for settlement negotiations or other proceedings which could materially and unduly harm participants if conducted in public, such as by exposing trade secrets or violating rights of personal privacy.

4. Changes from the “Third Draft Proposal on Work Stream 1 Recommendations”

- The scope of the IRP will be restricted to the IANA naming functions for claims that PTI through its Board of Directors or staff has acted (or has failed to act) in violation of its contract with ICANN.
- The scope of the IRP will include actions and inactions of PTI by way of the PTI Board being bound to ensure that PTI complies with its contractual obligations with ICANN in the Bylaws. ICANN’s failure to enforce material obligations will be appealable by way of the IRP as a Bylaws violation.
- The scope of the IRP will include claims that DIDP decisions by ICANN are inconsistent with ICANN’s Bylaws.
- Clarified that ICANN must modify Registry Agreements with gTLD Operators to expand scope of arbitration available thereunder to cover PTI service complaints.
- Exclusion: The IRP will not be applicable to protocols parameters.
- Exclusion: An IRP cannot be launched that challenges the result(s) of an SO’s policy development process (PDP) without the support of the SO that developed such PDP or, in the case of joint PDPs, without the support of all of the SOs that developed such PDP.
- Limitation: An IRP challenge of expert panel decisions is limited to a challenge of whether the panel decision is consistent with ICANN’s Bylaws.
- The legal expenses of the Empowered Community associated with a community IRP will be borne by ICANN.

5. Stress Tests Related to this Recommendation

- ST3 & 4
- ST5, 6, 7, 8
- ST11
- ST14
- ST19, 20
- ST10, 16, 24
- ST13
- ST22
- ST23
- ST25
- ST26
- ST29, 30

6. How does this meet the CWG-Stewardship Requirements?

- 67 The recommendations as outlined above meet the CWG-Stewardship requirements by:
- Creating the IRP directly meets the requirement of the CWG-Stewardship for an IRP.
 - Excluding ccTLD delegation/re-delegation from the IRP.
 - As requested by the CWG-Stewardship, decisions regarding country code top-level domains delegations or re-delegations would be excluded from standing, until the country code top-level domains community, in coordination with other parties, has developed relevant appeals mechanisms.
 - Excluding Number Resources from the IRP. The ASO has indicated that disputes related to Internet Number Resources should be out of scope for the IRP. As requested by the ASO, decisions regarding numbering resources would be excluded from standing.

7. How does this address NTIA Criteria?

- 68 **Support and enhance the multistakeholder model.**
- By enhancing ICANN's appeals mechanisms and binding arbitration processes and further fortifying and expanding their remit, the community is further empowered.
-
- 69 **Maintain the security, stability and resiliency of the Internet DNS.**
- These accountability measures were designed to contribute to maintaining the operational functioning of the organization.
-
- 70 **Meet the needs and expectation of the global customers and partners of the IANA services.**
- These accountability measures were designed to contribute to maintaining the operational functioning of the organization.
-
- 71 **Maintain the openness of the Internet.**
- The accountability measures help to mitigate the likelihood of problematic scenarios by ensuring that robust accountability mechanisms are in place.
-
- 72 **NTIA will not accept a proposal that replaces the NTIA role with a government-led or an inter-governmental organization solution.**
- N/A

EXHIBIT 221

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Updated Supplementary Procedures for Independent Review Process (IRP)

Open Date

28 Nov 2016 23:59 UTC

Close Date

1 Feb 2017 23:59 UTC

Staff Report Due

29 May 2017 23:59 UTC



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Originating Organization

Cross-Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability)

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Brief Overview

Purpose: This public comment proceeding seeks community input on the Updated Supplementary Procedures (USP) for the ICANN Independent Review Process (IRP) developed per the requirements contained in the final report of the Cross-Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability, Work Stream 1) and provided to the ICANN Board on 10 March 2016.

Current Status: The Updated Supplementary Procedures for Independent Review Process have been drafted by the IRP Implementation Oversight Team (IOT) in collaboration with the ICANN legal team and the external counsel to the CCWG-Accountability. The CCWG-Accountability reviewed these Supplementary Procedures at its 2 November 2016 meeting during ICANN57 and approved their publication for community input.

Next Steps: Following the public comment proceeding, the inputs will be analyzed by the IRP-IOT who will consider amending its USP in light of the comments received. If there are no significant issues, the final version of the Updated Supplementary Procedures for Independent Review Process along with the analysis of the public comments will be presented to the CCWG-Accountability for approval. Once approved, the CCWG-Accountability will forward the Updated Supplementary Procedures to the ICANN Board of Directors for final approval.

[Report of Public Comments](#)

Section I: Description and Explanation

ICANN operates a separate process for independent third-party review of Disputes – the Independent Review Process (IRP). The International Centre for Dispute Resolution (ICDR) currently administers the ICANN Independent Review Processes. ICANN IRPs are governed by the ICDR's International Dispute Resolution Procedures as modified by Supplementary Procedures for the ICANN IRP.

The CCWG-Accountability Work Stream 1 (WS1) in its final report included the following under Implementation for Recommendation 7 concerning the IRP:

"The CCWG-Accountability proposes that the revised IRP provisions be adopted as Fundamental Bylaws. Implementation of these enhancements will necessarily

require additional detailed work. Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a CCWG (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld."

This part of the recommendations on IRP is included in the following section of the new ICANN Bylaws which were adopted on 27 May 2016:

"(n) Rules of Procedure

(i) An IRP Implementation Oversight Team shall be established in consultation with the Supporting Organizations and Advisory Committees and comprised of members of the global Internet community. The IRP Implementation Oversight Team, and once the Standing Panel is established the IRP Implementation Oversight Team in consultation with the Standing Panel, shall develop clear published rules for the IRP ("Rules of Procedure") that conform with international arbitration norms and are streamlined, easy to understand and apply fairly to all parties. Upon request, the IRP Implementation Oversight Team shall have assistance of counsel and other appropriate experts.

(ii) The Rules of Procedure shall be informed by international arbitration norms and consistent with the Purposes of the IRP. Specialized Rules of Procedure may be designed for reviews of PTI service complaints that are asserted by direct customers of the IANA naming functions and are not resolved through mediation. The Rules of Procedure shall be published and subject to a period of public comment that complies with the designated practice for public comment periods within ICANN, and take effect upon approval by the Board, such approval not to be unreasonably withheld."

In early in 2016 the CCWG-Accountability created the IRP IOT, which has been working on updating the Supplementary Rules of Procedures.

Given the IRP IOT is recommending significant changes to the Rules of Procedures it is publishing these for public comments.

Section II: Background

Revising the Independent Review Process was determined from the outset to be a key part of the CCWG-Accountability work.

Given the critical link between accountability and the IRP process the CCWG-Accountability undertook to review and improve the ICANN IRP to address the

concerns raised in the consultation process and meet the requirements of the additional accountability mechanisms that it was proposing.

Following several public consultations on its recommendations the CCWG-Accountability published its final Work Stream 1 (WS1) recommendation in March 2016 at ICANN55 which were promptly accepted by the ICANN Board of Directors. These recommendations were then implemented as part of the revised ICANN Bylaws that came into effect on 1 October 2016.

The WS1 report identified that as part of the implementation of its recommendations, an Implementation Oversight Team would be formed from the CCWG-Accountability to do the following tasks:

Drafting the detailed supplementary rules of procedure for Board adoption (Updated Supplementary Procedures).

Process for the selection of organizations to administer the IRP.

Process for community review and selection of proposed slate of the standing panel members.

The IRP IOT agreed at its first meeting on 25 May 2016 that the most important task, which it needed to undertake was the drafting of the detailed supplementary rules so these could be approved by the ICANN Board of Directors.

The IRP Implementation Oversight Team (IOT) in collaboration with the ICANN legal team and the external counsel to the CCWG-Accountability proceeded to develop a draft set of Updated Supplementary Procedures over the summer and fall of 2016. The CCWG-Accountability reviewed these Supplementary Procedures at its 2 November 2016 meeting during ICANN57 and approved their publication for community input.

Section III: Relevant Resources

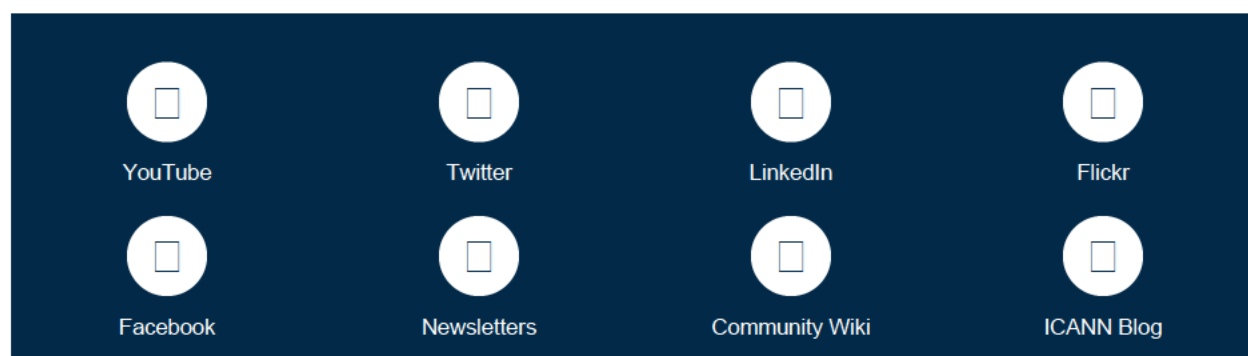
- [Draft IRP Updated Supplementary Procedures Report](#) [PDF, 428 KB]
- [Draft IRP Updated Supplemental Procedures – Clean](#) [PDF, 869 KB]
- [Draft IRP Updated Supplemental Procedures – Redline from current Supplementary Procedures](#) [PDF, 338 KB]

Section IV: Additional Information

- [Current Supplementary Procedures for IRP](#) [PDF, 32 KB]
- [CCWG-Accountability Final Report for WS1](#) [PDF, 6.03 MB]
- [Current ICANN Bylaws](#)

Section V: Reports

- [Report](#)



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EXHIBIT 222

Draft IRP Updated Supplementary Procedures: Report of the IRP IOT

The IRP Implementation Oversight Team (IOT) has been tasked with drafting detailed rules of procedure for the Independent Review Process (IRP) enhancements described in the CCWG-Accountability Supplemental Final Proposal Work Stream 1 Recommendations (the WS-1 Recommendations).

As a first step in this process, and to ensure that the Bylaws changes adopted by the ICANN Board on 27 May 2016 can be given full effect, the IOT has developed a set of Updated Supplementary Procedures for ICANN's IRP.

The proposed Updated Supplementary Procedures (USP) is now presented for a final reading by the CCWG-Accountability prior to publication for public comment.

Background

The International Centre for Dispute Resolution (ICDR) currently administers ICANN's Independent Review Processes. ICANN IRPs are governed by the ICDR's [International Dispute Resolution Procedures](#) as modified by [Supplementary Procedures for ICANN's IRP](#). In the event of any inconsistency between the ICDR Procedures and the Supplementary Procedures, the ICANN-specific Supplementary Procedures take precedence.

Full implementation of the WS-1 Recommendations requires:

- Initiation of tender process for selecting an organization to provide administrative support for the IRP;
- Selection of a standing Panel; and
- Development of detailed rules of procedure.

To ensure that the WS-1 Recommendations are implemented while these steps are being carried out, it is necessary to revise the Supplementary Procedures to reflect the substantive and procedural changes to the IRP as reflected in the new Bylaws.

Major Issues

The IOT was unable to reach full consensus on three issues, which were referred to the CCWG-Accountability meeting in plenary session. These open issues were first presented to the CCWG-Accountability on 20 September 2016. A first reading of was held on 25 October 2016.

First, the IOT sought the input of the full CCWG on the applicability of the updated rules to existing but unresolved IRPs. For the reasons discussed in Section 2 (Scope) below, the proposed Updated Supplementary Procedures (USP) do not apply retroactively.

31 October 2016

Second, the IOT sought CCWG input on the outside date for filing an IRP claim. For the reasons discussed in Section 4 (Time for Filing) below, the proposed USP provides that IRP claims must be filed within 45 days of the date on which a claimant first becomes aware of the material affect of the action or inaction giving rise to the dispute, but in any case, no more than twelve (12) months from the date of the alleged Bylaws violation.

Third, the IOT sought CCWG input on whether witness testimony/cross examination should be permitted in IRP hearings. Based on these discussions, the USP provides that hearings – whether via video conference or in person – should ordinarily be limited to legal argument only, but that witnesses would be permitted where the IRP Panel determines that a the party seeking to present witness testimony has demonstrated that such testimony is 1) necessary for a fair resolution of the claim; (2) necessary to further the purposes of the IRP; *and* (3) considerations of fairness and furtherance of the purposes of the IRP outweigh the time and financial expense of witness testimony and cross examination.

Summary of Changes

1. Definitions.

The Updated Supplemental Rules contain several new defined terms. Most of these definitions reflect procedural enhancements, such as the definition of an “Emergency Panelist” to adjudicate requests for interim relief and a Procedures Officer to adjudicate requests for consolidation, invention, and joinder.

More substantively, a “Dispute” is defined to cover: (a) actions or inactions by ICANN (including the Board, Directors, Officers, or Staff members) that violate ICANN’s Articles of Incorporation or Bylaws; (b) claims that ICANN has not enforced its contractual rights under the IANA Naming Function Contract; or (c) complaints by direct customers of the IANA naming function that are not resolved by mediation.

2. Scope.

The Updated Supplementary Procedures (USP) specify that the new rules apply to cases filed on or after their effective date, but not to cases filed prior to that date. The section also provides that in the event of further changes (Amended USP), which are to be expected in this transition period, a party to an IRP subject to the USP may seek to apply provisions of the Amended USP on the basis that application of the prior rules would be unjust and impracticable to the requesting party and application of the amendments would not materially disadvantage any other party’s substantive rights. Note, however, that the standard of review set out in Section 11 is established by ICANN’s Bylaws. Accordingly, Section 11 of the USP cannot be amended without a corresponding Bylaws change. Thus, while the USP may be modestly adjusted as this work is finalized, retroactive application of modified procedural rules is unlikely to have a substantive impact on ongoing proceedings.

The IRP Implementation Oversight Team had significant discussions regarding application of the same standard (unjust/impracticable without material disadvantage to the other party) to cases filed before the effective date of the USP. In particular, several members of the IOT felt that the claimants should have the right to seek application of the revised standard of review retroactively as a matter of fairness. This issue was discussed in CCWG-Accountability plenary sessions in September and October. The group elected not to provide for this kind of retroactivity based on concerns about unintended consequences, including increased complexity and potential Bylaws violations resulting from doing so.

3. IRP Panel Composition.

The USP provides mechanism for: (a) selecting members of a decisional panel (each party selects one panelist, and those panelists select the third); (b) confirmation of the independence and impartiality of those panelists; and (c) substitution of panelists in the event of vacancy or removal.

4. Time for Filing.

This section establishes that IRP claims must be filed within 45 days of the date on which a claimant first becomes aware of the material affect of the action or inaction giving rise to the dispute, but in any case, no more than twelve (12) months from the date of the alleged Bylaws violation. The provision seeks to balance the fact that individuals may not always become aware of ICANN actions when they occur with the need for certainty about the finality of ICANN actions. Note, however, that actions or inactions giving rise to an IRP claim can occur more than twelve months following the adoption of a particular rule. For example, were ICANN to interpret a policy in a manner that violated the Bylaws, the time period would run from the date on which the offending interpretation occurred, not the date on which the policy was adopted.

In addition, this provision requires that any applicable fees must be paid to the dispute resolution provider within three days of filing an IRP request.

5. Conduct of Independent Review.

This section confirms that the goal of the IRP is to resolve disputes expeditiously and cost effectively while ensuring fundamental fairness and due process. To this end, the USP calls for independent review to proceed by electronic means where possible, but permits face to face hearings in “extraordinary circumstances” where the IRP PANEL determines that the party seeking an in-person hearing has demonstrated that: (1) an in-person hearing is necessary for a fair resolution of the claim; (2) an in-person hearing is necessary to further the purposes of the IRP; *and* (3) considerations of fairness and furtherance of the purposes of the IRP outweigh the time and financial expense of an in-person hearing.

The USP also provides that hearings – whether via video conference or in person – should ordinarily be limited to legal argument only, but that witnesses would be permitted where the IRP Panel determines that a the party seeking to present witness testimony has demonstrated that such testimony is 1) necessary for a fair resolution of the claim; (2) necessary to further the purposes of the IRP; *and* (3) considerations of fairness and furtherance of the purposes of the IRP outweigh the time and financial expense of witness testimony and cross examination.

6. Written Statements

This section is unchanged from existing Supplementary Procedures

7. Consolidation, Intervention, and Joinder.

This section was added to address the WS-1 Recommendation, as reflected in Article IV, Section 4.3(o) (ii) of the May 2016 ICANN Bylaws.

8. Discovery Methods.

This section was added to address the WS-1 Recommendation, as reflected in Article IV, Section 4.3(n) (iv) (D) of the May 2016 ICANN Bylaws. It provides for discovery of documents or other information likely to relevant and material to resolution of the Dispute. The section provides that depositions, interrogatories, and requests for admission will not be permitted.

9. Summary Dismissal

This section provides for summary dismissal of a request for Independent Review where the Claimant does not meet the standing requirements (materially affected) or where the request lacks substance, is frivolous, or is vexatious.

10. Interim Measures of Protection

This section has been changed to implement WS-1 Recommendations reflected in Article IV, Section 4.3(p) of the May 2016 Bylaws regarding the circumstances in which interim relief is available.

11. Standard of Review

This section replaces the current IRP standard of review, which purports to limit the Panel to an examination of three questions:

- (i) Did the ICANN Board act without conflict of interest in taking its decision;*
- (ii) Did the ICANN Board exercise due diligence and care in having sufficient facts in front of them;*
- (iii) Did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*

31 October 2016

In its place, the USP provides for an objective, de novo examination of the Dispute and permits the Panel to consider prior relevant IRP decisions. It prevents (as required by law) the Panel from replacing the Board's reasonable business judgment with respect to the Board's exercise of its fiduciary duties. Finally, it establishes the standard of review for claims related to the IANA Naming Functions Contract.

While modifications to the Updated Supplementary Procedures are generally permitted, this Section 11 is dictated by the ICANN Bylaws and cannot be modified without a corresponding Bylaws amendment.

12. IRP Panel Decision

This replaces Section 9 of the existing procedures (Declarations) consistent with Article IV, Section 4.3(k)(v) of the May 2016 Bylaws.

13. Form and Effect of an IRP Panel Decision

This section has been revised to reflect the requirement for a written decision, specifically designating the prevailing party, and setting out a well-reasoned application of how the Dispute was resolved in light of prior IRP Decisions, the Articles and Bylaws and norms of applicable law.

14. Appeal

This is a new section reflecting the WS-1 Recommendation that an IRP Panel Decision may be appealed to the full Standing Panel in specified circumstances.

15. Costs

This section provides that except in the case of a community IRP, each party shall bear its own legal expenses. Except in the case of a community IRP, it permits the panel to award administrative costs and/or fees of the prevailing party if it determines that the losing party's claims or defense were frivolous or abusive.

EXHIBIT 223

[IOT] Status of ICANN staff in IOT

Mike Rodenbaugh Contact Information Redacted

Thu Dec 6 23:14:43 UTC 2018

- Previous message: [\[IOT\] Status of ICANN staff in IOT](#)
- Next message: [\[IOT\] Status of ICANN staff in IOT](#)
- Messages sorted by: [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)

I was not part of that early discussion, as I was not aware of the formation of this IOT until well after it was formed and had begun its work. And I pay pretty close attention to all ICANN missives about accountability.

It seems to me that "comprised of members of the Internet community" ought to exclude ICANN Staff and Board Members, and include literally everyone else in the world. Goran seems to have that interpretation.

Even if there was agreement to have an "active voice in the discussion", it appears more that the group has effectively been captured by ICANN, almost to the exclusion of anyone else's views. Perhaps that is largely because so few other people are participating at all in this effort. And, perhaps that is by ICANN design? It certainly could appear that way to a reasonable person.

Mike Rodenbaugh
RODENBAUGH LAW
tel/fax: Contact Information Redacted
<http://rodenbaugh.com>

On Thu, Dec 6, 2018 at 3:03 PM Burr, Becky via IOT <iot@icann.org> wrote:

```
> amen
>
> On 12/6/18, 5:34 PM, "IOT on behalf of avri doria" <iot-bounces@icann.org>
> on behalf of Contact Information Redacted wrote:
>
>   Hi,
>
>   This matches my recall and understanding
>
>   I would add that I would think we would better spend our time trying to
>   resolve the issue, option 2, than we would trying to remove people we
>   disagree with from the IOT
>
>
>   avri
>
>   On 06-Dec-18 14:53, Burr, Becky via IOT wrote:
>   > Respectfully to all, and without opining on the substance of the
>   > repose issue, I am concerned that we may be imposing general
>   > assumptions about the role of staff in policy development on the work
>   > of the IRP Implementation Oversight Team without adequate
>   > consideration The role of Org in this work - which is not
>   > traditional
>   > policy development - may be fundamentally different According to the
>   > Bylaws, "An IRP Implementation Oversight Team shall be established in
>   > consultation with the Supporting Organizations and Advisory
>   > Committees
>   > and comprised of members of the global Internet community " As I
>   > recall, when we discussed this (now a long time ago) we collectively
>   > determined that it was in fact appropriate for someone from ICANN
>   > Legal to be an active part of the discussion If we are going to
>   > revisit that, perhaps we should do that in a more formal way, in
>   > consultation with SOs and ACs, as specified in the bylaws
>   >
>   >
>   > On 12/6/18, 12:17 PM, "IOT on behalf of Arasteh"
>   > <iot-bounces@icann.org> on behalf of Contact Information Redacted
> wrote:
>   >
>   > Dear All
>   > I fully support the legitimate comments and request made by Malcolm
>   > In addition to the criteria he described I add the following
>   > Staff and legal people only intervene if and only if a clarification
>   > sought by formal members of the group
>   > Thus sort of a smoky interaction was and is being observe in other
>   > occasions
>   > At some other meeting the staff even jumped ahead of the people in
> the
>   > queue and d'Irak without the floor being given to them
>   > Regards
>   > Kavouss Sent from my iPhone
>   > > On 6 Dec 2018, at 13:47, Malcolm Hutty Contact Information Redacted wrote:
>   > > > Dear David,
>   > > > I write to confirm for the written record my request as raised
> in our
>   > > last meeting
```

> > > When this group was formed, you took the extraordinary step of
> including
> > ICANN staff and external counsel as full members of this group:
> > - they are listed as full participants on the group membership
> page
> > - they are included in quorum counts
> > - they are invited to speak on all issues on an equal basis: that
> is,
> > not merely to describe the practical effects of matters proposed,
> but
> > also to opine on the balance of values
> > - they are included in consensus calls
> > > In the Board resolution in Barcelona adopting the Interim
> > Supplementary
> > Rules, the Board resolved to urge this group to come to a prompt
> > conclusion on final Supplementary Rules of Procedure
> > > During the Open Forum session, I offered the Board my opinion
> that we
> > would have completed our work earlier had we not been so split, as
> a
> > result of the divergent views of the team from ICANN Legal and
> Jones
> > > Day I asked whether it was normal for ICANN staff and agents to
> engage
> > > in community processes like this one as full participants, and
> whether
> > > there was guidance available
> > > Göran answered my question on behalf of the Board He stated very
> > > clearly and firmly that staff "are not members of the community"
> and
> > > participate as staff support, not a co-participants He appeared
> to me
> > > to be angry that I was even suggesting that staff would overstep
> such
> > > bounds, and that he had to defend them from such an accusation
> which he
> > > gave every impression as regarding as an unfair accusation of
> > > impropriety He was plainly unaware of your decision
> > > In the light of this response, I request that we revisit the
> > > classification of ICANN staff and Jones Day
> > > In my view, it was never proper to regard ICANN Legal and Jones
> Day as
> > > co-equal participants in this group The matter under discussion
> is the
> > > procedures that apply in a core process for holding ICANN to
> account:
> > > ICANN is plainly irredeemably conflicted
> > > Moreover, the conflict goes beyond the institutional to the
> > > personal An
> > > IRP case can only be brought on the basis that ICANN has acted
> > > inconsistently with the Bylaws Usually, ICANN will have taken the
> > > advice of its lawyers before acting in a manner that might give
> rise to
> > > such a claim Accordingly, an IRP case will quite commonly be a
> direct
> > > challenge to the advice that Samantha, Elizabeth and the team have
> > > previously given, personally It is quite wrong to involve them in
> > > directly in the decision-making as to how such a challenge can be
> > > brought This is not to impugn their professional integrity: any
> lawyer
> > > would recognise this as an irreconcilable conflict of interests and
> > > obligations Your decision places them in an impossible and
> untenable
> > > position, that fundamentally compromises the legitimacy of this
> group's
> > > output
> > > Now that Göran has confirmed that staff should not be regarded as
> > > members of the community for the purpose of participation in
> community
> > > processes, I ask that their status be reclassified as staff
> support,
> > > with the following consequences:
> > > - they will not be counted in quorum counts
> > > - they will not be included in consensus calls
> > > - they will be permitted to attend meetings, and their input
> sought on
> > > factual matters, such as how procedures operate, where that
> assists the
> > > group, but their opinion will be not be sought as to the balance of
> > > expedience
> > > Kind Regards,
> > > Malcolm Hutty
> > > -- > Malcolm Hutty | tel: Contact Information Redacted
> > > Head of Public Affairs | Read the LINX Public Affairs blog
> > > London Internet Exchange |
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- Previous message: [\[IOT\] Status of ICANN staff in IOT](#)
 - Next message: [\[IOT\] Status of ICANN staff in IOT](#)
 - Messages sorted by: [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)

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EXHIBIT 224

Dashboard / WS1 - Enhancing ICANN Accountability / WS1 WP-OT - RP Implementation Oversight Team

WP-IOT Meetings

Created by Brenda Brewer, last modified on Jan 11, 2019

14 Jan 2016	Meeting #1
25 May 2016	Meeting #2
01 Jun 2016	Meeting #3
06 Jul 2016	Meeting #4
All future meeting can be found on WS2 Wiki page	HERE

EXHIBIT 225

BECKY BURR: Hello, everybody, and thanks for attending this morning. Hopefully, more people are joining. We usually take roll based on who's in the Adobe Connect room. If there is anybody who is not in the Adobe Connect room, could you identify yourselves?

Okay. And there are three participants in the Adobe Room who are identified by their telephone numbers: 202-XXX-8479, 310-XXX-5800, and 703-XXX-4154. Could you please identify yourselves so that we have a complete roll? 4154 is you, David, okay.

FRAN FAIRCLOTH: Sorry, I was on mute.

UNIDENTIFIED FEMALE: Fran is with us, at Sidley. She is dialing in.

BECKY BURR: Okay.

AMY STATHOS: Hey, Becky, the 310-5800 number, that's ICANN's main number.

BECKY BURR: Okay.

Note: The following is the output resulting from transcribing an audio file into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.

AMY STATHOS: I don't know who that is, but...

BECKY BURR: Okay. All right. Well, if anybody is not identified in the room, just let us know. And I know that Ed is doing a speech today, but he has rearranged his schedule to be able to join us and should be here in a moment. Also, Marianne Georgelin e-mailed me to say that there is a transportation strike in Paris today, and she is stuck in traffic. So I think we will proceed here.

I've sent out a deck that the Sidley folks prepared that sort of outlines a number of the procedural issues that we need to talk about. And I propose that we walk through this document today. It is, at least on my screen, rendering partially. Some words are not showing. Is anybody else having that problem? Okay, it looks good there? All right, that's fine.

In addition, I sent out a document that essentially has this deck in Word format. And some folks may be interested in using that for noting things.

And finally, a very helpful document that essentially walks through the IRP section of the CCWG proposal and maps the provisions in the proposal to the IRP Bylaws, and other relevant sections in the Bylaws, just so that we can double-check that, going forward. Those are provided for background for members of the IOT.

In addition, I hope that you all got the background documents that I sent out last weekend for separate mailings. Sorry to flood you with

background information, but I thought that as we go through this work, it may be very useful for people to have the documents in hand. And I have not checked the wiki, but I believe those documents, or the links, should also be posted there as well.

Okay. So just so we're all on the same page, what we propose to do is walk through this deck to talk about – sorry – several administrative things that we need to do deal with in the course of our work, the structural bodies being the IRP provider that the proposal calls for and the standing panel. Some administrative questions about pre-hearing processes. And there's substantive and policy, the emergency/injunctive relief process; also, cooperative engagement process and how that interplays with some of the Work Stream 2 work; filings and amended pleadings; motions; intervention, joinder, and consolidation; the panel itself constituting the decisional panel, choice of law, jurisdiction; arbitration format; discovery, evidence, and witnesses; settlements; and appeals and revisions to procedures.

Holly, [inaudible] hand is up.

HOLLY GREGORY:

Yes, my hand is up. I just wanted to say two things about the materials and the questions that we provided. The questions could use some fine tuning. And sometimes, I was just noticing that the questions almost – they don't mean to assume any kind of answer. And so this was a quick stab at sketching out the procedural questions that the Bylaws raise. But there are more, and they can be in more detail. And again, they're not meant to assume any answer.

And the second thing I just wanted to say is we provided the chart that shows the sections of the Bylaws next to the procedural questions so that we can always make sure we are very cognizant of what the Bylaw framework is. Because I find that even though I'm working on these documents all the time, it's very easy to forget what it was that we specifically said in the Bylaws. And again, the Bylaws are also wrapped back to the proposal, and you have those materials so that we can keep this really grounded in accuracy around what the proposal said and what the Bylaws say. That's all.

BECKY BURR:

Perfect. That's very useful. And I do think it is very useful to have that, and also the correlation to the proposal itself.

Okay. So the first couple of questions we talked about in the proposal, an IRP provider. And last week, we talked a little bit about the process for selecting the IRP provider itself. And so one question is, should the rules that we're developing now talk about the manner in which the IRP provider's office functions? So, for example, would the provider be responsible for maintaining the online dockets and the like? The current IRP procedure calls for most filings to be made public as soon as they are filed, subject to some limited exceptions. And currently, I think the community relies on posting by ICANN on that function. But one of the questions that we'll want to think about is, what are the requirements for those sorts of things?

David?

DAVID MCAULEY:

Thank you, Becky. I do have a comment on that question. And my comment is it strikes me that we should let the tender process drive this and maybe put placeholder language here with respect to what the provider will provide. And my guess is that when we go out with a tender, basically the tender will include a copy of the relevant Bylaws for the IRP. And we'll ask people to respond to us as to what services they provide, roughly the cost, obviously. And we should then look to what they've provided with respect to dockets, maintaining documents, etc., etc., and let that drive what the ultimate rule is. Because we may want to let the attractiveness of the provider shape this particular question. Thank you.

BECKY BURR:

Thank you, David. That makes total sense to me, although I think we probably will have some views on minimum services with respect to transparency and the like. But I do think that that probably makes sense.

Any other comments, just sort of preliminary comments on the functionality of the provider that we should be looking for or that we should be specifically asking about in an IRP? Obviously, the ability to manage, identify potential candidates, help us vet those candidates, and then to manage cases is something that should be dealt with.

David, is that a new hand?

DAVID MCAULEY:

It is, Becky. Another thought occurred to me, and that is – and this is probably a question for Bernie more than anyone. And that is, if we could get the views of the ICANN staff that handle the administrative side of IRPs to date and find out from them their thoughts on the question that Becky just asked, and if there's anything they see as an issue that might be fixed in this particular iteration. So if there are people that have routinely done this and have some insight as to how the administrative process functions or has some stickiness to it, it might be helpful to get their views, if there are such folks and it makes sense. Thanks.

BECKY BURR:

I see Amy on the line, and Kate. So let's turn to Holly and then Amy or Kate if they have any input at this point.

HOLLY GREGORY:

Terrific. I just wanted to mention that if you all think it would be useful, a document that we're creating for ourselves internally, so that we assure ourselves that we have a better understanding, is we're doing a little outline of how we think, based on public sources, it currently works. And so that we'll have something to look at, I think that might be helpful for you all as well. So let us know if it is worthwhile. We're happy to provide it. But we're in the process of doing that now, because we realized we had to have an understanding of how it currently works to be able to help you think about what it might be, where you might want some changes.

BECKY BURR:

Okay. And I imagine that Amy can provide some support on answering those kinds of questions.

Amy, not to put you on the spot, but in terms of services and functionality for the IRP office functions, are there any things that jump out at you as things that we should be thinking about, particularly in terms of Rules of Procedure?

AMY STATHOS:

Yes, thanks, Becky, and thanks, Holly. Holly, just as an amendment to what you're saying, it may be helpful if you want to have a call so that we can share with you exactly how it works right now, in terms of the administrative aspect, our working with the ICDR, who is currently the sole IRP provider that ICANN has named.

Becky, yeah, in terms of some of the procedure, I want to think about the specifics, the things that we faced over the past several years. One of the things I think we want to think about is what decisions the provider itself might be empowered to make, short of having the panel in place, etc., if there are any type of administrative decisions. Because right now, the provider is loath to make, really, any decisions without a panel. And I think there's probably some things that a provider can make a decision on that you don't necessarily need a panel. I don't really want to say right now what they are, because there's just a bunch of stuff rolling around in my head that I think we can sit down and think what we've experienced over the past years that might be helpful for this group to think about.

BECKY BURR: Okay. That would be very useful. I imagine this would function in some ways like a clerk of court. And sometimes, clerks can, in fact, be decision-makers.

Avri?

AVRI DORIA: One of the things I was thinking of in relation to that though, this will have a standing body behind it and can very well have some member of that, or some function of that, that allows for these earlier actions and decisions without [full-on paneling]. So that might be another way to look at it, as opposed to – because even a clerk may talk to a presiding judge, I would assume, though knowing less about this than many. So I'm just wondering whether that would be another avenue for that kind of issue. Thanks.

BECKY BURR: Yeah, that's also a very good point. So, Amy, as you are thinking about those decisions, it would be helpful for us to know – one of things that we'll even want to think about is what are the buckets of early decisions, and who can be empowered to make those decisions? So Avri is right. The nature of this, with the standing panel, may make some things easier. But we still need to draw lines about what the provider can decide, what the provider would need to consult with a member of the panel on, and the like. And any of the information, Amy, that you guys can put in front of us, in terms of your actual, real world experience with IRP, would be very helpful for us to know.

AMY STATHOS: Sure, yes. Thank you.

BECKY BURR: So this is exactly the kind of conversation I want to have today, which is a preliminary brainstorming conversation. So we will probably end up with some assignments that bring our discussion from the abstract to the concrete.

Okay. In terms of the standing panel, one question is, should there be an application form for members? Is that something that this group wants to do, based on the criteria? Is that something that we should defer to the panel to do? Is there some halfway in between? Sort of we take the criteria for panelists that are in the proposal, talk through them, flesh them out a little bit, and then ask the provider to take that to the next step. And then should a method of ranking applications be developed? And those two things necessarily go hand-in-hand, because we have to have a developed list of criteria in order to be able to do any kind of ranking.

But one of the, I think, more challenging tasks for this group is to figure out what the process by which the community develops a proposed panel for the presentation to the ICANN Board. And I think we will need to have procedures in place, one for bringing information to the community, and then the process by which the proposed panel is put together. And I think that is something that there isn't a lot of... Well, I don't know. Maybe there are other processes out there that we can borrow from. I know in the United States, for example, that the

American Bar Association does evaluations of prospective judges. I don't know if there are other bodies, that that is something that takes place elsewhere in the world. And I don't think that we have... Arun might have a sense of how that happens, for example, in India, if there's any sort of learning to be had by how other prospective jurists are evaluated.

David?

DAVID MCAULEY:

Thanks, Becky. Just to answer your question, my strong preference would be that we do develop an application form and not let the panel take care of this, even if it's a rudimentary form. But things such as the person's name; where they live, for geographical purposes; who they're employer is, for conflict purposes; whether they've been disciplined or are under a disciplinary proceeding; all those kinds of things that you might find in a Statement of Interest, that it's under control of ICANN, saying, "Here's the form. Fill it out," so that the people have an idea, at least a rudimentary idea, of who the service providers are. Thank you.

BECKY BURR:

Oh, I definitely agree on that. I think we definitely want to have something like that. The question is how much further we go in that.

EDWARD MCNICHOLAS:

Becky, by the way, I have joined into the call.

BECKY BURR: Oh, hi, Ed. Thank you for joining. And please feel – we’re just walking through this document here. And the goal is, basically, to do some brainstorming and make things a little bit more concrete. So I am taking it that the sort of decision point here is that we would work up a kind of an application with basic information kinds of questions, and then also any more elaboration on the requirements that are in the proposal. But I think that’s something that we can easily put together and bring to the group specifically for review and discussion. So I’ll take that as a to-do.

EDWARD MCNICHOLAS: One thing with respect to that, the ranking of applications, one model might be something like the federal civil service, where there were certain points awarded for certain areas, so that the application and the – there’s a scoring system, in terms of having certain credentials would get certain points, having certain... And then other things, such as award veteran status, disability status, diversity, these sorts of things can be awarded an express number of points. I don’t know if that would be helpful, in terms of having the community express relative valuation of things, or whether that would cause such a long discussion that it would derail things. But that was one way of possibly doing it, in terms of scoring things and having the evaluation process tied to the application in a fairly rigorous way so that the applications can be evaluated more objectively, as opposed to subjectively.

BECKY BURR: Well, that’s an interesting proposal. To me, it feels a little bit that, at some level, we don’t know precisely who is going to apply and be

available. And so I feel like at some level, we have general guidelines for what the requirements are. To me, until we have a better sense of who the applicant pool is, it would be hard to assign points to those things in a relative way. But others may disagree. Okay. I think –

EDWARD MCNICHOLAS: I do think it would be intensely bureaucratic. It might be too much of a system that's set up for the relatively small number of panelists that would be involved.

BECKY BURR: Okay. What I'm thinking is – and, David, I'm going to volunteer you and I to just go through the proposal itself and pull out the elements, to really bring that for a deeper-dive discussion back to the group next week, if we can do that?

DAVID MCAULEY: That's fine with me, Becky.

BECKY BURR: Okay. Thank you, David. Okay. Specific training, should specific training be required? I definitely think that there is a lot of ICANN-specific information that we need to have in place for these folks when they come on. And on that point, I'm curious as to whether ICANN already has training that it does, not necessarily for the IRP folks, but when it brings new people on. For example, how did you explain the world to

our new CEO? Are there materials out there that could be the starting point for more in-depth training for panelists?

People don't have to answer that right now. But if the ICANN folks who are on the call could go back and talk with colleagues about how you do a new introduction to ICANN. I know there's also programs that get put on at the various ICANN meetings for Fellows and stuff. And maybe we could gather some of those resources, rather than reinventing the wheel on the basic background stuff. Obviously, as we go along and get a better sense of the rules and procedures here, there will be some IRP-specific training.

But at the very least, I think the point of having a standing panel is to get away from some of the...to have better-informed decisions, decisions that are better informed from the "what ICANN is" and what its goals are. So I'd like to put that on a list.

In terms of, obviously, conflict and impartiality, that was something that the CCWG was quite clear on, that conflicts and impartiality kinds of issues had to be addressed, that there certainly had to be disclosures. And although we didn't talk about annual updating, I would imagine that that is something that makes quite a bit of sense.

In terms of term limits, the CCWG proposal was quite clear that there would be one five-year term, with no renewals. So there was a strong feeling that we needed to have a long enough term, but that there should not be renewals. So I think that's something that the CCWG put together.

Then, obviously, we did also talk about a period of post-employment preclusion, some period of time after the prohibition. So we didn't talk about what the period of bar from post-term appointments to the Board Nominating Commission or ICANN would be, but that is something. The CCWG definitely felt that there should be a post-term prohibition on appointments or employment, but did not set the period of time for that. And then the kinds of gifts and entertainment rules.

Ed and Holly and others? I see that David McAuley has his hand up and also has a good comment in the chat about conflict disclosures when they're first appointed and then when assigned to [any place]. David?

DAVID MCAULEY:

Thank you, Becky. On the terms of the panelists, I do recall the discussion in the CCWG. But I think in the Bylaws – and I have them in front of me – I think the appointment to the standing panel, the language is, "shall be made for a fixed term of five years, with no removal except for certain causes. The recall process shall be developed by the IRP." It didn't make it into the Bylaws, I don't think, that it's a one-term only.

BECKY BURR:

I think you're right, although I went back to the proposal, and it clearly is. "Term limits should apply. Five years, no renewal." But I think you're right, it didn't make it into the Bylaws.

My question for Ed and Holly and others is whether there are examples of the kinds of conflicts and impartiality rules that apply in the federal

courts, for example, or in other systems that we can actually just try to borrow from.

EDWARD MCNICHOLAS: There are things. Sorry, I'm not in the Adobe room. There are certainly different arbitral bodies – JAMS, AAA – have code of ethics and code of conduct, in terms of disclosure. There's also federal judicial rules that we can borrow from. Oftentimes, they are expressed in the civil rules or the criminal rules, and sometimes they're in a code of judicial conduct separate from that. We could certainly develop a few examples of that and see which ones read best in this context.

BECKY BURR: Yeah. I think it would be useful to give us the main point comparison of how a couple of places do it, or just take a look and make a recommendation of one or two for us to consider. Obviously, we should probably look at the ICDR, since that's what ICANN is operating under. But otherwise, just take a look and see what's out there so we don't need to reinvent the wheel.

Okay. Moving on to the pre-hearing process, so we do state in the proposal what the standard for emergency/injunctive relief would be. This question, the question that you're raising here really is more about do you have to have a panel formed beforehand? Do you have to essentially file a case? What's the nuts and bolts of the operation that we would use?

I just want to go back. Amy note that International Bar Association Guidelines on Conflicts of Interest in International Arbitration, that's a good resource for us.

EDWARD MCNICHOLAS:

And there's two main approaches there. I guess one extreme would be the federal rules, where anything that is descriptably a complaint is enough to start the process. It could be a scrawl on a cocktail napkin saying, "This person wronged me, and I want to sue them." You could push it very far into they'll take anything and work with it, which is great for accessibility. I don't know that we have to have that same accessibility concern here, given the nature of people who would likely have ICANN disputes. It'd mainly be corporate entities, and you would assume that they can work in the model, I think, closer to, for instance, what they do for the Domain Name Dispute Resolution Policy, where there is a very specific formatting of complaints and a recommended form that is used so that it does cut down the cost a little bit, because people don't have to wonder about the format of the complaints. But it does also then create the possibility of complaints being bounced out because they are not in compliance with the procedural rules. And so sometimes if you have that, you could have the cure where the clerk gives you something nonconforming you didn't notice, and you have three days to cure or something like that. Walk the middle ground.

BECKY BURR: Okay. Any thoughts on that? I think we want something more than a napkin but not so technical as to it has people bounced out on mere technicalities.

David McAuley?

DAVID MCAULEY: Becky, hi. My attention was diverted by somebody for just a minute. But I believe we're discussing still the ability to deal with emergency relief and issues like that. Is that correct?

BECKY BURR: Yeah.

DAVID MCAULEY: Something occurred to me that when Holly and Avri were talking earlier, about the idea of whether the pleadings were sufficient, can the IRP provider have the ability to wash out claims? And Avri made the point, there's going to be a standing panel behind there. So the idea that occurred to me, maybe the standing panel, we could adopt the concept that one of them will be sort of a motions judge or a magistrate – and it could rotate every quarter, something like that – to deal with questions of adequacy of pleadings in emergency relief to simplify it and have a person from the panel there available for that kind of duty in a formal way, in a sense. It might make it easy. Anyway, that's my observation. Thanks.

BECKY BURR:

Okay. That's good. I think that fits into the kind of thinking that Amy was going to do about what kinds of decisions could be made and by whom, before a full panel is established and empowered. So we'll mark that down as something we want to come back to.

The next thing that we have on the pre-hearing process is the cooperative engagement process. Now, I will just tell you that what we put into the proposal was essentially there would be cooperative engagement, but that either party could decide, after the first meeting, that cooperative engagement wasn't going to work and invoke more formal mediation here. And that has the effect of allowing ICANN to continue to control its cooperative engagement process, or constructive engagement process, or whatever it is. But give people an [off-ramp].

I have to say that when the CCWG was really thinking about IRP issues, one of the most often heard complaints were complaints about CEP. And so I think we can make recommendations about CEP, but I had sort of thought of this as something for ICANN in the first instance to design, with the safeguard being that formal mediation could be invoked at any point in this process. And so one of the things that we will need to think about more is what the formal mediation process is here.

But, again, Amy, I don't know if you have views or inputs on this particular issue.

AMY STATHOS:

Yeah, I think the process of CEP was added back in 2013 without consideration of any particular issue. I don't know that CEP has been, as it's currently written, tested sufficiently in non-New gTLD related

matters. And I think we should look at how it's written and what we can look at to modify it, because what you have to have, is you have to have the ability of somebody to actually provide relief. And who the CEP, parties are involved with CEP, to be able to actually try to narrow issues before they get any further down the path. And I think that's something the group can kind of look at and consider, to see... Seeing how it's worked with New gTLDs may not be an accurate test of a process that we have tried to utilize for just other general ICANN-related matters. That's just an observation I have, from what I've been involved in.

BECKY BURR:

That probably makes sense. Bernie has noted that CEP is on Work Stream 2's list. So again, I think that brings me back to my sense that, to the extent that we have observations about CEP, we can feed those into the Work Stream 2 work. And anything that comes out of that can be folded into this.

Then kind of narrowing of issues is I felt that... Holly and Amy, you guys will remember when we were sitting in that conference room in Los Angeles at the very early stages of the Bylaws, we had this chart that addressed the narrowing of the issues. And I thought that the narrowing of the issues came after a formal filing.

AMY STATHOS:

Actually, no. At least the way it works currently is when we get notice of somebody who wants to initiate CEP, that will initiate the process before an IRP is actually filed.

BECKY BURR: Okay.

AMY STATHOS: At least that's the way it currently works.

BECKY BURR: Well, I would think that that opportunity, and any kind of mediation, to narrow issues and proceed only with you were not able to resolve. So that makes sense.

Bernie, I see your hand.

BERNIE TURCOTTE: Thank you, Becky. Just a reminder for everyone, for transcripts and everything, if you're going to speak, please identify yourself. The voices that we're really used to and speaking a lot, like Becky, that's not required. But we have some voices [inaudible] on the call. Easier for the notes, and easier for transcription later. Thank you.

BECKY BURR: Great, thank you, Bernie. I see that Marianne has gotten out of traffic. Welcome, Marianne and Olga. And Tijani has joined us. Thanks, guys.

Okay. Moving on. And just for the people who have joined us as we've gotten into the conversation, we're really just working our way through a deck and brainstorming as a preliminary matter and identifying places

and ways where we can get more specific. And so that's what we are doing here. And 40 minutes to go, so I think I should speed it up.

Okay. The next issue is filing notices/answer/counterclaims, formal guidelines for the filings, page limits and other restrictions. Now, I know that there were page limits in the Bylaws. And I am hoping that Holly can remind us about what the state of any of these kind of details, in the current Bylaws, are. Because I thought we had retained some of those page limits and the like.

HOLLY GREGORY:

I'm not sure that we did. I'm doing a quick scan through this, and I don't know that we did. I think what happened was it was decided that those were implementation issues. I could be wrong. It's hard to be familiar with all this.

BECKY BURR:

Now, I'm just looking through it myself. I think that for us to do a deeper dive on this, it would be very useful to have side-by-side of what the limits in the old Bylaws were and what other arbitration bodies recommend, so that we can just look at those things. And obviously, I think everybody's interests are in having some sensible rules to maintain some limits on the scope and the cost and all of that, of the process. And we just need to be informed by that. So maybe we can get that.

David McAuley?

DAVID MCAULEY:

Thank you, Becky. I think it would be good too to get Amy's perspective, and the folks that worked on it before, to see if the 25-page limit that was in effect before caused any problems. But I do think a page limitation is a very good idea.

I also want to float an idea that I think this group should come up with, and I'd be happy to take a pass at it whenever the point comes up, that every pleading, whether it's a claim or a reply or whatever it is, include a certification that the person signing the claim has read the Bylaws, believes that this is a proper claim, understands the relief that's available – for instance, if the panel can only declare something is or is not within mission, etc. – and also maybe specify that they've read those provisions of the Bylaws that say, "If you file a frivolous claim, you might be liable for costs." So I think a paragraph at the end, a certification paragraph, would be a good idea. And I would urge that we do that. Thank you.

BECKY BURR:

Okay. That makes total sense to me. So if we could just get, I think, on these sort of, how the old Bylaws or rules treated these things. And by "these things," I mean filings, amended pleadings, and motions. And then maybe comparison to a couple of other forms out there so that we have some sense. And then very much would like to hear from Amy and the ICANN people on their experience with those kinds of procedures.

Holly, your hand is up?

HOLLY GREGORY: Yes, just to say that we agree. And that was one of the purposes that we were thinking in trying to have a very high level outline of the current processes so that, as you go through these kinds of issues, you can give some thought to how it has been done here, from the experience of whether it's working well or not, and use that to guide the decision-making of this group.

We will sketch this out, work with Amy to make sure that it's accurate and get her feedback, and then get something to you. This might take a week or two. So I can't promise that we'll have it for you next week.

BECKY BURR: Yeah, that's fine.

HOLLY GREGORY: But we'll move as quickly as we can.

BECKY BURR: Okay. I don't know the answer to... But I don't recall there being any form of early dispositive motions allowed in the existing IRP. I think the CCWG –

OPERATOR: Pardon the interruption. Tijani has joined.

BECKY BURR: Thank you. Hi, Tijani.

TIJANI BEN JEMAA: Hi, how are you?

BECKY BURR: Good. We're good. One of the things that the CCWG was very concerned about was the possibility of dealing with frivolous or abusive claims. And so I think that is something that early dispositive motions that can be used to sharpen the issues and to identify abuses of the process and resolve them expeditiously is something that is important.

Amy, was there a specific provision in the ICDR rules for this? If so, was it ever used? Was it effective? What are the things that we should be thinking about, based on your experience with this?

AMY STATHOS: Thanks, Becky. I just noted in the chat that I have to drop off in a couple of minutes, because I have another meeting starting at 11:00 on my calendar. So I apologize in advance. But there was no specific provision about motion practice of any kind. I do think one could be beneficial for things, just like what you're talking about, which is frivolous filings or things that just clearly, on their face, are not sufficient to even – if you want to state a claim, using a legal term, in the United States here. But there was not anything specific in place, and is not at the present time.

I don't think that anybody, as I recollect, to date has actually attempted to impose motion practice. That said, there have been times where the panelists have asked for advanced briefing on particular minor issues so they can understand. But it didn't necessarily result in any final

decisions that would eliminate the need for continuing the IRP or anything along those lines.

BECKY BURR: Okay. So this is something that definitely we want to think about, because we are making the IRP much more accessible. And that is a good thing, but we have to be conscious that, at the same time we do that, we want to be very disciplined about sharpening issues and ensuring that the panel is looking at issues that are properly before the panel. So I think that's something that we definitely want to give some serious thought to.

AMY STATHOS: Okay, thanks, Becky, again. I apologize for having to drop off. I've got to go now. Okay.

BECKY BURR: All right. Sorry about that.

AMY STATHOS: Thanks. Bye-bye.

BECKY BURR: Okay. Another issue that we did talk about in the CCWG was intervention, joinder, and consolidation of issues, and intervene processes for intervention. I know that one thing that folks from ICANN identified was a difficulty in some of these situations where, really, the

dispute may have been between [inaudible] and one and another party, but the dispute also implicated the rights and interests of other folks.

Now, I believe when I looked at it that the ICDR rules did provide for some forms of intervention. But it seems like that is something that we do want to think carefully about. Obviously, you don't want to allow anybody to intervene in a dispute, but you also do want to make sure that all of the parties and interests are before the panel at the right time. And so that, I think, is something that, as we go through the documentation, we really want to think about, that we are making sure that there's an efficient way for other parties who have an interest in the dispute to make their views known or to be participants.

And then the other thing is consolidation and the rules for consolidation and bifurcation. Again, I don't think that has ever really come up. Kate may be able to correct me if I'm wrong. But this is something that was identified as a problem.

Ed, I see your hand.

EDWARD MCNICHOLAS: Yes. I don't know if you can hear me well. One of the issues would also be whether there should be something short of full intervention, such as an amicus brief, so that people who feel that they want to say something about a dispute can present arguments and present concerns to a panel without having to jump fully into the dispute.

BECKY BURR: Okay. Yeah, and I think that probably makes sense in some of these things.

KATE WALLACE: Becky, with respect to bifurcation, it hasn't been an issue to bifurcate proceedings in their entirety. We have had questions from panels on various IRPS who ask the parties to brief a specific issue, separate and apart from other issues that are pending in the case. But it hasn't resulted in any sort of bifurcation of the proceedings as a whole.

BECKY BURR: And any consolidation?

KATE WALLACE: Yes, we have had consolidation. I am trying to remember which IRP it was, but it was recently. And basically, the same types of issues were presented, and the claimants agreed to consolidate. So that has happened.

BECKY BURR: Okay. Okay. So moving along, the process for selecting the IRP panel, I think that since the general notion in the CCWG is that each party would select one panelist, and those panelists would select a third. That's sort of an odd notion in a standing panel, but I believe that is what we proposed here. Is that correct? I think that is what was proposed. So a system that essentially says ICANN picks one, the claimant picks one. And that is obviously from a list of otherwise available panelists,

because panelists are engaged in other things. There could be problems about that.

So I think we're going to have to think through some of these processes. I believe that there are processes in place in the existing IRP for challenging in partiality. Those are part of the [ICRB] rules, and we may want to look at those to determine whether they are adequate.

In terms of choice of law and jurisdictional questions, I think this is an important discussion for us to have here. Currently, ICANN is, and will remain for the foreseeable future, a California corporation. It is incorporated in California. Presumably, the meaning of its Bylaws would be read by California law. Ed and Holly, correct me if I'm wrong on that. But it would seem odd to have the interpretation of the Bylaws or the Articles of Incorporation be subject to another law. But I think we should discuss that, and I just shouldn't assume that I understand that.

EDWARD MCNICHOLAS: That would be my understanding, that it would be under California law, yeah.

HOLLY GREGORY: Yeah, the Internal Affairs Doctrine, which is a choice of law construct, provides that bylaws are interpreted under the law of formation, jurisdiction of formation. So here, that would be California.

BECKY BURR: And we really wouldn't have much by way of interpretation of agreements, unless it's the contract between PTI and ICANN, which would come up in the IANA context.

HOLLY GREGORY: And any of those agreements will probably have a provision that says what law they should be interpreted under. It's a fairly standard concept, provision.

BECKY BURR: I agree. So Bernie has noted that jurisdiction is a Work Stream 2 topic also. I think that the discussion there are both broader and narrower, in the sense that the question would be, in some of those, should ICANN be entering into contracts where the choice of law is other than in California? Which would obviously implicate, if a contract was in some way before the IRP, would implicate that. But I think the question of whether the Bylaws themselves are interpreted in accordance with jurisdiction in which ICANN is incorporated, whatever that may mean, as [that going] in principle seems to make sense here.

Holly, your hand is up. I don't know if that's a new hand. And then David McAuley.

HOLLY GREGORY: Yeah, I just wanted to say that while jurisdiction may be a Work Stream 2 topic, also I think it's jurisdiction in a different respect. So long as ICANN is a California corporation, its Articles and Bylaws were drafted under California law. And California law is the law that applies to their

interpretation. There's simply no way to apply some other law to have the California bylaws get interpreted. It would make no sense. We would have bylaws that we now wouldn't know what they mean. So they exist in a framework of California law. They were drafted under California law. And the only way to interpret them is under California law.

Of course, that all changes if you decide to reincorporate someplace else. And then we'll have Articles and Bylaws that are drafted under whatever the law of that jurisdiction is. But for now, California law applies to the interpretation of Articles and Bylaws.

BECKY BURR:

Okay. David McAuley?

DAVID MCAULEY:

Thanks, Becky. Maybe I should have lowered my hand, but listening to what Holly said just now makes me just think a little bit more. But I was going to say that it's possible that an issue before IRP also must be hinging on an interpretation of Bylaws as the application of the Bylaws to a certain set of facts, where both parties agree to the interpretation. And I don't know. I don't know. I have to think this through a little bit more, based on what Holly just said.

But I also wanted to note, as Bernie did, that it's a Work Stream 2 issue, although it is cabined a bit, as Holly said. So I just need to think it through a little bit more, Becky. Thank you.

BECKY BURR:

Okay. Well, I do think that this is a complicated issue. There are certainly a lot of feelings in the community about this. And in some ways, what the community decides to do in Work Stream 2 would be naturally woven back into this if, for example, there was a decision to reincorporate ICANN in some other jurisdiction.

But here, the discussion really needs to be, is there a circumstance under which the choice of law would be something other than either ICANN's incorporation, to the extent where talking about the meaning of the Bylaws, or the choice of law in any agreement, should that be at issue, although most of the IRP issues really should be about what do the Bylaws say about this? And then standard, traditional jurisdictional decisions about where harm occurred. And so how those all get woven out, I think we are going to need to think about more carefully here. Because in a typical arbitration proceeding, what you have is a choice of law that is clearly specified in a commercial agreement. And we may not have that. So this is an issue that I think we are going to need to do a deeper dive in.

Another thing that I think we need to think about is where hearings take place and what kinds of accommodations need to be made to different stakeholders where those resolutions are being resolved.

There's a question in here about currency for the award. But I don't think that we contemplate any sort of monetary damages coming out of this process. The decision of the panel, based on everything in the CCWG, is a – and I'm setting aside just for a moment the PTI ICANN IANA functions aspect of it. The decision really is, was ICANN's action or

inaction in a specific circumstance consistent with its obligations under the Bylaws?

Holly?

HOLLY GREGORY:

Hi. So we drafted this question poorly. It's not for an award. It's, do we need to address any kind of currency issue as for fees that need to be paid in order to participate or fees that are shifted? There are circumstances under which, if something is really frivolous, there could be an award of a fee-shifting kind of mechanism whereby the complainant would have to pay fees. So that's why there's a currency question. But we agree, it should not say, "What currency for the award?" It's a currency for the fees would have to be paid in or fee shifting. Okay?

BECKY BURR:

Okay. That's very helpful. Kate?

KATE WALLACE:

Hi, thanks. I just had a question about the question that says, "Where should hearings take place?" And I was wondering if it made sense to look back at the Bylaws. But I think whether hearings should be permitted in the first place, and then if so, what they're going to look like, meaning if they're going to include witnesses being presented, traditional opening/closing statements and arguments, and the extent to which that would occur would also be a topic of discussion. So I just wanted to make sure or clarify that that wasn't permitted or already

happened, or would be something that would be discussed here before figuring out where they would take place.

BECKY BURR: Okay.

HOLLY GREGORY: And we agree with that. And that was one of the things I was thinking about when I said early on that we didn't mean to presume any outcome. And that was one of the questions where I was actually uncomfortable, that we should said, "Whether hearings will be allowed," not, "Where should hearings take place?" Whether they should be allowed and, if so, where they should take place. So again, poor drafting on our part.

KATE WALLACE: Okay, thanks for the clarification.

BECKY BURR: I think those are both questions that we're going to need to resolve. So in terms of the format of arbitration, I'm not sure, "What forms of representation are allowed?" is really getting at. Can I ask Holly or Ed to help us understand that question?

HOLLY GREGORY: I can, because it's a question that I asked a few minutes before the call. It means, is representation by counsel allowed? If representation is

allowed, could you be represented by someone who's not a lawyer? Are there any requirements about having someone represent you? So those kinds of – who can appear before the panel? Is it only complainants with some sort of form of representation? Those kinds of rules.

BECKY BURR:

Okay. Okay. That's a good question. We also have the question about paying a filing fee or a deposit. And it seems like that really goes along with the questions about prevention of frivolous suits. I know that we provided that cost shifting could take place, where someone was found to have been abusing the process itself. But we really didn't spend a lot of time talking about filing fees or deposits or anything like that. And that's something that we will need to talk about.

I'm just mindful of the time here, so I want to just kind of cruise through the last couple of pages here. Rules about confidentiality, I mean, clearly the notion here and the sort of default is that these things should be transparent and public. All the filings should be transparent and public. But obviously, there has to be some exceptional process to protect truly proprietary, trade secret kind of information.

Rules about ex parte communications and hearings, again, hearings on the record, open and closed, in person, electronic, telephonic, and different forms of waiver.

There are also questions about – Holly, you've got your hand up there. Is that a question, input?

HOLLY GREGORY: No, I'll put it down. Sorry.

BECKY BURR: We have a very serious question about discovery and evidence and witnesses, and the model. Judges in common law jurisdictions play a very different role than judges in civil law jurisdictions. Or in places where there's an investigating magistrate model where, to the extent where there is discovery, it's really undertaken by the judges or magistrates themselves, as opposed to the opposing parties conducting discovery.

And again, I'm hoping that we can get some input from Amy and Kate when we get to talking about this, about ICANN's experience with it. I am not aware of any of any discovery having gone on. And generally, that's what makes things in the United States expensive. On the other hand, we need to be sure that our transparency rules in general are such that, if we decided that we would have limited or no discovery, that [all the] protections under ICANN's document disclosure policies and the like are adequate. So that's something that we're going to have to talk about.

KATE WALLACE: And, Becky, just real briefly, the only type of discovery that has taken place in IRPs is document discovery. We haven't had anything along the lines of depositions or interrogatories or requests for admissions, or things like that. But there has been, certainly, document exchange.

BECKY BARR: Okay. Ed?

EDWARD MCNICHOLAS: Yeah, I just wanted to mention another midway model is having a model of disclosure where parties need to affirmatively provide the information upon which they intend to rely. There's a weak part of that in the civil rules and federal procedure now that you could imagine a more robust version of disclosure could be a way of having the exchange of information that you get from discovery without the burden and expense of the discovery.

BECKY BARR: Right. And I think that would be optimal, right, if we were sure that those rules were adequate, the document disclosure rules were adequate, then the need for discovery... On the other hand, the questions about what the panel itself can ask for and what kind of investigation the panel itself can conduct are also interesting questions, and questions on which I certainly don't have a lot of experience.

Then just quickly going through the next couple of pages, rules for witnesses, rules for settlement. Two judges out of three, is that sufficient for a determination? I think that is actually in the proposal, the RFP proposal.

Ed, you've got a question?

EDWARD MCNICHOLAS: Sorry, old hand.

BECKY BURR:

Okay. And then following that, rules for appellate procedure, there is a specific appellate limited appeals rights set forth in the proposal.

So going through this feels like an introduction to the topic, but I thought it was important for us to begin to get the scope of our work laid out here and understand what we're looking down the road to. I'd like to just take the last couple of minutes to get general observations from folks in the group about our path forward and how we tackle these issues going forward. I'd also like to suggest that we have some work to do and it may make sense to not have a call next week, take this week to organize the calendar and the topics to be discussed at calls as we go forward, circulate that on paper, get people's buy-in in the list, and then begin to move forward substantively in two weeks' time.

So other comments from folks on that approach? On what we've seen here? Everybody is... David is in agreement. Okay.

So obviously, we have a lot of resources, in terms of topics and the examples that we sent out. I'd like to ask that the people in this group start thinking about these issues and looking at the resource documents that we sent out. We will regroup here and try to come back to you in two weeks with a calendar and suggested approach for organizing our work, and then move forward with another call in two weeks' time. And we will take a look at people's responses to the Doodle poll on times so far and see if we can identify a good time from that, or if we need to do another Doodle poll.

With that, I want to say thanks. I don't think, Holly, that we are planning to have in-face discussions about this in Helsinki, because I am actually not sure how many of us will be in Helsinki. And in any case, if there was a call during that week, we would have remote participation. So our work for the time being is intended to be via call, as opposed to via face-to-face.

So with that, I will say thanks to everybody, and look for communications from us in the next week. And we'll talk to you in two weeks.

[END OF TRANSCRIPTION]

EXHIBIT 226

Updated Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process¹

Revised as of []

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These updated procedures supplement the International Centre for Dispute Resolution’s international arbitration rules in accordance with the independent review process set forth in Article IV, Section 4.3² of ICANN’s Bylaws. These procedures apply to all independent review process proceedings filed after [insert effective date of the Bylaws].

¹ CONTEXTUAL NOTE: These Supplemental Procedures are intended to be supplemental to the ICDR RULES. Therefore, when the ICDR RULES appropriately address an item, there is no need to re-state that Rule within the Supplemental Procedures. The IOT, through its work, may identify additional places where variance from the ICDR RULES is recommended, and that would result in addition or modification to the Supplemental Procedures.

² Formatting updated to conform with 2016 ICANN Bylaws.

1. Definitions

In these Supplementary Procedures:

A CLAIMANT is any legal or natural person, group, or entity that has been materially affected by a Dispute. To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation of ICANN’s Articles of Incorporation (“Articles”) or Bylaws.

COVERED ACTIONS are any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a DISPUTE.³

DISPUTES are defined as:

(A) Claims that COVERED ACTIONS constituted an action or inaction that violated ICANN’s Articles of Incorporation or Bylaws, including, but not limited to, any action or inaction that:

- 1) exceeded the scope of the Mission;
- 2) resulted from action taken in response to advice or input from any Advisory Committee or Supporting Organization that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
- 3) resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
- 4) resulted from a response to a DIDP (as defined in Section 22.7(d)) request that is claimed to be inconsistent with the Articles of Incorporation or Bylaws; or
- 5) arose from claims involving rights of the EC as set forth in the Articles of Incorporation or Bylaws;

(B) Claims that ICANN, the Board, individual Directors, Officers or Staff members have not enforced ICANN’s contractual rights with respect to the IANA Naming Function Contract; and

³ 2016 ICANN Bylaws Article IV, Section 4.3 (b)(ii).

(C) Claims regarding the Post-Transition IANA entity service complaints by direct customers of the IANA naming functions that are not resolved through mediation.⁴

EMERGENCY PANELIST refers to a single member of the STANDING PANEL designated to adjudicate requests for interim relief⁵ or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for interim relief.

IANA refers to the Internet Assigned Numbers Authority.

ICDR refers to the International Centre for Dispute Resolution, which has been designated and approved by ICANN’s Board of Directors as the Independent Review Panel Provider (IRPP) under Article IV, Section 4.3 of ICANN’s Bylaws.

ICANN refers to the Internet Corporation for Assigned Names and Numbers.

INDEPENDENT REVIEW PROCESS or IRP refers to the procedure that takes place upon the Claimant’s filing of a written statement of a DISPUTE with the ICDR.⁶

IRP PANEL refers to the panel of three neutral members appointed to decide the relevant DISPUTE.⁷

IRP PANEL DECISION refers to the final written decision of the IRP PANEL that reflects the reasoned analysis of how the DISPUTE was resolved in compliance with ICANN’s Articles and Bylaws.⁸

ICDR RULES refers to the ICDR’s rules in effect at the time the relevant request for independent review is submitted.⁹

⁴ 2016 ICANN Bylaws, Article IV, Section 4.3 (b)(iii).

⁵ 2016 ICANN Bylaws, Article IV, Section 4.3 (p).

⁶ 2016 ICANN Bylaws, Article IV, Section 4.3 (d).

⁷ 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(i)

⁸ The 2016 ICANN Bylaws refer to an “IRP Panel decision” rather than a “declaration” (although the 2016 ICANN Bylaws state that an IRP Panel will “declare” certain findings). *See* 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(v) & 2016 ICANN Bylaws, Article IV, Section 4.3(o)(iii).

⁹ Recommended inclusion to clarify what happens to already pending IRPs when an updated version of the Supplemental Procedures goes into force, with an ongoing IRP filed under different standards and processes.

PROCEDURES OFFICER refers to a single member of the STANDING PANEL designated to adjudicate requests for consolidation, intervention, and joinder, or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to its International Arbitration Rules relating to appointment of panelists for interim relief.

PURPOSES OF THE IRP are to hear and resolve Disputes for the reasons specified in the ICANN Bylaws, Article IV, Section 4.3(a).

STANDING PANEL refers to an omnibus standing panel of at least seven members from which three-member IRP PANELS are selected to hear and resolve DISPUTES consistent with the purposes of the IRP.¹⁰

2. Scope

The ICDR will apply these Updated Supplementary Procedures, in addition to the ICDR RULES, in all cases submitted to the ICDR in connection with Article IV, Section 4.3(i)¹¹ of the ICANN Bylaws after the date these Supplementary Procedures go into effect. In the event there is any inconsistency between these Updated Supplementary Procedures and the RULES, these Updated Supplementary Procedures will govern. These Updated Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is received by the ICDR.

3. Composition of Independent Review Panel

The IRP PANEL will comprise three panelists selected from the STANDING PANEL, unless a STANDING PANEL is not in place when the IRP is initiated.¹² The CLAIMANT and ICANN shall each select one panelist from the STANDING PANEL, and the two panelists selected by the parties will select the third panelist from the STANDING PANEL. In the event that a STANDING PANEL is not in place when the

¹⁰ 2016 ICANN Bylaws, Article IV, Section 4.3 (j)(i).

¹¹ 2016 ICANN Bylaws, Article IV, Section 4.3 (m).

¹² 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(i). There has been discussion in the IOT re: whether it makes sense to require a disclosure form to be signed (1) when a person is appointed to the standing panel; AND (2) when that person is selected for a particular IRP. For the IOT's consideration is the following proposed language: "A STANDING PANEL member's appointment will not take effect unless and until the STANDING PANEL member signs a Notice of STANDING PANEL Appointment affirming that the member is available to serve and is independent and impartial. An IRP PANEL member's appointment will not take effect unless and until the IRP PANEL member signs a Notice of IRP PANEL Appointment affirming that the member is available to serve and is independent and impartial."

relevant IRP is initiated or is in place but does not have capacity due to other IRP commitments or the requisite diversity of skill and experience needed for a particular IRP proceeding, the CLAIMANT and ICANN shall each select a qualified panelist from outside the STANDING PANEL, and the two panelists selected by the parties shall select the third panelist. In the event that the two party-selected panelists cannot agree on the third panelist, the RULES shall apply to selection of the third panelist.¹³ In the event that a panelist resigns, is incapable of performing the duties of a panelist, or is removed and the position becomes vacant, a substitute arbitrator shall be appointed pursuant to the provisions of this Section [] of these Updated Supplementary Procedures.

4. Time for Filing

A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than [] days after a CLAIMANT becomes aware or reasonably should have been aware of the action or inaction giving rise to the DISPUTE.¹⁴

5. Conduct of the Independent Review

The IRP PANEL should conduct its proceedings by electronic or telephonic means unless the IRP PANEL in its discretion determines other means would, in unusual circumstances, further the PURPOSES OF THE IRP.¹⁵

In the unusual circumstance that the IRP PANEL deems an in-person hearing to further the PURPOSES OF THE IRP, it is generally expected that all evidence, including witness statements, must be submitted in writing in advance without any live witness testimony. Telephonic hearings are subject to the same limitation as to live witnesses.¹⁶ The IRP Panel may deem in-person or electronic testimony to be necessary to further the

¹³ 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(ii).

¹⁴ As an item for consideration by the IOT, would be to include language such as: “In order for an IRP to be deemed to have been filed timely, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.” The IRP process has previously been silent on the issue of the relationship between filing a notice and completing the fee payment, and including this could result in more predictability of the timing.

¹⁵ ICANN NOTE: the language proposed by CCWG Counsel would modify the status quo and does not appear to be contemplated in the Bylaws or CCWG Proposal. The IOT could consider further guidance on this for further updates to the Supplementary Procedures, but the suggested text (proposed for deletion) is a significant variation from current practice.

¹⁶ This is an issue for consideration within the IOT. This provision maintains the status quo until there is an agreed recommendation to change.

PURPOSES OF THE IRP.

The IRP PANEL retains responsibility for determining the timetable for the IRP proceeding.¹⁷ Any violation of the IRP PANEL's timetable may result in the assessment of costs pursuant to Section 10 of these Updated Supplementary Procedures.¹⁸

6. Written Statements

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font.¹⁹ All necessary and available evidence in support of the Claimant's Claim(s) should be part of the submission.²⁰ Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence.²¹ The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.²²

7. Consolidation, Intervention, and Joinder²³

[At the request of a party, a PROCEDURES OFFICER may be appointed from the STANDING PANEL to consider requests for consolidation, intervention, and joinder. Requests for consolidation, intervention, and joinder are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for interim relief.

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact such that the joint

¹⁷ 2016 ICANN Bylaws, Section 4.3(o)(vi).

¹⁸ This is an issue for consideration within the IOT. This provision maintains the status quo until there is an agreed recommendation to change.

¹⁹ This is an issue for consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

²⁰ Language modified to reflect broadened scope of IRPs. *See* 2016 ICANN Bylaws, Article IV, Section 4.3 (i).

²¹ This is an issue for consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

²² 2016 ICANN Bylaws, Article IV, Section 4.3 (o)(ii).

²³ There is no existing Supplemental Rule. The CCWG Final Proposal and 2016 ICANN Bylaws recommend that these issue be considered by IOT.

resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the permission of the PROCEDURES OFFICER. A CLAIMANT may join in a single written statement of a DISPUTE, as independent or alternative claims, as many claims as it has that give rise to a DISPUTE.]²⁴

8. Discovery Methods²⁵

The IRP PANEL may allow a Party's request for discovery if it deems such discovery to be necessary to further the PURPOSES OF THE IRP.

Depositions, interrogatories, and requests for production or admission will generally not be permitted unless the IRP PANEL determines that discovery is necessary to further the PURPOSES OF THE IRP.²⁶

In the event that a party submits what the IRP PANEL deems to be an expert opinion, such opinion must be provided in writing and the other party must have a right of reply to such an opinion with an expert opinion of its own.²⁷]

9. Summary Dismissal

An IRP PANEL may summarily dismiss any request for INDEPENDENT REVIEW where the Claimant²⁸ has not demonstrated that it has been materially affected by a

²⁴ Pursuant to the 2016 ICANN Bylaws, Article IV, Section 4.3(n) (Rules of Procedure), these Supplementary Rules will govern the format of proceedings. This is an issue for consideration within the IOT. 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(B).

²⁵ There is no existing Supplemental Rule. The CCWG Final Proposal and 2016 ICANN Bylaws recommend that discovery methods be considered by IOT. For example, consideration should be given to whether to require each party to provide the other party with all reasonably available documents in its possession, custody, or control that relate materially to the Dispute. Such mandatory disclosure obligations can further procedural fairness without the economic burdens of full discovery.

²⁶ The independent discretion of the panel to require discovery is consistent with the Purposes of the IRP.

²⁷ Pursuant to the 2016 ICANN Bylaws, Article IV, Section 4.3(n) (Rules of Procedure), these Supplementary Rules will govern the format of proceedings. This is an issue for consideration within the IOT. 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(D).

²⁸ 2016 ICANN Bylaws, Article IV, Section 4.3(b)(i). Note that the term "requestor" be replaced with "Claimant" for consistency with IRP terminology.

DISPUTE. To be materially affected by a DISPUTE, a Claimant must suffer an injury or harm that is directly and casually connected to the alleged violation.²⁹

An IRP PANEL may also summarily dismiss a request for INDEPENDENT REVIEW that lacks substance or is frivolous or vexatious.³⁰

10. Interim Measures of Protection

A Claimant may request interim relief from the IRP PANEL, or if an IRP PANEL is not yet in place, from the STANDING PANEL. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN action in order to maintain the status quo until such time as the action can be considered by the IRP Panel as described in ICANN Bylaws, Article IV, Section 4.3(o)(iv).

An EMERGENCY PANELIST shall be selected from the STANDING PANEL to adjudicate requests for interim relief. In the event that no STANDING PANEL is in place when an EMERGENCY PANELIST must be selected, a panelist may be appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for interim relief. Interim relief may only be provided if the EMERGENCY PANELIST determines that the Claimant has established all of the following factors:

- (i) A harm for which there will be no adequate remedy in the absence of such relief;
- (ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and
- (iii) A balance of hardships tipping decidedly toward the party seeking relief.³¹

11. Standard of Review

Each IRP PANEL shall conduct an objective, de novo examination of the DISPUTE.

- a. With respect to COVERED ACTIONS, the IRP PANEL shall make findings of fact to determine whether the COVERED ACTION

²⁹ 2016 ICANN Bylaws, Article IV, Section 4.3 (o)(i).

³⁰ 2016 ICANN Bylaws, Article IV, Section 4.3 (o)(i).

³¹ 2016 ICANN Bylaws, Article IV, Section 4.3(p).

constituted an action or inaction that violated ICANN’S Articles or Bylaws.

- b. All DISPUTES shall be decided in compliance with ICANN’s Articles and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.
- c. For Claims arising out of the Board’s exercise of its fiduciary duties, the IRP PANEL shall not replace the Board’s reasonable judgment with its own so long as the Board’s action or inaction is within the realm of reasonable business judgment.
- d. With respect to claims that ICANN has not enforced its contractual rights with respect to the IANA Naming Function Contract, the standard of review shall be whether there was a material breach of ICANN’s obligations under the IANA Naming Function Contract, where the alleged breach has resulted in material harm to the Claimant.
- e. IRPs initiated through the mechanism contemplated at Article IV, Section 4.3(a)(iv) of ICANN’s Bylaws shall be subject to a separate standard of review as defined in the IANA Naming Function Contract.³²

12. IRP Panel Decisions³³

IRP PANEL DECISIONS shall be made by a simple majority of the IRP PANEL³⁴. If any IRP PANEL member fails to sign the IRP PANEL DECISION, the IRP PANEL member shall endeavor to provide a written statement of the reason for the absence of such signature.³⁵

³² 2016 ICANN Bylaws, Article IV, Section 4.3 (i).

³³ The 2016 ICANN Bylaws refer to an “IRP Panel decision” rather than a “declaration” (although, to be sure, the 2016 ICANN Bylaws state that an IRP Panel will “declare” certain findings.) *See* 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(v) & 2016 ICANN Bylaws, Article IV, Section 4.3(o)(iii).

³⁴ 2016 ICANN Bylaws, Article IV, Section 4.3(k)(v).

³⁵ This is an issue for consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

13. Form and Effect of an IRP PANEL DECISION

- a. IRP PANEL DECISIONS shall be made in writing, promptly by the IRP PANEL, based on the documentation, supporting materials and arguments submitted by the parties.³⁶
- b. The IRP PANEL DECISION shall specifically designate the prevailing party as to each Claim.³⁷
- c. Subject to Article IV, Section 4.3 of ICANN’s Bylaws, all IRP PANEL DECISIONS shall be made public, and shall reflect a well-reasoned application of how the DISPUTE was resolved in compliance with ICANN’s Articles and Bylaws, as understood in light of prior IRP PANEL DECISIONS decided under the same (or an equivalent prior) version of the provision of the Articles and Bylaws at issue, and norms of applicable law.

14. Appeal of IRP Panel Decisions³⁸

An IRP PANEL DECISION may be appealed to the full STANDING PANEL sitting en banc within 60 days of the issuance of such decision (excluding those members issuing the IRP PANEL DECISION). The en banc STANDING PANEL will review such appealed IRP PANEL DECISION based on a clear error of judgment or the application of an incorrect legal standard. The en banc STANDING PANEL may also resolve any disputes between panelists on an IRP PANEL or the PROCEDURES OFFICER with respect to consolidation of CLAIMS or intervention or joinder.

15. Costs

The IRP PANEL shall fix costs in its IRP PANEL DECISION.³⁹ Except as otherwise provided in Article IV, Section 4.3(e)(ii) of ICANN’s Bylaws, each party to an IRP

³⁶ 2016 ICANN Bylaws, Article IV, Sections (s), (t). The 2016 ICANN Bylaws require the IRP Panel to “issu[e] an early scheduling order and its written decision no later than six months after the filing of the Claim, except as otherwise permitted under the Rules of Procedure.” This is an issue for consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon regarding timing.

³⁷ 2016 ICANN Bylaws, Article IV, Section 4.3 (t).

³⁸ There is no existing Supplemental Rule. The following proposed text is for consideration by IoT. The proposed text was drafted based upon the CCWG’s Final Proposal, which provided that an en banc appeal be based on subparts (i) and (ii), below. Suggest using actual text from Annex 7, ¶ 16.

³⁹ This is an issue for consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

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proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, as defined in Article IV, Section 4.3(d) of ICANN's Bylaws, including the costs of all legal counsel and technical experts.

Except with respect to a Community IRP, the IRP PANEL may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.⁴⁰

⁴⁰ 2016 Bylaws, Article IV, Section 4.3(r).

EXHIBIT 227

BECKY BURR:

Thank you very much, and thank you all for participating in the call this morning. We have a few people who appear in the room as telephone numbers. So if you could just identify yourselves on the list here, and then when you participate in the chat, then you appear in the chat with your name. That's excellent.

Okay, I want to apologize first of all for not giving additional time to review the document that we're going to talk about this morning. We wanted to get the proposed revisions in the best possible shape to bring them to the group for discussion this morning. Let me just reconfirm, as I did on the e-mail list, that we're not going to make final decisions today, but we will be working through this. This is also a new – although we talked about it on our last call – this is a reasonably new document to many people, so it will take some getting used to.

The document that you are seeing is a markup that reflects consensus between ICANN legal and the CCWG Council with respect to the supplementary procedures that would need to be put in place to implement – although, obviously, there's still work for us to do – the implement the CCWG recommendations with respect to the independent review process as of October 1 on the transition date.

You will see that there are questions for the group to consider. Many of the issues were issues that the CCWG report left to the IRP Implementation Oversight Team (that's us), and not all of them can or need to be addressed at this point. But we do need to modify these supplementary procedures and have those in place.

Note: The following is the output resulting from transcribing an audio file into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.

I'm just going to skip down, just noting the contextual note that these are supplemental to the International Center for Dispute Resolution arbitration rules, which are what currently govern the IRP process. In general, to the extent that the ICDR rules address an issue consistent with the way the IRP is administered, we defer to those rules. This is really to get us to close the gap.

You will see that there – so what you're seeing is a redline here that compares the existing supplemental procedures for the ICANN IRP. Deletions are marked with a cross out, and additions are marked with a different color change. There are many new definitions here.

A "claimant" obviously is "any legal or natural person ... material affected by a dispute." So we are going to have to define "disputes," as you will see here. This also incorporates the standing requirement, "an injury or harm that is directly and causally connected to an alleged violation of ICANN's Articles of Incorporation or Bylaws."

Can I just make a note for ICANN and for Sidley? I think that we may need to modify this to incorporate the PTI causes of action here.

"Covered actions" are "any actions or failures to act ... that give rise to a dispute." All of these things I think are fairly straightforward.

The "dispute" definition I think is substantive, and we need to make sure that we've covered all of the issues in the report. So, as we said in the report, any action or inaction that causes ICANN to exceed the scope of its mission, any action or inaction that is inconsistent with the Articles of Incorporation or Bylaws, results from decisions of process-specific expert panels that a claimed to be inconsistent with the Articles

of Incorporation or Bylaws, result from a response to a document access request, and arose from claims involving any rights of the Empowered Community.

Let's just pause for a moment to look back at the first and second one. I have a question for our drafters here as to why we have phrased 2 to be limited to violations of the Articles of Incorporation or Bylaws, why we have limited that to actions or inactions taken in response to advice from an Advisory Committee. What if it's just a plain old action taken by the Board on its own or the staff on its own.

Ed, I see your hand. Could you answer that question for us?

EDWARD MCNICHOLAS: Yes, it is. I think the key [bit] there is that "covered action" is any action or inaction that violated the Articles or Bylaws, and then it's including but not limited to, so those are particular examples. The example SO/AC was there to make sure that there was no ambiguity about that being included. But that was not meant to be exclusive. I believe this section was picked up directly from the Bylaws.

SAMANTHA EISNER: I agree with that. I'm just confirming again, but that's where that language came from.

BECKY BURR: Okay. So this is including but not limited to, and the definition in general is violations of the Articles of Incorporation or Bylaws, so that works for

me. It looks like from the chat that that is working for other people. Other comments on this first definition of “dispute”?

Okay, B is claims. These are the PTI provisions, so they have not enforced the contractual rights with respect to the Naming Function Contract or that they’re direct customer disputes that are not resolved through mediation. That seems to refer quite closely to what we have said in the report.

Can I just go back? I want to just make sure that we’ve got this. I think in the definition of “claimant” we need – oh, I see. So what we’re saying is everything under the definition of “dispute” – I guess my question for the legal drafter is whether the definition of “claimant” needs to clearly pick up the two PTI causes of action.

EDWARD MCNICHOLAS: I was trying to raise my hand. The definition of “dispute” was pulled straight from the Bylaws, and it was intended to pick up the PTI actions in B and C. I’m trying to find the definition of “claimant” to see if that is...

BECKY BURR: Yeah, I think that the definition of “claimant” covers A but may not cover B and C. I just think that’s something that I’d like to ask you guys to go back and look at to make sure we’ve got that covered.

EDWARD MCNICHOLAS: Yeah, I see where we would need to alter the definition of “claimant” there, “the claimant must suffer an injury.” Yeah, I see you’re drafting point there.

BECKY BURR: Okay, great. So going down to the definition of “Emergency Panelist,” just to make sure, this may be a new concept. It “refers to a single member of the Standing Panel” that would be “designated to adjudicate requests for interim relief or, if a Standing Panel is not in place at the time,” somebody “appointed by the ICDR.”

In a long-term – once the Standing Panel is formed, the concept is that there would be an Emergency Panelist who would be designated by the Standing Panel itself to respond to emergency requests for an interim emergency relief, proactive relief, that kind of thing. We didn’t really work through this particular – although we contemplated that there would be a mechanism available to request and receive interim relief, we hadn’t really talked about the mechanism. So this is the mechanism that has been suggested by the drafters. It works for me. Does anybody have any questions or concerns about the concept or the approach?

Okay, then we have definitions for the IRP Panel. One thing to keep in mind as we are going through here is the Standing Panel refers to the large group of at least seven members, and an IRP Panel is actually what is defined here to cover what we have been talking about as a decisional panel. So just a note for understanding as we go through here.

Okay, then we have a Procedures Officer concept. A Procedures Officer – this is after the ICDR Rules if anybody is having trouble following me

here – a Procedures Officer is also a concept that, although we provided in the proposal for the consolidation and intervention and joinder, we didn't really specify the mechanisms by which that would take place. The drafters have proposed creation of a Procedures Officer who would be "a single member of the Standing Panel" that would be "designated to" deal with these kinds of "requests for consolidation, intervention, and joinder." And as we said, until the time the Standing Panel is in place, there would be should appointed by ICDR while they are the provider here.

Any thoughts on that concept? David is typing. David, do you have something to – okay, you have a comment on joinder later. Okay.

Okay, one definition that is useful just to note – I don't think it's controversial, but it helps make the document more understandable as we go through this – is the "purposes" of the IRP as a defined term. The purposes "are to hear and resolved disputes (also a defined term) for the reasons specified in the ICANN Bylaws." You'll see that shorthand used throughout the document.

And then the Standing Panel is our omnibus panel of at least seven members.

Going down to "scope," this really is sort of an internal note talking about how the supplemental rules interact with the ICDR Rules for so long as ICDR is our provider. Here we specify an order of precedence, which is to say that these updated supplementary procedures take precedence over the ICDR Rules at any particular time.

David has two comments on scope, so now is your opportunity.

DAVID MCAULEY:

Thank you, Becky. On scope, I thought two things. One is I think we should take care to address items like appeals and consolidated cases to make sure that in case there's a pleading or something that comes before the rules change, we know what happens if there's another bit that comes after the rules change so that if there's a conflict between timing and what rules might apply, we can sort that out.

Then on the second point, I thought it might be a good idea to add the Bylaws to the inconsistency provision so that at any time the Bylaws would take precedence over either the rules or the supplemental rules, and the Bylaws should be the final point of reference.

Those are my two comments, and I'll add them in the chat too. Thank you.

BECKY BURR:

Thank you, David. I'm very glad to have you back with us. It sounds like you're still in the mending process.

This is an interesting and I think potentially important point that deserves some discussion, particularly references to the Bylaws. Sam, do you have a response?

SAMANTHA EISNER:

I do. I think we would fully agree with that idea that the Bylaws need to take preference, but that's why it's so important that we do this exercise very carefully and make sure that we have the things from the

Bylaws that we think we need in here or they're already covered in the ICDR Rules themselves. Because from what we understand, the panelists through the ICDR, they have to follow their rules. We can't tell them in their rules that they have to go follow the Bylaws. We have the obligation in bringing forth supplementary procedures to make sure that the supplementary procedures have everything we expect to have in there.

That's the sense that I've gotten in some conversation about how we can make sure that the providers can accept these rules and concerns about consistency of the Bylaws. That is really becomes our obligation to make sure that things are included within the procedures themselves because typically within providers, and maybe a different provider would handle this differently, but at least with ICDR our understanding is they can't require their panelists to then go and follow the Bylaws as well. That's why they have a set of procedures and rules.

BECKY BURR:

Okay, so just summarizing this, I think we all agree that the Bylaws from our perspective that the ultimate source and authority with respect to the IRP proceedings is the Bylaws. Having said that, I think Samantha is requesting a point based on interactions with the ICDR provider saying that they need a fully fleshed out document that is essentially self-contained and incorporated into the supplemental rules to the extent the rules are inconsistent with the Bylaws.

I think David is agreeing or is saying that in that case we really absolutely need to have very carefully assured ourselves that we have really reflected the Bylaws in here, and I think we'll agree on that.

I just want to go back to David's other point, which is talking about what would happen where there are appeals and consolidated cases or whatever and somehow in between the time a dispute was originally filed and then there was an appeal of that, if there was an amendment of the supplemental procedures, what would happen?

I think that's an interesting and hard substantive question because there's a due process question about the fact that rules or the supplemental procedures themselves can be amended during the pendency of a dispute.

It's also an interesting question that I don't think we've talked about but we should definitely put in the hopper for discussion is a process by which the supplemental procedures could be modified. Because, of course, the supplemental procedures are not governed, they're not Bylaws essentially.

David is proposing that we could apply the later rules, so the most recent rule would apply. But give the party an opportunity to show that it's being harmed or prejudiced by the application of the revised rules and, therefore, on the basis of equity have the previous rules apply. That seems like a reasonable manner to proceed. Any views on that? If not, could I ask the lawyers – okay, Sam?

SAMANTHA EISNER: I just wanted to confirm. So we're talking about applying these rules based on this form of the IRP to existing IRPs?

BECKY BURR: I think that what David is saying is these rules can change, and they can change while an IRP is pending. So you file under one set of rules, and then suddenly the rules have been revised. What does that mean? What is the panel supposed to do? I think David's suggestion was that we say the later rules, the later supplemental procedures apply unless the claimant makes the case that it is harmed by the application of the most recent rules. That's what the suggestion is. Ed?

SAMANTHA EISNER: Can I follow up on that before Ed goes?

BECKY BURR: Yes, sure.

SAMANTHA EISNER: I think from our perspective, there needs to be a bit of a delineation here. Right now we're in the process of a major overhaul of the rules to a new form of IRP with a different standing requirement and different things, right? This update is a very big breakpoint because people are actually operating under a different form of the IRP come October 1. So I think we have two questions on the table.

First, we need to make sure that we're not doing anything that alters the course of the IRPs that are currently underway that were under [a form].

Then there's the separate question of once we have these updated rules, we understand and I think that we're all in agreement on this call that we're going to likely need to do some iterations to the updated rules as we continue to go through this process. We have a goal that we really need to get a set of supplemental rules in place very quickly that address the Bylaws and then if the IOT has some further innovation on those points, we can get the rules updated.

So there's the question of the [iterative] updates on the updated rules to reflect what we can call our 2016 IRP. But I don't think we should put any statements in here that would impact and require that the 2016 IRP rules become applicable to cases filed under the 2013 IRP and are already proceeding under that. So I think we need to consider these things separately.

BECKY BURR:

Okay, so Sam is proposing that we need to have – and I take it that you're okay with David's suggestion for cases filed under the new supplementary procedures as we iterate along that. And then what we need to have is separate discussion about what, if anything, happens to IRPs that have already been filed. Is that correct, Sam?

SAMANTHA EISNER: For the most part, yes. I think that we do have from our understanding the general case in arbitration is that the rules that apply to any case so the rules that were in place at the time of the filing of the claim. And so I don't know if that is just a simpler way to go as we proceed and try to make different rules around that.

BECKY BURR: I don't think we need to decide that right now. I think that we need to make it as a discussion point and we can come back on that. I just want to make sure that, in terms of proceeding going forward, for cases filed under these supplemental procedures once they're adopted the question is, do we stick with the rules that apply or the rules that applied when you filed or do we say the new supplemental procedures apply unless you show prejudice?

So that's just one point. I've got Ed, and then Amy, and then Holly in the queue.

EDWARD MCNICHOLAS: I just wanted to say that I think it's fine. The idea that we would need to have the continuation of the old rules for pending IRPs that are pending today makes a lot of sense. Going forward, oftentimes procedural changes are applied, and the way that David suggested where if procedures change in the mid-course and an operator changes from allowing 25 page briefs to 20 or 30 page briefs then going forward, all the briefs in the action are governed by the new page limit because no one should be prejudiced by the page limit. But there is an out if the rules change would affect your substantive rights, then it doesn't apply

to you because your substantive entitlements are frozen at the time of the filing. And so I like David's suggestion of having it be the rules which should be procedural in nature would apply going forward which would alter that last sentence in scope, but that if someone thought that it was somehow affecting their substantive rights and was not merely procedural then they would make that case to the panelists under that particular circumstance.

BECKY BURR: Thanks, Ed. Amy?

AMY STATHOS: Yes, thank you. I do think we need to look at this because I definitely agree that if there's a substantive issue addressed in the rules or the procedures that the ones that are pending when you file are what need to apply, because you need to really create certainty and predictability so that you can understand under what rules you're operating the minute you file which I think is pretty standard. I think the possibility of whether there are some procedural rules such as what Ed was saying about page limits and such may be an option, but I think we need to figure out how to draw that line because I do think it's an important line to draw.

BECKY BURR: Okay. Holly?

HOLLY GREGORY: Greetings all. I apologize, I'm unable to chat and the comment I just would have made in the chat, I was going to make the substance versus procedure point that I think both Ed and Amy have made and so I fully support that. Thanks.

BECKY BURR: Okay, so if I could just ask the legal drafters to have an offline discussion and come back to us with a proposal on that. It sounds like the way forward. And then I just want to note that I personally want to have a conversation about the substantive standard given through the changes and I want to understand that. And I think that's the conversation we don't need to have right now for existing IRPs. It's a conversation we don't need to have right now, but I do want to have that conversation so that we all understand what that means.

Okay, so I've still got Amy. Amy, do you have a new hand?

AMY STATHOS: Sorry, no. Let me take it down.

BECKY BURR: Alright, so we're going to put that on as a to-do for the drafters. We then go down to the composition of the Independent Review Panel, and just recalling from the definition, the IRP panel is the three member decisional panel and this provides that the claimant and ICANN each select one panelist from the Standing Panel and the two panelists select the third panel. It does provide that if a Standing Panel is not in place or if resource constraints on the Standing Panel are such that there is no

availability, then ICANN and the claimant can select panelists from outside the Standing Panel. And I think that's something we do need to provide for in periods where there's a lot of call on the IRP process.

This provides that if the two party's selected panelists can't agree on the third panelist there will – which I assume are the ICDR rules – apply to the selection of a third party, and if a panelist resigns or is incapable of performing its duties or removed, then a substitute arbitrator shall be appointed pursuant to the provisions of these updated procedures.

Can I ask one of the drafters to explain the last couple of sentences in this section? Because there's reference out the rules and then there's an internal reference to the updated supplementary procedures, and I guess my question is, if the two panelists selected by the parties can't agree what happens? And if a panelist becomes unavailable mid-proceeding, what happens?

Ed or Amy or Holly? Can you help us on this?

EDWARD MCNICHOLAS: To jump into the fray here – the issue here is that there's going to be a reference out to the ICDR rules. The question is whether we want to proceed with the [fault] rule or not. I don't know that this has ever come up. Maybe perhaps Sam could –

BECKY BURR: Well it has, I think. It did come up, didn't it, in the dot connect Africa?

EDWARD MCNICHOLAS: Maybe Sam would be better to speak to this [for] experience.

BECKY BURR: Amy?

AMY STATHOS: Yes, well it came up in the sense that we actually had a panelist pass away, and so the party that appointed that panelist picked another panelist.

BECKY BURR: And is that essentially what's provided for in the ICDR rules?

AMY STATHOS: Frankly, I really can't say. I think it's currently in IRPs we agree on a process for selecting panelists which generally is each party will select a panelist and then there is various ways that we go about selecting the Chair. But generally, if either one of the two party selected panelists have to leave or resign or what have you, then the party who selected that panelist gets to pick the replacement.

BECKY BURR: And if the third panelist becomes unavailable then presumably the two existing panelists would do it. So essentially you just repeat the process for [inaudible]?

AMY STATHOS: Yes, I would say that that's probably the case. It's never happened with the Chair, but in that case it would probably be the manner in which this Chair was originally selected would be the same manner in which you would select that person's replacement.

BECKY BURR: Yes. Okay. That makes sense.

EDWARD MCNICHOLAS: That does follow through in the supplemental procedures where there's a particular article on replacement of an arbitrator. And that essentially forces a cross reference back to the initial procedures for appointment. The only catch there is that if there is a three person panel and one panelist disappears, the two panelists do have the ability to continue under their rules by themselves unless they determine they need a third panelist. And if they need a third panelist then they go back to the original procedure.

BECKY BURR: Okay, although I think that's a totally interesting way to proceed, and at this point we probably should look to the procedure that's already specified and in place here as opposed to introducing a new element of change which we may want to do at some later point.

So going down to the time for filing, we have, "A claimant shall file a written statement of a dispute with the ICDR no more than X days after a claimant becomes aware or reasonably should have been aware of the action or inaction."

I take it we did not have a specific time period recommendation in the report, David?

DAVID MCAULEY:

Thank you, Becky. To be honest, I don't remember if we had a specific one in the report. I was just going to make two comments. One is, I'm glad that this talks about days as opposed to business days because business days vary around the world. To me, it seems like 30, 45, or 60 would be the right number, so I would go for 45. But I particularly wanted to note my support for Footnote 14 which basically says, "Timeliness of a claim is dependent upon the payment of fees." I think that's extraordinarily important. And I'll put these comments in the chat as well. Thank you.

BECKY BURR:

Okay, thank you. Okay, so the time period was not mentioned in the proposal. David has put 45 days on the table. What's the current requirement, Amy or Sam?

SAMANTHA EISNER:

Amy, is it 30 or 60 days past the release of the minutes in the briefing material?

AMY STATHOS:

Yes, it's 30 days following the posting of the Board briefing materials, which includes the resolution and rationale of the decision.

BECKY BURR: Okay, and that must take into account all of the reconsideration and all of that stuff, is that the notion?

AMY STATHOS: It depends on what the basis for the claim is, right? So if the challenge is, let's say, a BGC decision on reconsideration it would be when the minutes of the BGC meeting are posted, because typically actually the full determination of the BGC is posted long before the minutes are. That's what encompasses the rationale. So we do wait for the minutes, although from a BGC decision on reconsideration it's generally posted within a few days after the decision.

BECKY BURR: Okay. So David has said 45 or 60 days. Other views on that and, Robin, I'm thinking maybe you can help refresh us on the timing discussions with respect to reconsideration, because I know that was part of the work that you did in terms of the timing issues.

Robin's going to type her answer.

Okay, shall we [try] a straw man of 45 days in here, so Sam was recalling 30 days increased from 15. So there was a concern about shortness going of 45 days up from 30 would be consistent with that. Okay. Obviously, we're not making any final decisions but we suggest 45 days straw man in here. Okay.

Next we go to the conduct of the Independent Review. And this actually has some substantive issues that we need to discuss.

“The panel would conduct its meetings by electronic or telephonic means unless the IRP panel its discretion determine that other means would in unusual circumstances further the purposes of the IRP.”

So this somewhat softens the language of the existing supplemental rules which refers to the hearing from extraordinary. This provides a greater degree of deference to the panelists in seeking to further the purposes of the IRP, so it goes back to fundamental principles.

But it still says basically, we want this to be as efficient as possible, and so electronic or telephonic proceedings are really what we would like to look for.

And then it goes on to say, “In the unusual circumstances that an in-person hearing is deemed by the panelists to further the purposes of the IRP, all witness statements would be submitted in writing in advance and telephonic hearings would be subject to the same limitations which is to say that witness statements would be provided in advance and the panel may deem that in-person or electronic testimony is necessary to further the purposes of the IRP.”

This reflects what I thought was the sense of the group when we talked about this the other day. David, you’re asking is there any way to put a high hurdle on a panel calling for live testimony. I think that the language has in here been a fairly high hurdle, referring to it as an extraordinary event. But in some cases the panel themselves have said

essentially, we need to be able to determine what kind of testimony is necessary to do this.

I agree if it's being abused that's a problem here, but let me just say there's a clear debate to be had on this point which is, do we as a group want to say, no – live hearings should have to pass a very, very high hurdle, or do we want to say – the panelists, that while we prefer electronic or telephonic means of conducting this, if the IRP panel determined that in-person hearings, for example, would serve the purposes of the IRP they should do so. I think that's a real question that if we haven't – and I thought we had settled on a more deferential approach – but we may not have. Sam?

SAMANTHA EISNER:

As Becky would know, in the back and forth between the firms as we were looking at this language, ICANN had language that was that you can see was struck out and then other language was recommended by Sidley on this.

This is one of those areas that, clearly this is an item that the IOT can further discuss and should further discuss the scope of discovery and the limitations that we would wish to have put on the panels relating to discovery is really one of the most important aspects I think that this group can face. Because if you look at the purposes of the IRP, it includes items of efficiency which go not only to time but also to cost. And so within ICANN we have experience with panels even when they have a clear prohibition against live witness testimony and in-person hearings, have proceeded in that manner. And we also know from

experience that when IRPs are taken to an in-person hearing that the costs involved in those are exponential.

So there are many different factors that I think we need to consider and maybe provide more guidance to the panels if we were to include some other deferential language. So if we look at this as an iterative document, we would propose from the ICANN side that we start off with more restrictive language that better reflects the status quo of how these proceed so that we can get to a point where we have some clearer guidance of when we expect that deference to be exercised and the types of situations that the panel should consider, including things like cost, time, and those sorts of things that would further the other purposes of the IRP.

BECKY BURR: Okay. Ed?

EDWARD MCNICHOLAS: Just to speak about the proposed draft here. The mechanisms here would be to default to having the very efficient hearings that we have today, but then to provide latitude for the panelists and their discretion to, if they think in a particular case that the purposes of the IRP require further in-person or live testimony, to allow them that flexibility there. Obviously, the whole process depends upon the reasonable exercise of discretion by the IRP panelists, and we could alter that over time if there were abuse or it was becoming too expensive.

There is an inherent restriction in this draft with regard to the purposes of the IRP which speak to the way in which the community, through the proposal and then in the Bylaws, through that whole process articulated what they wanted the IRP to do. And so those constitutional terms about what the purpose of the IRP would do would be something that the panelists would have to consider their discretion to be guided by and one would hope over time that there would be a development of a common law of when circumstances were sufficiently exceptional as to allow for in-person or live testimony. One would think that would only be in circumstances where the panelists thought it was important to judge the credibility of witnesses or felt that a interactive form would be more conducive to understanding the dispute.

BECKY BURR:

Amy?

AMY STATHOS:

I just wanted to come in and again talk about the fact that I think we do need to discuss this more, and changing it now without that further discussion could be difficult. As Sam had said, in terms of the efficiencies and the accessibility, one of the issues that we face is with cost it's been almost an order of magnitude more when we've had live testimony at the hearings where we've had that in two circumstances. One, Becky, that you'll recall in the ICM Registry matter and then with the DCA matter. And I just think that that's something that we need to consider quite strongly.

I'm not sure that even if we have some language in here that allows for the discretion of the panel it's sufficiently restrictive just having the words "unusual circumstances" may not cover it. And if we do need to reflect what the community was talking about, I think we would need to add more language in here so that the panel does actually consider what the community was talking about in terms of accessibility and affordability of the process. Because I don't think that would be sufficiently covered in what we have now for the panel to actually consider that.

BECKY BURR: I just want to clarify this. Does the current language include, "In the extraordinary event that an in-person hearing is deemed necessary by the panel presiding over the IRP, then the in-person hearing shall be limited to argument only." Is that the current language?

AMY STATHOS: Yes.

BECKY BURR: Okay, so the current language does provide latitude for the panel to require an in-person hearing as an extraordinary event.

AMY STATHOS: Right. But with no witness testimony.

BECKY BARR: Oh, to argument only. But in fact, in those two cases that you're referring to the panel basically said, "We want a witness here. We want witness."

AMY STATHOS: No.

BECKY BARR: One thing that I'm trying to –

AMY STATHOS: Let me clarify. So when the ICM matter was on, that limitation was not in here. That limitation was placed. That limitation meaning no witness testimony at hearing. That was added by the experts in 2013 when the expert group looked at the procedures and made some changes to the Bylaws relating to IRP. And so it was only the DCA panel that heard witness testimony that did so contrary to the Bylaws.

BECKY BARR: Okay. So the DCA panel basically said, "We believe that in order to do this, notwithstanding the prohibition on witnesses, we're going to hear witnesses."

So we're going to come back and we're going to talk about this again next week. I think that this is something that we should all sort of reflect on and maybe have some discussion on the list over the course of the week on it and then come back to this so that makes sense for people.

Okay. So this is still very much a discussion point and we hear the concerns about sort of what the status quo and what changing it does with respect to accessibility and cost on the one hand and also then just the interests of making sure that the purposes of the IRP are fully served by those rules. So that's on our list for further discussion both over the course of the week and at our next call.

Written statements is pretty straightforward. I'm just trying to look at a bunch of provisions. Going down to Section 7, consolidation, intervention and joinder. There's no existing supplemental rule for consolidation, intervention and joinder. But we did in the CCWG proposal talk about making sure that this would be available.

So if I could ask one of the drafters. I see David. I'm sorry, your hand's up.

DAVID MCAULEY:

Thanks Becky. I was just going to say about this paragraph that I think it's a good idea to give the panel some discretion in this area. But I also think we might want to look for an objective cutoff time because once evidence starts coming in, it may be unfair, it might be confusing to have people joining in after a certain position. And also on consolidation, I wanted to add that there ought to be a cumulative page total so that if there's one party on one side and a number of parties on the other, the one can't be sort of overcome by briefs from the multiple side party. But I'll put these comments in chat. Thank you.

BECKY BURR:

Okay. Thank you. So if I could just ask one of the drafters to sort of walk us through it. I mean, as I read it, it's basically saying that a procedures officer would be appointed from the standing panel – so that's from the larger panel – to consider requests for consolidation, intervention and joinder.

And that consolidation, intervention and joinder would be allowed at the discretion of the procedures officer and that consolidation would be appropriate when the procedures officer concludes that there's sufficient common nucleus of operative facts that the joint resolutions of the dispute would foster justice and an efficient resolution and any person or if they qualified to be a claimant. So anybody who would be materially affected by the action or inaction of ICANN would be permitted to intervene with the permission of the procedures officer.

And I think that this is something that ICANN has had some experience on as well. So Amy, do you want to offer any thoughts on this section?

AMY STATHOS:

Hi. Yeah, sorry. In terms of the consolidation and joinder issues, the experience that we've had relate a couple different matters. And both of these relate to the New gTLD Program issues. One is where one party wanted to file an IRP on a couple of different strings and so while the decisions were not the same, they just filed on the same string so it was on both strings. So it was on different issues but the same party.

And then in another matter, we had a situation where it happened to be the same lawyer that represented a couple of different parties and they wanted to consolidate the cases and we had no objection nor did the

panel. So those are the nature of the experiences we've had where there's been a consolidation, if you will, of different issues versus different parties.

BECKY BURR:

That's interesting. And what about interveners? Because I think that was something that we had talked about as it was important to make sure that all of the relevant parties were at the table.

AMY STATHOS:

Right. So we have had a situation where particularly with the New gTLD Program, in some instances, while we are limited to the standard of whether the Board did something that violates its Bylaws or Articles of Incorporation, many of the arguments have related to actually other conduct or something along those lines. And when you're at this issue, at least with the new G, generally it's because there was contention or an objection and somebody won and somebody lost. And neither of those parties was ICANN. Or somebody is being put on hold because the IRP is moving forward.

So we have had some instances where the parties who are either on hold or whose application is being challenged through the IRP have wanted to even present briefing or something along those lines and participate. And I think the one instance where the actual request was given up to the panel, the panel declined to allow that party to participate.

BECKY BURR: And did the party decline for equity purposes or because they didn't have a mechanism for doing it that we would provide by this?

AMY STATHOS: I think in that instance, it was the panel who had said what we're really talking about Board conduct, so your input would not necessarily be relevant. But there might have been a flavor of all of those things that you mentioned. I can't off the top of my head remember what the procedural order said about it. I can certainly go back and look though.

BECKY BURR: But it would be helpful, I take it, to affirmatively contemplate a situation where sort of one party is making a claim about actions and violations of the Bylaws but another party is directly affected as well even if on the other side.

AMY STATHOS: Is that a question to me? I'm sorry.

BECKY BURR: Yeah, that was sort of a question but I think it was sort of a reiteration of what I heard you say. You said also that it might be helpful to contemplate on this situation.

So going to David's point, I think what he's talking about in terms of consolidation and joinder and intervention and the like, that courts commonly have rules particularly if it's not an intervener on the side,

but where sort of the parties are coming together with somewhat similar claims, that it doesn't announce a sort of doubling the page limits, that a choice to come in does have effects on limiting and allocating page limits across the group of claimants so that it's not a mechanism for just doubling the page limits and permitting greater argumentation for the sake of that. And that, I definitely understand how that works.

We have some page limits here, but I think for this one, if we could ask the drafters to sort of put their heads together and think about what would be appropriate here and come back with a proposal, that would probably be the best way to proceed.

Okay. Going down to eight, discovery methods. I think that there's no existing supplemental rule on discovery. And this is a really complicated and important issue because it really does go to efficiency, accessibility, cost on the one hand and due process on the other. And it's critical that we really draw a balance here with respect to what we come up with.

I think, Sam, your hand's up if you would like to talk to this issue, speak to this issue.

SAMANTHA EISNER:

Thanks. Becky, along those lines, I think that the discovery issue and this is a place where there's a large change from the status quo in the existing IRP procedure and this is, again, a place where I think we all agree that the IOT has a lot of work ahead of it in terms of what the ultimate discovery procedures around the six month IRP process is supposed to look like and would best meet the needs of the IRP and

also, again, measured against that request for the six month timeframe and the efficiency and the burden on the parties who are participating.

So this is another place where in the drafting, there was probably a fairly, this is one of the places where, like the hearing issue, there were the most apparent differences the ICANN Team working on this and the Sidley Team that we still have continuing concerns about suggestions of [inaudible] which is depositions, interrogatories and requests for production or admission will generally not be permitted unless the IRP panel determines that discovery is necessary to further the purposes of the IRP.

The granting of discretion, again here, without a focus on, as David suggested, the existence of documents that were already available through the [inaudible] and as that process is being developed through the CCWG, the idea of depositions which can be very expensive, including a lot of attorney time and witness prep time and everything you need to get to there. And there's also no sort of limitation on depositions or interrogatories or requests for production here.

And so we do have a concern about starting off with a baseline that we haven't really discussed fully in terms of the types of guidance or limits that we might wish to put on the panel so I think that this is another place where we expect that there would be robust conversation within the IOT but for the initial set of supplementary procedures that we're hoping to get in place so that we can move forward and not have a time issue with the transition, is this really the right baseline to set in right now without further discussion?

BECKY BURR: Okay. Thank you, Sam. Ed?

EDWARD MCNICHOLAS: Yes. I just wanted to agree that there certainly, this is a time for discussion of this. The question about whether discovery would be allowed was put off during the proposal process in favor of discussing it now and it seems to be the appropriate time. The issue does come to where most discretion will be afforded to the panelist to adjust procedures in light of particular circumstances.

And so I would say that yes, the panelist would take account of all of the relevant facts and circumstances including whether documents were otherwise available, including the nature of the dispute, whether they thought... And the issue is here, the due process concern, is that if ICANN is in possession of documents that have not been turned over or otherwise made available, whether due process would require that the panelist have some ability to force those documents to be made available. Or likewise, if the claimant has documents that ICANN needs, there is no process otherwise by which ICANN can force the claimant to produce documents, documents which may well undercut their claim. And so the suggestion here would be to have some sort of discretion.

Now that you could be by having a requirement that each party produce documents that they have that are material so there's not a discovery process in which there's a request for the sun, the moon, the stars, people say I give you nothing, and there's a fight, something in the middle which would make the American process so expensive. It could

be simply a requirement on each side that they produce to be policed by the panelist that there's abuse on either side. And so we see a little bit of that on the U.S. rules on disclosure requirements.

The other one would be to have something that would give the panelist discretion to order whatever level of discovery the parties wanted in light of the dispute. That would be significant because I don't think it will affect accessibility at all because if you are a small party who does not have resources, you're not going to be the one asking for discovery but if it's a large commercial party in a complex dispute that they have with ICANN, this would free the panelist up to have that procedure available to them so that they could have the ICANN, the IRP procedures, expand or contract as necessary in light of those particular facts and circumstances.

So that's, I think, the range of debate and I certainly agree with Sam that there's a lot of debate to be had here.

BECKY BURR:

Okay. I think, again, I completely agree. This is a critically important discussion and it has significant implications on all sides. I propose that we have discussions about this on the e-mail list over the course of the week, that people consider these issues and that we talk about and I think a significant amount of time on our next call will need to be devoted to the questions that we've identified regarding the conduct of the proceeding hearings and discovery. So we're going to, just in the interest of getting this issue on the table but then moving us forward for

a more thoughtful discussion over the course of the week and then following up next week.

Okay. Going to summary dismissal, this is consistent with the current state of affairs and also the recommendations that there must be a process for quickly dismissing claims that are abusive and here we say that don't demonstrate that they've been materially affected by the dispute which is the standing requirement that we put in or that the claim lacks substance or is frivolous or vexatious.

So that, I think, is consistent with the IRP, with the recommendations in the proposal, although I think that there was some discussion about the term "vexatious." Robin, do you recall that coming up in the context of reconsideration requests? David McAuley finds vexatious to be vexing. I agree.

Robin? Okay. I think that Robin is correct, that it was lacks substance or is frivolous. I think let's make sure we go back and check that for next time.

We're in the sort of nine minutes to the top of the hour and I know this has been a long call so I want to just make sure that we end on time.

So let me just take a look at the interim measures of protection which is the next one. I believe that this language is quite closely modeled on the ICANN Bylaws. Amy or Sam or Holly or Ed, correct me if I'm wrong, but please review those so we can go over them. And that the standard that has been put in here is consistent with the language in the Bylaws and the recommendation.

So the next item is the standard of review, and again, I believe this language is taken directly from the ICANN Bylaws. But please, do read this carefully for our next call.

The IRP panel decisions language is likewise consistent with our [inaudible] Bylaws. The form and effect of an IRP is either essentially just documentation but then reflects the language in the language that's in the Bylaws themselves.

A new item that we need to discuss at greater length next week is the appeal of an IRP panel decision although I believe that this is drafted based on the final proposal and needs some careful consideration.

So just in order to permit us to get through and then costs we need to look at. So we haven't gotten quite all the way through this document, but I hope that what we have done has helped people to sort of understand what it is and to lay out what I think are definitely the issues that are going to require careful thought on the part of the IRT.

So over the course of the next week, I'll try to kick off discussions on both the conduct of the proceeding and the discovery issues. I hope everybody will take the opportunity to carefully read this document and then we'll get together next week for another in-depth discussion of this.

And I just want to close by thanking all of the attorneys, Amy and Sam and Holly and Ed and their team, who really worked hard to get us a document that was substantive and that we could really work through in a detailed way.

So with that, I do plan a call next week and I'm hoping that we will be in a kind of weekly call rhythm now that we've gotten some documentation here. And is there any other business, any other comments?

Okay. Yes, so David mentions we are in a running up to August 12th kind of deadline here so we know that that's a day on which ICANN needs to report back to the commerce department so we want to make sure that we are not holding up that progress report.

So thanks to everybody and thanks to hanging in there with us while we worked out a good mechanism for getting this in front of people and I will speak with you on the list and next week in-person. Thanks, everybody.

UNIDENTIFIED MALE: Thanks.

UNIDENTIFIED FEMALE: Thank you.

[END OF TRANSCRIPTION]

EXHIBIT 228

Updated Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process¹

Revised as of []

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¹ CONTEXTUAL NOTE: These Supplemental Procedures are intended to be supplemental to the ICDR RULES. Therefore, when the ICDR RULES appropriately address an item, there is no need to re-state that Rule within the Supplemental Procedures. The IOT, through its work, may identify additional places where variance from the ICDR RULES is recommended, and that would result in addition or modification to the Supplemental Procedures.

These updated procedures supplement the International Centre for Dispute ~~Resolution's~~ ~~International Arbitration Rules~~ Resolution's international arbitration rules in accordance with the independent review ~~procedures~~ process set forth in Article IV, Section ~~3 of the ICANN~~ ~~Bylaws~~ 4.3² of ICANN's Bylaws. These procedures apply to all independent review process proceedings filed after [insert effective date of the Bylaws].

1. ~~4.~~ **Definitions**

In these Supplementary Procedures:

~~DECLARATION refers to the decisions/opinions of the IRP PANEL.~~

A CLAIMANT is any legal or natural person, group, or entity including, but not limited to the Empowered Community, a Supporting Organization, or an Advisory Committee, that has been materially affected by a Dispute.³ To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation. COVERED ACTIONS are any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a DISPUTE.⁴

DISPUTES⁵ are defined as:

(A) Claims that COVERED ACTIONS constituted an action or inaction that violated ICANN's Articles of Incorporation or Bylaws, including, but not limited to, any action or inaction that:

- 1) exceeded the scope of the Mission;
- 2) resulted from action taken in response to advice or input from any Advisory Committee or Supporting Organization that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
- 3) resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;

² Formatting updated to conform with 2016 ICANN Bylaws.

³ 2016 ICANN Bylaws Article IV, Section 4.3(b)(i).

⁴ 2016 ICANN Bylaws Article IV, Section 4.3 (b)(ii).

⁵ Consideration should be given to whether the definitions of COVERED ACTIONS and DISPUTES are coterminous and/or circular.

- 4) resulted from a response to a DIDP (as defined in Section 22.7(d)) request that is claimed to be inconsistent with the Articles of Incorporation or Bylaws; or
- 5) arose from claims involving rights of the EC as set forth in the Articles of Incorporation or Bylaws;

(B) Claims that ICANN, the Board, individual Directors, Officers or Staff members have not enforced ICANN’s contractual rights with respect to the IANA Naming Function Contract; and

(C) Claims regarding the Post-Transition IANA entity service complaints by direct customers of the IANA naming functions that are not resolved through mediation.⁶

EMERGENCY PANELIST refers to a single member of the STANDING PANEL designated to adjudicate requests for interim relief⁷ or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for interim relief.

~~ICANN~~IANA refers to the Internet ~~Corporation for~~ Assigned Names and Numbers Authority.

ICDR refers to the International Centre for Dispute Resolution, which has been designated and approved by ~~ICANN’s~~ICANN’s Board of Directors as the Independent Review Panel Provider (IRPP) under Article IV, Section ~~3 of ICANN’s~~4.3 of ICANN’s Bylaws.

ICANN refers to the Internet Corporation for Assigned Names and Numbers.

INDEPENDENT REVIEW PROCESS or IRP refers to the procedure that takes place upon the ~~filing of a request to review ICANN Board actions or inactions alleged to be inconsistent with ICANN’s Bylaws or Articles of Incorporation~~Claimant’s filing of a written statement of a DISPUTE with the ICDR.⁸

⁶ 2016 ICANN Bylaws, Article IV, Section 4.3 (b)(iii).

⁷ 2016 ICANN Bylaws, Article IV, Section 4.3 (p).

⁸ 2016 ICANN Bylaws, Article IV, Section 4.3 (d).

DRAFT as of 26 July 2016 – Updates to ICDR Supplementary Procedures

~~INTERNATIONAL DISPUTE RESOLUTION PROCEDURES OR RULES refer to the ICDR's International Arbitration Rules that will govern the process in combination with these Supplementary Procedures.~~

~~IRP PANEL refers to the neutral(s) appointed to decide the issue(s) presented. The IRP will be comprised of members of a standing panel identified in coordination with the ICDR. Certain decisions of the IRP are subject to review or input of the Chair of the standing panel. In the event that an omnibus standing panel: (i) is not in place when an IRP PANEL must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member panel comprised in accordance with the rules of the ICDR; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the ICDR shall identify and appoint one or more panelists, as required, from outside the omnibus standing panel to augment the panel members for that proceeding.~~

IRP PANEL refers to the panel of three neutral members appointed to decide the relevant DISPUTE.⁹

IRP PANEL DECISION refers to the final written decision of the IRP PANEL that reflects the reasoned analysis of how the DISPUTE was resolved in compliance with ICANN's Articles and Bylaws.¹⁰

ICDR RULES refers to the ICDR's rules in effect at the time the relevant request for independent review is submitted.¹¹

PROCEDURES OFFICER refers to a single member of the STANDING PANEL designated to adjudicate requests for consolidation, intervention, and joinder, or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to its International Arbitration Rules relating to appointment of panelists for interim relief.

PURPOSES OF THE IRP are to hear and resolve Disputes for the reasons specified in the ICANN Bylaws, Article IV, Section 4.3(a).

STANDING PANEL refers to an omnibus standing panel of at least seven members from which three-member IRP PANELS are selected to hear and resolve DISPUTES consistent with the purposes of the IRP.¹²

⁹ 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(i)

¹⁰ The 2016 ICANN Bylaws refer to an "IRP Panel decision" rather than a "declaration" (although the 2016 ICANN Bylaws state that an IRP Panel will "declare" certain findings). See 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(v) & 2016 ICANN Bylaws, Article IV, Section 4.3(o)(iii).

¹¹ Recommended inclusion to clarify what happens to already pending IRPs when an updated version of the Supplemental Procedures goes into force, with an ongoing IRP filed under different standards and processes.

2. ~~2.~~ Scope

The ICDR will apply these Updated Supplementary Procedures, in addition to the ~~INTERNATIONAL DISPUTE RESOLUTION PROCEDURES~~ ICDR RULES, in all cases submitted to the ICDR in connection with ~~the~~ Article IV, Section ~~34.3(4i)~~¹³ of the ICANN Bylaws after the date these Supplementary Procedures go into effect. In the event there is any inconsistency between these Updated Supplementary Procedures and the RULES, these Updated Supplementary Procedures will govern. These Updated Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is received by the ICDR. IRPs commenced prior to the adoption of these Updated Supplementary Procedures shall be governed by the Supplementary Procedures in effect at the time such IRPs were commenced. In the event that these Updated Supplementary Procedures are further amended to provide for modified procedural rules, such procedural amendments will apply to any IRPs pending at the time of such amendments. Any party to a then-pending IRP may challenge the application of an amendment to these Updated Supplementary Procedures if that party contends that the amendment would affect the party's substantive rights in the IRP. Such challenges are to be resolved by the IRP Panel in the exercise of its discretion.¹⁴

3. ~~3.~~ Number Composition of Independent Review ~~Panelists~~ Panel

The IRP PANEL will comprise three panelists selected from the STANDING PANEL, unless a STANDING PANEL is not in place when the IRP is initiated.¹⁵ The CLAIMANT and ICANN shall each select one panelist from the STANDING PANEL, and the two panelists selected by the parties will select the third panelist from the STANDING PANEL. In the event that a STANDING PANEL is not in place when the relevant IRP is initiated or is in place but does not have capacity due to other IRP commitments or the requisite diversity of skill and experience needed for a particular

¹² 2016 ICANN Bylaws, Article IV, Section 4.3 (j)(i).

¹³ 2016 ICANN Bylaws, Article IV, Section 4.3 (m).

¹⁴ We need to determine the impact of this language with respect to how amendments to substantive and procedural rules are applied to then-pending IRPs.

¹⁵ 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(i). There has been discussion in the IOT re: whether it makes sense to require a disclosure form to be signed (1) when a person is appointed to the standing panel; AND (2) when that person is selected for a particular IRP. For the IOT's consideration is the following proposed language: "A STANDING PANEL member's appointment will not take effect unless and until the STANDING PANEL member signs a Notice of STANDING PANEL Appointment affirming that the member is available to serve and is independent and impartial. An IRP PANEL member's appointment will not take effect unless and until the IRP PANEL member signs a Notice of IRP PANEL Appointment affirming that the member is available to serve and is independent and impartial."

IRP proceeding, the CLAIMANT and ICANN shall each select a qualified panelist from outside the STANDING PANEL, and the two panelists selected by the parties shall select the third panelist. In the event that the two party-selected panelists cannot agree on the third panelist, the RULES shall apply to selection of the third panelist.¹⁶ In the event that a panelist resigns, is incapable of performing the duties of a panelist, or is removed and the position becomes vacant, a substitute arbitrator shall be appointed pursuant to the provisions of this Section [3] of these Updated Supplementary Procedures.

4. Time for Filing

A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than [45]¹⁷ days after a CLAIMANT becomes aware or reasonably should have been aware of the action or inaction giving rise to the DISPUTE.¹⁸

~~Either party may elect that the request for INDEPENDENT REVIEW be considered by a three-member panel: the parties' election will be taken into consideration by the Chair of the standing panel convened for the IRP, who will make a final determination whether the matter is better suited for a one- or three-member panel.~~

5. ~~4.~~ Conduct of the Independent Review

The IRP ~~Panel~~PANEL should conduct its proceedings by electronic ~~means to the extent feasible. Where necessary, the IRP Panel may conduct telephone conferences or~~telephonic means unless the IRP PANEL in its discretion determines other means would, in unusual circumstances, further the PURPOSES OF THE IRP.¹⁹

In the ~~extraordinary event that~~unusual circumstance that the IRP PANEL deems an in-person hearing ~~is deemed necessary by the panel presiding over the IRP proceeding (in coordination with the Chair of the standing panel convened for the IRP, or the ICDR in the event the standing panel is not yet convened), the in-person hearing shall be limited~~

¹⁶ 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(ii).

¹⁷ We note that the February 2016 Bylaws provide for a 30-day period in which to file a request for independent review. See ICANN Bylaws, Art. IV § 3 ¶ 3 (as amended 11 February 2016).

¹⁸ As an item for consideration by the IOT, would be to include language such as: “In order for an IRP to be deemed to have been filed timely, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.” The IRP process has previously been silent on the issue of the relationship between filing a notice and completing the fee payment, and including this could result in more predictability of the timing.

¹⁹ ICANN NOTE: the language proposed by CCWG Counsel would modify the status quo and does not appear to be contemplated in the Bylaws or CCWG Proposal. The IOT could consider further guidance on this for further updates to the Supplementary Procedures, but the suggested text (proposed for deletion) is a significant variation from current practice.

~~to argument only;~~to further the PURPOSES OF THE IRP, it is generally expected that all evidence, including witness statements, must be submitted in writing in advance without any live witness testimony. Telephonic hearings are subject to the same limitation ~~as to live witnesses.~~²⁰ The IRP Panel may deem in-person or electronic testimony to be necessary to further the PURPOSES OF THE IRP.

The IRP PANEL retains responsibility for determining the timetable for the IRP proceeding.²¹ Any violation of the IRP PANEL's timetable may result in the assessment of costs pursuant to Section 10 of these Updated Supplementary Procedures.²²

6. ~~5-~~Written Statements

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font.²³ All necessary ~~evidence to demonstrate the requestor's claims that ICANN violated its Bylaws or Articles of Incorporation~~and available evidence in support of the Claimant's Claim(s) should be part of the submission.²⁴ Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence.²⁵ The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.²⁶

7. Consolidation, Intervention, and Joinder²⁷

[At the request of a party, a PROCEDURES OFFICER may be appointed from the STANDING PANEL to consider requests for consolidation, intervention, and joinder. Requests for consolidation, intervention, and joinder are committed to the reasonable

²⁰ This is an issue for consideration within the IOT. This provision maintains the status quo until there is an agreed recommendation to change.

²¹ 2016 ICANN Bylaws, Section 4.3(o)(vi).

²² This is an issue for consideration within the IOT. This provision maintains the status quo until there is an agreed recommendation to change.

²³ This is an issue for consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

²⁴ Language modified to reflect broadened scope of IRPs. See 2016 ICANN Bylaws, Article IV, Section 4.3 (i).

²⁵ This is an issue for consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

²⁶ 2016 ICANN Bylaws, Article IV, Section 4.3 (o)(ii).

²⁷ There is no existing Supplemental Rule. The CCWG Final Proposal and 2016 ICANN Bylaws recommend that these issue be considered by IOT.

discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for interim relief.

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the permission of the PROCEDURES OFFICER. A CLAIMANT may join in a single written statement of a DISPUTE, as independent or alternative claims, as many claims as it has that give rise to a DISPUTE.]²⁸

In the event that requests for consolidation, intervention, and joinder are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP Panel in its discretion.

=

8. Discovery Methods²⁹

The IRP PANEL may allow a Party's request for discovery if it deems such discovery to be necessary to further the PURPOSES OF THE IRP.

Depositions, interrogatories, and requests for production or admission will generally not be permitted unless the IRP PANEL determines that discovery is necessary to further the PURPOSES OF THE IRP.³⁰

In the event that a party submits what the IRP PANEL deems to be an expert opinion, such opinion must be provided in writing and the other party must have a right of reply to such an opinion with an expert opinion of its own.^{31]}

²⁸ Pursuant to the 2016 ICANN Bylaws, Article IV, Section 4.3(n) (Rules of Procedure), these Supplementary Rules will govern the format of proceedings. This is an issue for consideration within the IOT. 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(B).

²⁹ There is no existing Supplemental Rule. The CCWG Final Proposal and 2016 ICANN Bylaws recommend that discovery methods be considered by IOT. For example, consideration should be given to whether to require each party to provide the other party with all reasonably available documents in its possession, custody, or control that relate materially to the Dispute. Such mandatory disclosure obligations can further procedural fairness without the economic burdens of full discovery.

³⁰ The independent discretion of the panel to require discovery is consistent with the Purposes of the IRP.

9. ~~6.~~ Summary Dismissal

An IRP PANEL may summarily dismiss any request for INDEPENDENT REVIEW where the ~~requestor~~Claimant³² has not demonstrated that it ~~meets the standing requirements for initiating the INDEPENDENT REVIEW.~~has been materially affected by a DISPUTE. To be materially affected by a DISPUTE, a Claimant must suffer an injury or harm that is directly and casually connected to the alleged violation.³³

~~Summary dismissal of a request for INDEPENDENT REVIEW is also appropriate where a prior IRP on the same issue has concluded through DECLARATION.~~

An IRP PANEL may also summarily dismiss a ~~querulous, frivolous or vexatious~~ request for INDEPENDENT REVIEW, that lacks substance or is frivolous or vexatious.³⁴

10. ~~7.~~ Interim Measures of Protection

~~An IRP PANEL may recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the IRP declaration. Where the IRP PANEL is not yet comprised, the Chair of the standing panel may provide a recommendation on the stay of any action or decision.—~~

A Claimant may request interim relief from the IRP PANEL, or if an IRP PANEL is not yet in place, from the STANDING PANEL. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN action or decision in order to maintain the status quo until such time as the opinion of the IRP PANEL is considered by ICANN as described in ICANN Bylaws, Article IV, Section 4.3(o)(iv).³⁵

An EMERGENCY PANELIST shall be selected from the STANDING PANEL to adjudicate requests for interim relief. In the event that no STANDING PANEL is in place when an EMERGENCY PANELIST must be selected, a panelist may be appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for interim

³¹ Pursuant to the 2016 ICANN Bylaws, Article IV, Section 4.3(n) (Rules of Procedure), these Supplementary Rules will govern the format of proceedings. This is an issue for consideration within the IOT. 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(D).

³² 2016 ICANN Bylaws, Article IV, Section 4.3(b)(i). Note that the term “requestor” be replaced with “Claimant” for consistency with IRP terminology.

³³ 2016 ICANN Bylaws, Article IV, Section 4.3 (o)(i).

³⁴ 2016 ICANN Bylaws, Article IV, Section 4.3 (o)(i).

³⁵ 2016 ICANN Bylaws, Article IV, Section 4.3(p).

relief. Interim relief may only be provided if the EMERGENCY PANELIST determines that the Claimant has established all of the following factors:

(i) A harm for which there will be no adequate remedy in the absence of such relief;

(ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and

(iii) A balance of hardships tipping decidedly toward the party seeking relief.³⁶

11. 8-Standard of Review

~~The IRP is subject to the following standard of review: (i) did the ICANN Board act without conflict of interest in taking its decision; (ii) did the ICANN Board exercise due diligence and care in having sufficient facts in front of them; (iii) did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?~~

~~If a requestor demonstrates that the ICANN Board did not make a reasonable inquiry to determine it had sufficient facts available, ICANN Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the ICANN Board to be in the best interests of the company, after taking account of the Internet community and the global public interest, the requestor will have established proper grounds for review.~~

Each IRP PANEL shall conduct an objective, de novo examination of the DISPUTE.

- a. With respect to COVERED ACTIONS, the IRP PANEL shall make findings of fact to determine whether the COVERED ACTION constituted an action or inaction that violated ICANN'S Articles or Bylaws.
- b. All DISPUTES shall be decided in compliance with ICANN'S Articles and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.
- c. For Claims arising out of the Board's exercise of its fiduciary duties, the IRP PANEL shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment.

³⁶ 2016 ICANN Bylaws, Article IV, Section 4.3(p).

- d. With respect to ~~claims that ICANN~~ has not enforced its contractual rights with respect to the IANA Naming Function Contract, the standard of review shall be whether there was a material breach of ICANN’s obligations under the IANA Naming Function Contract, where the alleged breach has resulted in material harm to the Claimant.
- e. IRPs initiated through the mechanism contemplated at Article IV, Section 4.3(a)(iv) of ICANN’s Bylaws shall be subject to a separate standard of review as defined in the IANA Naming Function Contract.³⁷

12. IRP Panel Decisions³⁸

9. Declarations

~~Where there is a three-member IRP PANEL, any DECLARATION of the IRP PANEL shall by DECISIONS shall be~~ made by a simple majority of the IRP PANEL ~~members~~³⁹. If any IRP PANEL member fails to sign the DECLARATION, ~~it shall be accompanied by a~~ IRP PANEL DECISION, the IRP PANEL member shall endeavor to provide a written statement of the reason for the absence of such signature.⁴⁰

13. 10. Form and Effect of an IRP DeclarationPANEL DECISION

- a. ~~DECLARATIONS~~ IRP PANEL DECISIONS shall be made in writing, promptly by the IRP PANEL, based on the documentation, supporting materials and arguments submitted by the parties.⁴¹
- b. The ~~DECLARATION~~ IRP PANEL DECISION shall specifically designate the prevailing party ~~as to each Claim.~~⁴²

~~c. A DECLARATION may be made public only with the consent of all parties or as required by law. Subject to the redaction of Confidential information, or unforeseen~~

³⁷ 2016 ICANN Bylaws, Article IV, Section 4.3 (i).

³⁸ The 2016 ICANN Bylaws refer to an “IRP Panel decision” rather than a “declaration” (although, to be sure, the 2016 ICANN Bylaws state that an IRP Panel will “declare” certain findings.) See 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(v) & 2016 ICANN Bylaws, Article IV, Section 4.3(o)(iii).

³⁹ 2016 ICANN Bylaws, Article IV, Section 4.3(k)(v).

⁴⁰ This is an issue for consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

⁴¹ 2016 ICANN Bylaws, Article IV, Sections (s), (t). The 2016 ICANN Bylaws require the IRP Panel to “issu[e] an early scheduling order and its written decision no later than six months after the filing of the Claim, except as otherwise permitted under the Rules of Procedure.” This is an issue for consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon regarding timing.

⁴² 2016 ICANN Bylaws, Article IV, Section 4.3 (t).

~~circumstances, ICANN will consent to publication of a DECLARATION if the other party so request.~~

~~d. Copies of the DECLARATION shall be communicated to the parties by the ICDR.~~

c. Subject to Article IV, Section 4.3 of ICANN’s Bylaws, all IRP PANEL DECISIONS shall be made public, and shall reflect a well-reasoned application of how the DISPUTE was resolved in compliance with ICANN’s Articles and Bylaws, as understood in light of prior IRP PANEL DECISIONS decided under the same (or an equivalent prior) version of the provision of the Articles and Bylaws at issue, and norms of applicable law.

14. Appeal of IRP Panel Decisions⁴³

An IRP PANEL DECISION may be appealed to the full STANDING PANEL sitting en banc within 60 days of the issuance of such decision (excluding those members issuing the IRP PANEL DECISION). The en banc STANDING PANEL will review such appealed IRP PANEL DECISION based on a clear error of judgment or the application of an incorrect legal standard. The en banc STANDING PANEL may also resolve any disputes between panelists on an IRP PANEL or the PROCEDURES OFFICER with respect to consolidation of CLAIMS or intervention or joinder.

15. ~~11.~~ Costs

The IRP PANEL shall fix costs in its ~~DECLARATION. The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP PANEL may allocate up to half of the costs to the prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties’ positions and their contribution to the public interest.~~ IRP PANEL DECISION.⁴⁴ Except as otherwise provided in Article IV, Section 4.3(e)(ii) of ICANN’s Bylaws, each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, as defined in Article IV, Section 4.3(d) of ICANN’s Bylaws, including the costs of all legal counsel and technical experts.

⁴³ There is no existing Supplemental Rule. The following proposed text is for consideration by IoT. The proposed text was drafted based upon the CCWG’s Final Proposal, which provided that an en banc appeal be based on subparts (i) and (ii), below. Suggest using actual text from Annex 7, ¶ 16.

⁴⁴ This is an issue for consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

Except with respect to a Community IRP, the IRP PANEL may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.⁴⁵

~~In the event the Requestor has not availed itself, in good faith, of the cooperative engagement or conciliation process, and the requestor is not successful in the Independent Review, the IRPPANEL must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.~~

12. Emergency Measures of Protection

~~Article 37 of the RULES will not apply.~~

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⁴⁵ 2016 Bylaws, Article IV, Section 4.3(r).

Summary report:	
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Style name: Sidley Default	
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Original filename: 2013 ICDR Supplemental Procedures.docx	
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Add	307
Delete	126
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Move To	53
Table Insert	0
Table Delete	0
Table moves to	0
Table moves from	0
Embedded Graphics (Visio, ChemDraw, Images etc.)	0
Embedded Excel	0
Format changes	0
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EXHIBIT 229

Updated Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process¹

Revised as of [Day, Month], 2016

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These updated procedures supplement the International Centre for Dispute Resolution’s international arbitration rules in accordance with the independent review process set forth in Article IV, Section 4.3² of ICANN’s Bylaws. These procedures apply to all independent review process proceedings filed after [insert effective date of the Bylaws].

¹ CONTEXTUAL NOTE: These Supplemental Procedures are intended to supplement the ICDR RULES. Therefore, when the ICDR RULES appropriately address an item, there is no need to re-state that Rule within the Supplemental Procedures. The IOT, through its work, may identify additional places where variance from the ICDR RULES is recommended, and that would result in addition or modification to the Supplemental Procedures.

² Formatting has been updated to conform with the Bylaws approved by the ICANN Board of Directors on 27 May 2016 (hereafter the May 2016 ICANN Bylaws).

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1. Definitions

In these Updated Supplementary Procedures:

A CLAIMANT is any legal or natural person, group, or entity including, but not limited to the Empowered Community, a Supporting Organization, or an Advisory Committee, that has been materially affected by a Dispute.³ To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.

COVERED ACTIONS are any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a DISPUTE.⁴

DISPUTES are defined as:

(A) Claims that COVERED ACTIONS violated ICANN's Articles of Incorporation or Bylaws, including, but not limited to, any action or inaction that:

- 1) exceeded the scope of the Mission;
- 2) resulted from action taken in response to advice or input from any Advisory Committee or Supporting Organization that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
- 3) resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
- 4) resulted from a response to a DIDP (as defined in Section 22.7(d)) request that is claimed to be inconsistent with the Articles of Incorporation or Bylaws; or
- 5) arose from claims involving rights of the EC as set forth in the Articles of Incorporation or Bylaws;

³ May 2016 ICANN Bylaws Article IV, Section 4.3(b)(i).

⁴ May 2016 ICANN Bylaws Article IV, Section 4.3 (b)(ii).

(B) Claims that ICANN, the Board, individual Directors, Officers or Staff members have not enforced ICANN’s contractual rights with respect to the IANA Naming Function Contract; and

(C) Claims regarding the Post-Transition IANA entity service complaints by direct customers of the IANA naming functions that are not resolved through mediation.⁵

EMERGENCY PANELIST refers to a single member of the STANDING PANEL designated to adjudicate requests for interim relief⁶ or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for interim relief.

IANA refers to the Internet Assigned Numbers Authority.

ICDR refers to the International Centre for Dispute Resolution, which has been designated and approved by ICANN’s Board of Directors as the Independent Review Panel Provider (IRPP) under Article IV, Section 4.3 of ICANN’s Bylaws.

ICANN refers to the Internet Corporation for Assigned Names and Numbers.

INDEPENDENT REVIEW PROCESS or IRP refers to the procedure that takes place upon the Claimant’s filing of a written statement of a DISPUTE with the ICDR.⁷

IRP PANEL refers to the panel of three neutral members appointed to decide the relevant DISPUTE.⁸

IRP PANEL DECISION refers to the final written decision of the IRP PANEL that reflects the reasoned analysis of how the DISPUTE was resolved in compliance with ICANN’s Articles and Bylaws.⁹

⁵ May 2016 ICANN Bylaws, Article IV, Section 4.3 (b)(iii).

⁶ May 2016 ICANN Bylaws, Article IV, Section 4.3 (p).

⁷ May 2016 ICANN Bylaws, Article IV, Section 4.3 (d).

⁸ May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(i)

⁹ Change recommended for consistency with May 2016 ICANN Bylaws, which refer to an “IRP PANEL decision” rather than a “declaration” (although the same Bylaws state that an IRP PANEL will “declare” certain findings). *See* May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(v) & Section 4.3(o)(iii).

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ICDR RULES refers to the ICDR's rules in effect at the time the relevant request for independent review is submitted.¹⁰

PROCEDURES OFFICER refers to a single member of the STANDING PANEL designated to adjudicate requests for consolidation, intervention, and joinder, or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to its International Arbitration Rules relating to appointment of panelists for interim relief.

PURPOSES OF THE IRP are to hear and resolve Disputes for the reasons specified in the ICANN Bylaws, Article IV, Section 4.3(a).

STANDING PANEL refers to an omnibus standing panel of at least seven members from which three-member IRP PANELS are selected to hear and resolve DISPUTES consistent with the purposes of the IRP.¹¹

2. Scope

The ICDR¹² will apply these Updated Supplementary Procedures, in addition to the ICDR RULES, in all cases submitted to the ICDR in connection with Article IV, Section 4.3 of the ICANN Bylaws after the date these Updated Supplementary Procedures go into effect. In the event there is any inconsistency between these Updated Supplementary Procedures and the ICDR RULES, these Updated Supplementary Procedures will govern. These Updated Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is commenced.

IRPs commenced prior to the adoption of these Updated Supplementary Procedures shall be governed by the Supplementary Procedures in effect at the time such IRPs were commenced.

In the event that any of these Updated Supplementary Procedures are subsequently amended, such amendments will not apply to any IRPs pending at the time such amendments come into force unless a party successfully demonstrates that application of the former Supplementary Procedures would be unjust and impracticable to the

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¹⁰ Inclusion recommended to clarify what happens to already pending IRPs when an updated version of the Supplemental Procedures goes into force, with an ongoing IRP filed under different standards and processes.

¹¹ May 2016 ICANN Bylaws, Article IV, Section 4.3 (j)(i).

¹² May 2016 ICANN Bylaws, Article IV, Section 4.3 (m).

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requesting party and application of the amendments would not materially disadvantage any other party's substantive rights. Any party to a then-pending IRP may oppose the request for application of the amended Supplementary Procedures. Requests to apply updated amended supplementary procedures will be resolved by the IRP PANEL in the exercise of its discretion.

3. Composition of Independent Review Panel

The IRP PANEL will comprise three panelists selected from the STANDING PANEL, unless a STANDING PANEL is not in place when the IRP is initiated.¹³ The CLAIMANT and ICANN shall each select one panelist from the STANDING PANEL, and the two panelists selected by the parties will select the third panelist from the STANDING PANEL. A STANDING PANEL member's appointment will not take effect unless and until the STANDING PANEL member signs a Notice of STANDING PANEL Appointment affirming that the member is available to serve and is independent and impartial. An IRP PANEL member's appointment will not take effect unless and until the IRP PANEL member signs a Notice of IRP PANEL Appointment affirming that the member is available to serve and is independent and impartial. In the event that a STANDING PANEL is not in place when the relevant IRP is initiated or is in place but does not have capacity due to other IRP commitments, the CLAIMANT and ICANN shall each select a qualified panelist from outside the STANDING PANEL, and the two panelists selected by the parties shall select the third panelist. In the event that the two party-selected panelists cannot agree on the third panelist, the RULES shall apply to selection of the third panelist.¹⁴ In the event that a panelist resigns, is incapable of performing the duties of a panelist, or is removed and the position becomes vacant, a substitute arbitrator shall be appointed pursuant to the provisions of this Section [3] of these Updated Supplementary Procedures.

4. Time for Filing

An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than [45]¹⁵ days after a CLAIMANT becomes aware or reasonably should have been aware of the action or inaction giving rise to the DISPUTE.

¹³ May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(i).

¹⁴ May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(ii).

¹⁵ Note that the Current ICANN Bylaws (as amended 11 February 2016), Art. IV § 3 ¶ 3, provide for a 30-day period in which to file a request for independent review.

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In order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.¹⁶

5. Conduct of the Independent Review

It is in the best interests of ICANN and of the ICANN community for IRP matters to be resolved expeditiously and at a reasonably low cost while ensuring fundamental fairness and due process consistent with the PURPOSES OF THE IRP. The IRP PANEL shall consider accessibility, fairness, and efficiency (both as to time and cost) in its conduct of the IRP.

The IRP PANEL should conduct its proceedings by electronic means to the extent feasible. Where necessary, the IRP Panel may conduct live telephonic or video conferences.

The IRP PANEL should conduct its proceedings with the presumption that in-person hearings shall not be permitted. The presumption against in-person hearings may be rebutted only under extraordinary circumstances, where, upon motion by a Party, the IRP PANEL determines that the party seeking an in-person hearing has clearly demonstrated that: (1) an in-person hearing is necessary for a fair resolution of the claim; (2) an in-person hearing is necessary to further the PURPOSES OF THE IRP; and (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of an in-person hearing.¹⁷ In no circumstances shall in-person hearings be permitted for the purpose of introducing new arguments or evidence that could have been previously presented, but were not previously presented, to the IRP PANEL.

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Deleted: which are limited to circumstances where, upon motion by a Party, the IRP PANEL determines that the party seeking an in-person hearing has demonstrated, with clear and convincing evidence,

¹⁶ Currently there are no rules on the timely payment of fees. Inclusion of this language is designed to provide firmer guidance and to ensure that a Claimant is committed to the process.

¹⁷ This topic is being held for the next discussion. ICANN Legal to suggest examples of when in-person hearing might be necessary for inclusion in the Updated Supplementary Procedures. [ICANN NOTE: THE CIRCUMSTANCES IN WHICH AN IN-PERSON HEARING MAY BE “NECESSARY” ARE NOT SUBJECT TO ANY BRIGHT LINE RULE, AS THE CIRCUMSTANCES WILL DEPEND GREATLY ON THE SPECIFIC FACTS IN A GIVEN PROCEEDING. AS A RESULT, WE HAVE PROPOSED A STANDARD THAT WE BELIEVE ACCURATELY REPRESENTS THE “HIGH BAR” THAT MUST BE MET BEFORE AN IN-PERSON HEARING IS PERMITTED, AS DISCUSSED WITHIN THE IOT.]

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All hearings shall be limited to argument only; all evidence, including witness statements, must be submitted in writing [X] days in advance of any hearing.¹⁸

With due regard to Bylaw Section 4.3(s), the IRP PANEL retains responsibility for determining the timetable for the IRP proceeding.¹⁹ Any violation of the IRP PANEL's timetable may result in the assessment of costs pursuant to Section 10 of these Updated Supplementary Procedures.²⁰

6. Written Statements

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font.²¹ All necessary and available evidence in support of the Claimant's Claim(s) should be part of the initial written submission.²² Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence.²³ The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.²⁴

¹⁸ This is an issue for future consideration within the IOT. This provision maintains the status quo until there is an agreed recommendation to change. The following language is provided for the IOT's consideration: "Cross-examination of live witnesses shall be allowed only in extraordinary circumstances where, upon motion by a Party, the IRP PANEL determines that: (1) it is necessary for a fair resolution of the claim; (2) it is necessary to further the PURPOSES OF THE IRP; and (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of such a measure." **ICANN NOTE: This additional language raises the same types of concerns as noted for the hearing. How many witnesses are expected to be present for cross examination? What is the scope of that cross examination? How long would parties have to conduct the cross for each witness? How would the parties make the required showing? This topic is being held for consideration on the next call.**

¹⁹ May 2016 ICANN Bylaws, Section 4.3(o)(vi).

²⁰ This is an issue for future consideration within the IOT. This provision maintains the status quo until there is an agreed recommendation to change.

²¹ This is an issue for future consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

²² Language modified to reflect broadened scope of IRPs. See May 2016 ICANN Bylaws, Article IV, Section 4.3 (i).

²³ This is an issue for future consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

²⁴ May 2016 ICANN Bylaws, Article IV, Section 4.3 (o)(ii).

7. Consolidation, Intervention, and Joinder²⁵

At the request of a party, a PROCEDURES OFFICER may be appointed from the STANDING PANEL to consider requests for consolidation, intervention, and joinder. Requests for consolidation, intervention, and joinder are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for interim relief.

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the permission of the PROCEDURES OFFICER. CLAIMANT'S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE, but such claims may be asserted as independent or alternative claims.²⁶

In the event that requests for consolidation, intervention, and joinder are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion.

8. Discovery Methods²⁷

The IRP PANEL shall be guided by considerations of accessibility, fairness, and efficiency (both as to time and cost) in its consideration of discovery requests.

On the motion of either Party and upon finding by the IRP PANEL that such discovery is necessary to further the PURPOSES OF THE IRP, the IRP PANEL may order a Party to produce to the other Party, and to the IRP PANEL if the moving Party requests, documents or electronically stored information in the other Party's possession, custody,

²⁵ There is no existing Supplemental Rule. The CCWG Final Proposal and May 2016 ICANN Bylaws recommend that these issues be considered by IOT. See May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(B); CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, 23 February 2016, Annex 07 – Recommendation #7, at § 20.

²⁶ See May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(B).

²⁷ There is no existing Supplemental Rule. The [CCWG Final Proposal and] May 2016 ICANN Bylaws recommend that discovery methods be considered by IOT. See May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(D).

or control that the Panel determines are reasonably likely to be relevant and material²⁸ to the resolution of the CLAIMS and/or defenses in the DISPUTE and are not subject to the attorney-client privilege, the work product doctrine or otherwise protected from disclosure by applicable law. **In the extraordinary circumstances where such discovery method(s) are allowed,**²⁹ all Parties shall be granted the equivalent discovery rights.

A motion for document discovery shall contain a description of the specific documents, classes of documents or other information sought that relate to the subject matter of the Dispute along with an explanation of why such documents or other information are likely to be relevant and material to resolution of the Dispute.

Depositions, interrogatories, and requests for admission will not be permitted.³⁰

²⁸ ICANN NOTE: Materiality requirement aligns with the ICDR Rules.

²⁹ Email from David McAuley recommended deleting the highlighted text and adding a statement, relative to document inspection, rights, that a party providing documents for review may seek protection from public disclosure via a protective order in appropriate cases. This edit was not discussed on this call. [ICANN NOTE: NO NEED TO REMOVE HIGHLIGHTED SECTION BUT WE AGREE WITH THE PROPOSAL THAT A PARTY MAY MOVE FOR A PROTECTIVE ORDER, OR SEEK THE OTHER PARTY'S AGREEMENT, TO KEEP CONFIDENTIAL ITS INFORMATION.]

³⁰ ICANN NOTE: The “extraordinary circumstances” test is a new, untested standard that does not provide enough guidance to a Panel. There are a host of other considerations when designing discovery, particularly when we consider the short nature of the IRP. ICANN identifies some of the questions below. With the need for additional consideration, this item does not seem ready for inclusion in this version of the procedures. Some of the questions ICANN notes that would need to be addressed as we are considering what discovery in an IRP would look like:

- How many depositions will be permitted? The presumption under the Federal Rules of Civil Procedure is 10, but 10 is A LOT in the context of an IRP aimed at reducing costs and ensuring an accessible process.
- How much time will a party have at deposition? The presumption under the Federal Rules of Civil Procedure is 7 hours on the record.
- What evidentiary rules will govern a deposition? For example, will objections be permitted? If so, on what grounds? In what manner will a transcript be permitted to be used in subsequent litigation (should it occur) or in future IRPs?
- Will there be limitations as to who may be deposed? For example, if a Supporting Organization/Advisory Committee/Empowered Community is the Claimant, who is ICANN allowed to depose to understand the bases for a Claim? Who/which entity is that testimony binding against in connection with the pending IRP or future IRPs or litigation? Are depositions of corporate designees contemplated (i.e., akin to Rule 30(b)(6) depositions under the Federal Rules of Civil Procedure)? For ICANN staff, could claimants require the deposition of all staff they wished to question? What if the questions are not limited to the specific claim at issue?
- Are third party depositions permitted? If so, note that under the Federal Rules of Civil Procedure, the ability to subpoena a third party witness for deposition is limited based on geography. Are any similar limitations contemplated here? What about former ICANN employees/board members?
- Given that depositions, if permitted, would take place after the filing of the Claimant's claim, what supplemental briefing is contemplated based on any testimony obtained at deposition?

In the event that a Party submits what the IRP PANEL deems to be an expert opinion, such opinion must be provided in writing and the other Party must have a right of reply to such an opinion with an expert opinion of its own.^{31]}

9. Summary Dismissal

An IRP PANEL may summarily dismiss any request for INDEPENDENT REVIEW where the Claimant³² has not demonstrated that it has been materially affected by a DISPUTE. To be materially affected by a DISPUTE, a Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.³³

An IRP PANEL may also summarily dismiss a request for INDEPENDENT REVIEW that lacks substance or is frivolous or vexatious.³⁴

10. Interim Measures of Protection

A Claimant may request interim relief from the IRP PANEL, or if an IRP PANEL is not yet in place, from the STANDING PANEL. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN action or decision in order to maintain the status quo

Interrogatories & Requests for Admission

- How many interrogatories/requests for admission will each party be permitted to serve? The presumption under the Federal Rules of Civil Procedure is 25, but 25 is A LOT in the context of an IRP aimed at reducing costs and ensuring an accessible process.
- How much time will each side have to respond? The presumption under the Federal Rules of Civil Procedure is 30 days, plus 3 for mail service.
- Do responses have to be verified?
- What objections would be permitted?
- Given that interrogatories and requests for admission, if permitted, would take place after the filing of the Claimant's claim, what supplemental briefing is contemplated based on any discovery responses?

³¹ Pursuant to the May 2016 ICANN Bylaws, Article IV, Section 4.3(n) (Rules of Procedure), these Supplementary Rules will govern the format of proceedings. This is an issue for future consideration within the IOT. May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(D).

³² May 2016 ICANN Bylaws, Article IV, Section 4.3(b)(i). Note that the term "requestor" has been replaced with "Claimant" for consistency with IRP terminology.

³³ May 2016 ICANN Bylaws, Article IV, Section 4.3(o)(i).

³⁴ May 2016 ICANN Bylaws, Article IV, Section 4.3(o)(i).

until such time as the opinion of the IRP PANEL is considered by ICANN as described in ICANN Bylaws, Article IV, Section 4.3(o)(iv).³⁵

An EMERGENCY PANELIST shall be selected from the STANDING PANEL to adjudicate requests for interim relief. In the event that no STANDING PANEL is in place when an EMERGENCY PANELIST must be selected, a panelist may be appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for interim relief. Interim relief may only be provided if the EMERGENCY PANELIST determines that the Claimant has established all of the following factors:

- (i) A harm for which there will be no adequate remedy in the absence of such relief;
- (ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and
- (iii) A balance of hardships tipping decidedly toward the party seeking relief.³⁶

Interim relief may be granted on an ex parte basis in circumstances that the EMERGENCY PANELIST deems exigent, but any Party whose arguments were not considered prior to the granting of such interim relief may submit any opposition to such interim relief, and the EMERGENCY PANELIST must consider such arguments, as soon as reasonably possible. The EMERGENCY PANELIST may modify or terminate the interim relief if the EMERGENCY PANELIST deems it appropriate to do so in light of such further arguments.

11. Standard of Review

Each IRP PANEL shall conduct an objective, de novo examination of the DISPUTE.

- a. With respect to COVERED ACTIONS, the IRP PANEL shall make findings of fact to determine whether the COVERED ACTION constituted an action or inaction that violated ICANN'S Articles or Bylaws.
- b. All DISPUTES shall be decided in compliance with ICANN'S Articles and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.

³⁵ May 2016 ICANN Bylaws, Article IV, Section 4.3(p).

³⁶ May 2016 ICANN Bylaws, Article IV, Section 4.3(p).

- c. For Claims arising out of the Board’s exercise of its fiduciary duties, the IRP PANEL shall not replace the Board’s reasonable judgment with its own so long as the Board’s action or inaction is within the realm of reasonable business judgment.
- d. With respect to claims that ICANN has not enforced its contractual rights with respect to the IANA Naming Function Contract, the standard of review shall be whether there was a material breach of ICANN’s obligations under the IANA Naming Function Contract, where the alleged breach has resulted in material harm to the Claimant.
- e. IRPs initiated through the mechanism contemplated at Article IV, Section 4.3(a)(iv) of ICANN’s Bylaws shall be subject to a separate standard of review as defined in the IANA Naming Function Contract.³⁷

12. IRP PANEL Decisions³⁸

IRP PANEL DECISIONS shall be made by a simple majority of the IRP PANEL³⁹. If any IRP PANEL member fails to sign the IRP PANEL DECISION, the IRP PANEL member shall endeavor to provide a written statement of the reason for the absence of such signature.⁴⁰

13. Form and Effect of an IRP PANEL DECISION

- a. IRP PANEL DECISIONS shall be made in writing, promptly by the IRP PANEL, based on the documentation, supporting materials and arguments submitted by the parties.⁴¹
- b. The IRP PANEL DECISION shall specifically designate the prevailing party as to each Claim.⁴²

³⁷ May 2016 ICANN Bylaws, Article IV, Section 4.3 (i).

³⁸ The May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(v), refer to an “IRP PANEL decision” (although they also state that an IRP PANEL will “declare” certain findings in Article IV, Section 4.3(o)(iii)).

³⁹ May 2016 ICANN Bylaws, Article IV, Section 4.3(k)(v).

⁴⁰ This is an issue for future consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

⁴¹ May 2016 ICANN Bylaws, Article IV, Sections (s), (t). The May 2016 ICANN Bylaws require the IRP PANEL to “issu[e] an early scheduling order and its written decision no later than six months after the filing of the Claim, except as otherwise permitted under the Rules of Procedure.” While the current language maintains the status quo, consideration should be given to whether maintaining the status quo is sufficient given the clear directive in, and the need to comply with, the May 2016 ICANN Bylaws.

- c. Subject to Article IV, Section 4.3 of ICANN’s Bylaws, all IRP PANEL DECISIONS shall be made public, and shall reflect a well-reasoned application of how the DISPUTE was resolved in compliance with ICANN’s Articles and Bylaws, as understood in light of prior IRP PANEL DECISIONS decided under the same (or an equivalent prior) version of the provision of the Articles and Bylaws at issue, and norms of applicable law.

14. Appeal of IRP PANEL Decisions⁴³

An IRP PANEL DECISION may be appealed to the full STANDING PANEL sitting en banc within 60 days of the issuance of such decision.⁴⁴ The en banc STANDING PANEL will review such appealed IRP PANEL DECISION based on a clear error of judgment or the application of an incorrect legal standard. The en banc STANDING PANEL may also resolve any disputes between panelists on an IRP PANEL or the PROCEDURES OFFICER with respect to consolidation of CLAIMS or intervention or joinder.

15. Costs

The IRP PANEL shall fix costs in its IRP PANEL DECISION.⁴⁵ Except as otherwise provided in Article IV, Section 4.3(e)(ii) of ICANN’s Bylaws, each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, as defined in Article IV, Section 4.3(d) of ICANN’s Bylaws, including the costs of all legal counsel and technical experts.

Except with respect to a Community IRP, the IRP PANEL may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party’s Claim or defense as frivolous or abusive.⁴⁶

⁴² May 2016 ICANN Bylaws, Article IV, Section 4.3 (t).

⁴³ There is no existing Supplemental Rule. The proposed text is based upon the CCWG Final Proposal, Annex 7, ¶ 16, which provides for en banc appeal “based on a clear error of judgment or the application of an incorrect legal standard.”

⁴⁴ To discuss with ICDR.

⁴⁵ This is an issue for future consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

⁴⁶ May 2016 Bylaws, Article IV, Section 4.3(r).

EXHIBIT 230

[IOT] materials for call later today

Burr, Becky Contact Information Redacted

Wed Aug 17 17:43:18 UTC 2016

- Previous message: [\[IOT\] status on in-person hearing discussion following today's call](#)
 - Next message: [\[IOT\] materials for call later today](#)
 - Messages sorted by: [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)
-

We will work from the slides

J. Beckwith Burr

Neustar, Inc. / Deputy General Counsel & Chief Privacy Officer

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Type: application/pdf

Size: 110514 bytes

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Name: ICANN Draft IRP Updated Supplemental Procedures v.20.pdf

Type: application/pdf

Size: 283984 bytes

Desc: ICANN Draft IRP Updated Supplemental Procedures v.20.pdf

URL:

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- Previous message: [\[IOT\] status on in-person hearing discussion following today's call](#)
 - Next message: [\[IOT\] materials for call later today](#)
 - Messages sorted by: [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)
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EXHIBIT 231

BB DRAFT as of ~~2218~~ August 2016 – Updates to ICDR Supplementary Procedures

Updated Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process¹

Revised as of [Day, Month], 2016

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15. **Default Procedures** ~~Error! Bookmark not defined.Error! Bookmark not defined.9~~

16. **Costs** ~~131310~~

These updated procedures supplement the International Centre for Dispute Resolution’s international arbitration rules in accordance with the independent review process set forth in Article IV, Section 4.3² of ICANN’s Bylaws. These procedures apply to all independent review process proceedings filed after [insert effective date of the Bylaws].

¹ CONTEXTUAL NOTE: These Supplemental Procedures are intended to supplement the ICDR RULES. Therefore, when the ICDR RULES appropriately address an item, there is no need to re-state that Rule within the Supplemental Procedures. The IOT, through its work, may identify additional places where variance from the ICDR RULES is recommended, and that would result in addition or modification to the Supplemental Procedures.

² Formatting has been updated to conform with the Bylaws approved by the ICANN Board of Directors on 27 May 2016 (hereafter the May 2016 ICANN Bylaws).

1. Definitions

In these Updated Supplementary Procedures:

A CLAIMANT is any legal or natural person, group, or entity including, but not limited to the Empowered Community, a Supporting Organization, or an Advisory Committee, that has been materially affected by a Dispute.³ To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.

COVERED ACTIONS are any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a DISPUTE.⁴

DISPUTES are defined as:

(A) Claims that COVERED ACTIONS violated ICANN’s Articles of Incorporation or Bylaws, including, but not limited to, any action or inaction that:

- 1) exceeded the scope of the Mission;
- 2) resulted from action taken in response to advice or input from any Advisory Committee or Supporting Organization that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
- 3) resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
- 4) resulted from a response to a DIDP (as defined in Section 22.7(d)) request that is claimed to be inconsistent with the Articles of Incorporation or Bylaws; or
- 5) arose from claims involving rights of the EC as set forth in the Articles of Incorporation or Bylaws;

³ May 2016 ICANN Bylaws Article IV, Section 4.3(b)(i).

⁴ May 2016 ICANN Bylaws Article IV, Section 4.3 (b)(ii).

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(B) Claims that ICANN, the Board, individual Directors, Officers or Staff members have not enforced ICANN’s contractual rights with respect to the IANA Naming Function Contract; and

(C) Claims regarding the Post-Transition IANA entity service complaints by direct customers of the IANA naming functions that are not resolved through mediation.⁵

EMERGENCY PANELIST refers to a single member of the STANDING PANEL designated to adjudicate requests for interim relief⁶ or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for interim relief.

IANA refers to the Internet Assigned Numbers Authority.

ICDR refers to the International Centre for Dispute Resolution, which has been designated and approved by ICANN’s Board of Directors as the Independent Review Panel Provider (IRPP) under Article IV, Section 4.3 of ICANN’s Bylaws.

ICANN refers to the Internet Corporation for Assigned Names and Numbers.

INDEPENDENT REVIEW PROCESS or IRP refers to the procedure that takes place upon the Claimant’s filing of a written statement of a DISPUTE with the ICDR.⁷

IRP PANEL refers to the panel of three neutral members appointed to decide the relevant DISPUTE.⁸

IRP PANEL DECISION refers to the final written decision of the IRP PANEL that reflects the reasoned analysis of how the DISPUTE was resolved in compliance with ICANN’s Articles and Bylaws.⁹

⁵ May 2016 ICANN Bylaws, Article IV, Section 4.3 (b)(iii).

⁶ May 2016 ICANN Bylaws, Article IV, Section 4.3 (p).

⁷ May 2016 ICANN Bylaws, Article IV, Section 4.3 (d).

⁸ May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(i)

⁹ Change recommended for consistency with May 2016 ICANN Bylaws, which refer to an “IRP PANEL decision” rather than a “declaration” (although the same Bylaws state that an IRP PANEL will “declare” certain findings). *See* May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(v) & Section 4.3(o)(iii).

BB DRAFT as of 2218 August 2016 – Updates to ICDR Supplementary Procedures

ICDR RULES refers to the ICDR’s rules in effect at the time the relevant request for independent review is submitted.¹⁰

PROCEDURES OFFICER refers to a single member of the STANDING PANEL designated to adjudicate requests for consolidation, intervention, and joinder, or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to its International Arbitration Rules relating to appointment of panelists for interim relief.

PURPOSES OF THE IRP are to hear and resolve Disputes for the reasons specified in the ICANN Bylaws, Article IV, Section 4.3(a).

STANDING PANEL refers to an omnibus standing panel of at least seven members from which three-member IRP PANELS are selected to hear and resolve DISPUTES consistent with the purposes of the IRP.¹¹

2. Scope

The ICDR¹² will apply these Updated Supplementary Procedures, in addition to the ICDR RULES, in all cases submitted to the ICDR in connection with Article IV, Section 4.3 of the ICANN Bylaws after the date these Updated Supplementary Procedures go into effect. In the event there is any inconsistency between these Updated Supplementary Procedures and the ICDR RULES, these Updated Supplementary Procedures will govern. These Updated Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is commenced.

IRPs commenced prior to the adoption of these Updated Supplementary Procedures shall be governed by the Supplementary Procedures in effect at the time such IRPs were commenced- unless the IRP Panel determines that the party requesting application of the Updated Supplementary has demonstrated that application of the former Supplementary Procedures would be unjust and impracticable to the requesting party and application of the Updated Supplementary Rules would not materially disadvantage any other party’s substantive rights. Any party to a then-pending IRP may oppose the request for application of the Updated Supplementary Procedures. Requests to apply the

¹⁰ Inclusion recommended to clarify what happens to already pending IRPs when an updated version of the Supplemental Procedures goes into force, with an ongoing IRP filed under different standards and processes.

¹¹ May 2016 ICANN Bylaws, Article IV, Section 4.3 (j)(i).

¹² May 2016 ICANN Bylaws, Article IV, Section 4.3 (m).

Updated Supplementary Procedures will be resolved by the IRP PANEL in its discretion.]

In the event that any of these Updated Supplementary Procedures are subsequently amended, such amendments will not apply to any IRPs pending at the time such amendments come into force unless a party successfully demonstrates that application of the former Supplementary Procedures would be unjust and impracticable to the requesting party and application of the amendments would not materially disadvantage any other party's substantive rights. Any party to a then-pending IRP may oppose the request for application of the amended Supplementary Procedures. Requests to apply updated amended supplementary procedures will be resolved by the IRP PANEL in the exercise of its discretion.

3. Composition of Independent Review Panel

The IRP PANEL will comprise three panelists selected from the STANDING PANEL, unless a STANDING PANEL is not in place when the IRP is initiated.¹³ The CLAIMANT and ICANN shall each select one panelist from the STANDING PANEL, and the two panelists selected by the parties will select the third panelist from the STANDING PANEL. A STANDING PANEL member's appointment will not take effect unless and until the STANDING PANEL member signs a Notice of STANDING PANEL Appointment affirming that the member is available to serve and is independent and impartial. An IRP PANEL member's appointment will not take effect unless and until the IRP PANEL member signs a Notice of IRP PANEL Appointment affirming that the member is available to serve and is independent and impartial. In the event that a STANDING PANEL is not in place when the relevant IRP is initiated or is in place but does not have capacity due to other IRP commitments, the CLAIMANT and ICANN shall each select a qualified panelist from outside the STANDING PANEL, and the two panelists selected by the parties shall select the third panelist. In the event that the two party-selected panelists cannot agree on the third panelist, the RULES shall apply to selection of the third panelist.¹⁴ In the event that a panelist resigns, is incapable of performing the duties of a panelist, or is removed and the position becomes vacant, a substitute arbitrator shall be appointed pursuant to the provisions of this Section [3] of these Updated Supplementary Procedures.

¹³ May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(i).

¹⁴ May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(ii).

Commented [BB1]: This kind of language has been proposed by Avri and supported by others. The issue requires further discussion. Most importantly, we need to understand and address the impact that this change would have on IRPs that are ongoing as of October 1 2016. Would a claimant be entitled to essentially re-start the process to take advantage of a changed page limitation or the updated standard of review, even if a hearing has taken place and the only remaining step is for the Panel to issue a declaration? Could this be limited in some way?

ICANN thinks that needs to be a bright line between IRPs filed under the old Bylaws/old procedures, and the IRPs filed under the new Bylaws/new procedures. If there is not, the impact raised above could be heavy. What would it mean to those who didn't have a standard to request a hearing, and had substantial motion practice. What about those who are close to the end who want to make a demonstration now for a hearing?

Query whether this is within the scope of our remit.

4. Time for Filing

An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 45 days after a CLAIMANT becomes ~~aware~~ **or reasonably should have been aware** of the action or inaction giving rise to the DISPUTE **and, where a CLAIMANT demonstrates to the satisfaction of the Panel that it was not aware of the action or inaction prior to the end of that 45 day period, no more than [X] months from the date of such action or inaction**. In order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.¹⁵

Commented [BB2]: The CCWG's Final Report does not contemplate a "constructive knowledge" standard, so it has been removed. We should be concerned, however, that an "actual knowledge" standard could result in challenges coming long after a decision has been taken, and ICANN and third parties have acted in reliance on the finality of that action. We should not encourage people to sit on their claims to the detriment of ICANN and/or other interested and affected parties.

5. Conduct of the Independent Review

It is in the best interests of ICANN and of the ICANN community for IRP matters to be resolved expeditiously and at a reasonably low cost while ensuring fundamental fairness and due process consistent with the PURPOSES OF THE IRP. The IRP PANEL shall consider accessibility, fairness, and efficiency (both as to time and cost) in its conduct of the IRP.

The IRP PANEL should conduct its proceedings by electronic means to the extent feasible. Where **necessary**, the IRP Panel may conduct live telephonic or video conferences.

Commented [BB3]: NOTE: Several participants have expressed concern about this standard. Alternative to consider "The IRP Panel may conduct live telephonic or video conferences at its discretion."

SE – No material concern either way.

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The IRP PANEL should conduct its proceedings with the presumption that in-person hearings shall not be permitted. The presumption against in-person hearings may be rebutted only under extraordinary circumstances, where, upon motion by a Party, the IRP PANEL determines that the party seeking an in-person hearing has **clearly** demonstrated that: (1) an in-person hearing is necessary for a fair resolution of the claim; (2) an in-person hearing is necessary to further the PURPOSES OF THE IRP; **and** (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of an in-person hearing.¹⁶ In no circumstances shall in-person hearings be permitted for the purpose of introducing new arguments or evidence that could have been previously presented, but were not previously presented, to the IRP PANEL.

¹⁵ Currently there are no rules on the timely payment of fees. Inclusion of this language is designed to provide firmer guidance and to ensure that a Claimant is committed to the process.

¹⁶ ICANN continues to have serious concerns about the impact of in-person hearings on cost and time to resolution, and prefers to specify that the requisite demonstration must be made by clear and convincing evidence.

All hearings shall be limited to argument only ~~[unless the IRP Panel determines that a~~ the party seeking cross examination of [a] witness[es] has demonstrated that such cross examination is: (1) necessary for a fair resolution of the claim; (2) necessary to further the PURPOSES OF THE IRP; and (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of witness cross examination.] ~~All~~ evidence, including witness statements, must be submitted in writing [X] days in advance of any hearing.¹⁷

Commented [BB4]: FOR DISCUSSION

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With due regard to Bylaw Section 4.3(s), the IRP PANEL retains responsibility for determining the timetable for the IRP proceeding.¹⁸ Any violation of the IRP PANEL's timetable may result in the assessment of costs pursuant to Section 10 of these Updated Supplementary Procedures.¹⁹

Commented [BB5]: NOTE that this requires further discussion. There appear to be a number of views among the IOT. Several members think that cross examination of witnesses should be permitted as a matter of course, assuming in the case of F2F hearings, that the extraordinary circumstances standard has been met. Others think that cross-examination should be permitted on a case-by-case basis and only where the requesting party demonstrates that the requested cross-examination would meet the 3 part test for "extraordinary circumstances." ICANN continues to have serious concerns about the cost and delay associated with cross examination of witnesses.

6. Written Statements

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font.²⁰ All necessary and available evidence in support of the Claimant's Claim(s) should be part of the initial written submission.²¹ Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence.²² The IRP

¹⁷ ~~This is an issue for future consideration within the IOT. This provision maintains the status quo until there is an agreed recommendation to change. The following language is provided for the IOT's consideration: "Cross-examination of live witnesses shall be allowed only in extraordinary circumstances where, upon motion by a Party, the IRP PANEL determines that: (1) it is necessary for a fair resolution of the claim; (2) it is necessary to further the PURPOSES OF THE IRP; and (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of such a measure." ICANN NOTE: This additional language raises the same types of concerns as noted for the hearing. How many witnesses are expected to be present for cross examination? What is the scope of that cross examination? How long would parties have to conduct the cross for each witness? How would the parties make the required showing? This topic is being held for consideration on the next call.~~

¹⁸ May 2016 ICANN Bylaws, Section 4.3(o)(vi).

¹⁹ This is an issue for future consideration within the IOT. This provision maintains the status quo until there is an agreed recommendation to change.

²⁰ This is an issue for future consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

²¹ Language modified to reflect broadened scope of IRPs. See May 2016 ICANN Bylaws, Article IV, Section 4.3 (i).

²² This is an issue for future consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.²³

7. Consolidation, Intervention, and Joinder²⁴

At the request of a party, a PROCEDURES OFFICER may be appointed from the STANDING PANEL to consider requests for consolidation, intervention, and joinder. Requests for consolidation, intervention, and joinder are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for interim relief.

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the permission of the PROCEDURES OFFICER. CLAIMANT'S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE, but such claims may be asserted as independent or alternative claims.²⁵

In the event that requests for consolidation, intervention, and joinder are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion.

8. Discovery Methods²⁶

The IRP PANEL shall be guided by considerations of accessibility, fairness, and efficiency (both as to time and cost) in its consideration of discovery requests.

²³ May 2016 ICANN Bylaws, Article IV, Section 4.3 (o)(ii).

²⁴ There is no existing Supplemental Rule. The CCWG Final Proposal and May 2016 ICANN Bylaws recommend that these issues be considered by IOT. *See* May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(B); CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, 23 February 2016, Annex 07 – Recommendation #7, at § 20.

²⁵ *See* May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(B).

²⁶ There is no existing Supplemental Rule. The [CCWG Final Proposal and] May 2016 ICANN Bylaws recommend that discovery methods be considered by IOT. *See* May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(D).

On the motion of either Party and upon finding by the IRP PANEL that such discovery is necessary to further the PURPOSES OF THE IRP, the IRP PANEL may order a Party to produce to the other Party, and to the IRP PANEL if the moving Party requests, documents or electronically stored information in the other Party's possession, custody, or control that the Panel determines are reasonably likely to be relevant and material²⁷ to the resolution of the CLAIMS and/or defenses in the DISPUTE and are not subject to the attorney-client privilege, the work product doctrine or otherwise protected from disclosure by applicable law. ~~In the extraordinary circumstances~~ **Where such discovery method(s) are allowed,**²⁸ all Parties shall be granted the equivalent discovery rights.

A motion for document discovery shall contain a description of the specific documents, classes of documents or other information sought that relate to the subject matter of the Dispute along with an explanation of why such documents or other information are likely to be relevant and material to resolution of the Dispute.

Depositions, interrogatories, and requests for admission will not be permitted.²⁹

²⁷ ICANN NOTE: Materiality requirement aligns with the ICDR Rules.

²⁸ Email from David McAuley recommended deleting the highlighted text and adding a statement, relative to document inspection, rights, that a party providing documents for review may seek protection from public disclosure via a protective order in appropriate cases. This edit was not discussed on this call. **[ICANN NOTE: NO NEED TO REMOVE HIGHLIGHTED SECTION BUT WE AGREE WITH THE PROPOSAL THAT A PARTY MAY MOVE FOR A PROTECTIVE ORDER, OR SEEK THE OTHER PARTY'S AGREEMENT, TO KEEP CONFIDENTIAL ITS INFORMATION.]**

²⁹ ~~ICANN NOTE: The "extraordinary circumstances" test is a new, untested standard that does not provide enough guidance to a Panel. There are a host of other considerations when designing discovery, particularly when we consider the short nature of the IRP. ICANN identifies some of the questions below. With the need for additional consideration, this item does not seem ready for inclusion in this version of the procedures. Some of the questions ICANN notes that would need to be addressed as we are considering what discovery in an IRP would look like:~~

- ~~How many depositions will be permitted? The presumption under the Federal Rules of Civil Procedure is 10, but 10 is A LOT in the context of an IRP aimed at reducing costs and ensuring an accessible process.~~
- ~~How much time will a party have at deposition? The presumption under the Federal Rules of Civil Procedure is 7 hours on the record.~~
- ~~What e-discovery rules will govern a deposition? For example, will objections be permitted? If so, on what grounds? In what manner will a transcript be permitted to be used in subsequent litigation (should it occur) or in future IRPs?~~
- ~~Will there be limitations as to who may be deposed? For example, if a Supporting Organization/Advisory Committee/Empowered Community is the Claimant, who is ICANN allowed to depose to understand the bases for a Claim? Who/which entity is that testimony binding against in connection with the pending IRP or future IRPs or litigation? Are depositions of corporate designees contemplated (i.e., akin to Rule~~

Commented [BB6]: BB deleted "in the extraordinary circumstances" to avoid confusion with standard for in-person hearing/cross examination. Standard as currently drafted for document discovery is "necessary to further the purposes of the IRP" and "reasonably likely to be relevant and material to resolution of the claims and/or defenses" plus carve outs for privilege.

SE Note – Extraordinary circumstances should be put back in based on the IOT earlier conversations

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In the event that a Party submits what the IRP PANEL deems to be an expert opinion, such opinion must be provided in writing and the other Party must have a right of reply to such an opinion with an expert opinion of its own.³⁰

9. Summary Dismissal

An IRP PANEL may summarily dismiss any request for INDEPENDENT REVIEW where the Claimant³¹ has not demonstrated that it has been materially affected by a DISPUTE. To be materially affected by a DISPUTE, a Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.³²

An IRP PANEL may also summarily dismiss a request for INDEPENDENT REVIEW that lacks substance or is frivolous or vexatious.³³

~~30(b)(6) depositions under the Federal Rules of Civil Procedure)? For ICANN staff, could claimants require the deposition of all staff they wished to question? What if the questions are not limited to the specific claim at issue?~~

- ~~• Are third party depositions permitted? If so, note that under the Federal Rules of Civil Procedure, the ability to subpoena a third party witness for deposition is limited based on geography. Are any similar limitations contemplated here? What about former ICANN employees/board members?~~
- ~~• Given that depositions, if permitted, would take place after the filing of the Claimant's claim, what supplemental briefing is contemplated based on any testimony obtained at deposition?~~

Interrogatories & Requests for Admission

- ~~• How many interrogatories/requests for admission will each party be permitted to serve? The presumption under the Federal Rules of Civil Procedure is 25, but 25 is A LOT in the context of an IRP aimed at reducing costs and ensuring an accessible process.~~
- ~~• How much time will each side have to respond? The presumption under the Federal Rules of Civil Procedure is 30 days, plus 3 for mail service.~~
- ~~• Do responses have to be verified?~~
- ~~• What objections would be permitted?~~
- ~~• Given that interrogatories and requests for admission, if permitted, would take place after the filing of the Claimant's claim, what supplemental briefing is contemplated based on any discovery responses?~~

³⁰ Pursuant to the May 2016 ICANN Bylaws, Article IV, Section 4.3(n) (Rules of Procedure), these Supplementary Rules will govern the format of proceedings. This is an issue for future consideration within the IOT. May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(D).

³¹ May 2016 ICANN Bylaws, Article IV, Section 4.3(b)(i). Note that the term “requestor” has been replaced with “Claimant” for consistency with IRP terminology.

³² May 2016 ICANN Bylaws, Article IV, Section 4.3(o)(i).

³³ May 2016 ICANN Bylaws, Article IV, Section 4.3(o)(i).

10. Interim Measures of Protection

A Claimant may request interim relief from the IRP PANEL, or if an IRP PANEL is not yet in place, from the STANDING PANEL. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN action or decision in order to maintain the status quo until such time as the opinion of the IRP PANEL is considered by ICANN as described in ICANN Bylaws, Article IV, Section 4.3(o)(iv).³⁴

An EMERGENCY PANELIST shall be selected from the STANDING PANEL to adjudicate requests for interim relief. In the event that no STANDING PANEL is in place when an EMERGENCY PANELIST must be selected, a panelist may be appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for interim relief. Interim relief may only be provided if the EMERGENCY PANELIST determines that the Claimant has established all of the following factors:

- (i) A harm for which there will be no adequate remedy in the absence of such relief;
- (ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and
- (iii) A balance of hardships tipping decidedly toward the party seeking relief.³⁵

Interim relief may be granted on an *ex parte* basis in circumstances that the EMERGENCY PANELIST deems *exigent*, but any Party whose arguments were not considered prior to the granting of such interim relief may submit any opposition to such interim relief, and the EMERGENCY PANELIST must consider such arguments, as soon as reasonably possible. The EMERGENCY PANELIST may modify or terminate the interim relief if the EMERGENCY PANELIST deems it appropriate to do so in light of such further arguments.

11. Standard of Review

Each IRP PANEL shall conduct an objective, *de novo* examination of the **DISPUTE**

- a. With respect to COVERED ACTIONS, the IRP PANEL shall make findings of fact to determine whether the COVERED ACTION

³⁴ May 2016 ICANN Bylaws, Article IV, Section 4.3(p).

³⁵ May 2016 ICANN Bylaws, Article IV, Section 4.3(p).

Commented [BB7]: NOTE RELEVANT TO DISCUSSION REGARDING APPLICATION OF UPDATED SUPPLEMENTARY RULES TO IRPS PENDING ON 1 October 2016: The Standard of Review in these Updated Supplementary Procedures is materially different from the standard in the existing Supplementary Procedures, which read as follows:

The IRP is subject to the following standard of review: (i) did the ICANN Board act without conflict of interest in taking its decision; (ii) did the ICANN Board exercise due diligence and care in having sufficient facts in front of them; (iii) did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

To the extent the IOT believes that a claimant should be permitted to avail itself of the Updated Supplemental Procedures, it must consider how this would impact ongoing proceedings.

SE – See note above. Modifications to the existing standard in place for already-filed IRPs are not specified in the New ICANN Bylaws. Any reach into the ongoing IRPs would require modifications of the supplementary procedures and Bylaws under which those were filed. That is not within the implementation purview of the IOT.

constituted an action or inaction that violated ICANN’S Articles or Bylaws.

- b. All DISPUTES shall be decided in compliance with ICANN’S Articles and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.
- c. For Claims arising out of the Board’s exercise of its fiduciary duties, the IRP PANEL shall not replace the Board’s reasonable judgment with its own so long as the Board’s action or inaction is within the realm of reasonable business judgment.
- d. With respect to claims that ICANN has not enforced its contractual rights with respect to the IANA Naming Function Contract, the standard of review shall be whether there was a material breach of ICANN’S obligations under the IANA Naming Function Contract, where the alleged breach has resulted in material harm to the Claimant.
- e. IRPs initiated through the mechanism contemplated at Article IV, Section 4.3(a)(iv) of ICANN’S Bylaws shall be subject to a separate standard of review as defined in the IANA Naming Function Contract.³⁶

12. IRP PANEL Decisions³⁷

IRP PANEL DECISIONS shall be made by a simple majority of the IRP PANEL³⁸. If any IRP PANEL member fails to sign the IRP PANEL DECISION, the IRP PANEL member shall endeavor to provide a written statement of the reason for the absence of such signature.³⁹

³⁶ May 2016 ICANN Bylaws, Article IV, Section 4.3 (i).

³⁷ The May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(v), refer to an “IRP PANEL decision” (although they also state that an IRP PANEL will “declare” certain findings in Article IV, Section 4.3(o)(iii)).

³⁸ May 2016 ICANN Bylaws, Article IV, Section 4.3(k)(v).

³⁹ This is an issue for future consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

13. Form and Effect of an IRP PANEL DECISION

- a. IRP PANEL DECISIONS shall be made in writing, promptly by the IRP PANEL, based on the documentation, supporting materials and arguments submitted by the parties.⁴⁰
- b. The IRP PANEL DECISION shall specifically designate the prevailing party as to each Claim.⁴¹
- c. Subject to Article IV, Section 4.3 of ICANN's Bylaws, all IRP PANEL DECISIONS shall be made public, and shall reflect a well-reasoned application of how the DISPUTE was resolved in compliance with ICANN's Articles and Bylaws, as understood in light of prior IRP PANEL DECISIONS decided under the same (or an equivalent prior) version of the provision of the Articles and Bylaws at issue, and norms of applicable law.

14. Appeal of IRP PANEL Decisions⁴²

An IRP PANEL DECISION may be appealed to the full STANDING PANEL sitting en banc within 60 days of the issuance of such decision.⁴³ The en banc STANDING PANEL will review such appealed IRP PANEL DECISION based on a clear error of judgment or the application of an incorrect legal standard. The en banc STANDING PANEL may also resolve any disputes between panelists on an IRP PANEL or the PROCEDURES OFFICER with respect to consolidation of CLAIMS or intervention or joinder.

15. Costs

The IRP PANEL shall fix costs in its IRP PANEL DECISION.⁴⁴ Except as otherwise provided in Article IV, Section 4.3(e)(ii) of ICANN's Bylaws, each party to an IRP

⁴⁰ May 2016 ICANN Bylaws, Article IV, Sections (s), (t). The May 2016 ICANN Bylaws require the IRP PANEL to "issu[e] an early scheduling order and its written decision no later than six months after the filing of the Claim, except as otherwise permitted under the Rules of Procedure." While the current language maintains the status quo, consideration should be given to whether maintaining the status quo is sufficient given the clear directive in, and the need to comply with, the May 2016 ICANN Bylaws.

⁴¹ May 2016 ICANN Bylaws, Article IV, Section 4.3 (t).

⁴² There is no existing Supplemental Rule. The proposed text is based upon the CCWG Final Proposal, Annex 7, ¶ 16, which provides for en banc appeal "based on a clear error of judgment or the application of an incorrect legal standard."

⁴³ **To discuss with ICDR.**

⁴⁴ This is an issue for future consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

BB DRAFT as of ~~2218~~ August 2016 – Updates to ICDR Supplementary Procedures

proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, as defined in Article IV, Section 4.3(d) of ICANN's Bylaws, including the costs of all legal counsel and technical experts.

Except with respect to a Community IRP, the IRP PANEL may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.⁴⁵

⁴⁵ May 2016 Bylaws, Article IV, Section 4.3(r).

EXHIBIT 232

IRP IOT

Updated Supplementary Procedures
Open Issues 29 August 2016

Effect on Existing IRPs

- ALT 1: IRPs commenced prior to the adoption of these Updated Supplementary Procedures shall be governed by the Supplementary Procedures in effect at the time such IRPs were commenced.
- ALT 2: IRPs commenced prior to the adoption of these Updated Supplementary Procedures shall be governed by the Supplementary Procedures in effect at the time such IRPs were commenced unless the IRP Panel determines that a requesting party has demonstrated that application of the former Supplementary Procedures would materially and unjustly affect judgment on the case as presented by the requesting party and would not materially disadvantage any other party's substantive rights.

Any party to a then-pending IRP may oppose the request for application of the Updated Supplementary Procedures. Requests to apply the Updated Supplementary Procedures will be resolved by the IRP PANEL in its discretion.

Deadline to File

An Independent Review is commenced when Claimant files a written statement of a Dispute. A Claimant shall file a written statement of a Dispute with the ICDR no more than 45 days after a Claimant

- ALT 1: becomes aware or reasonably should have been *aware of the action or inaction* giving rise to the Dispute.
- ALT 2: becomes aware, or reasonably should have been *aware of the material affect of the action or inaction* giving rise to the Dispute.
- ALT 3: becomes aware of the material affect of the action or inaction giving rise to the Dispute; provided, however, that a *statement of a Dispute may not be filed more than twenty-four months from the date of such action or inaction*.

Cross Examination at Hearings

- **Alt 1:** All hearings shall be limited to argument only.
- **Alt 2:** All hearings shall be limited to argument only unless the IRP Panel determines that a the party seeking cross examination of [a] witness[es] has demonstrated that such cross examination is: (1) necessary for a fair resolution of the claim; (2) necessary to further the PURPOSES OF THE IRP; *and* (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of witness cross examination.
- **Alt 3:** The IRP Panel shall determine, in its discretion, whether or not to permit cross examination of witnesses at any hearing.
- **Alt 4:** In-person hearings, Alt 3 above; telephonic/video hearings, another standard TBD

EXHIBIT 233

Updated Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process¹

Revised as of [Day, Month], 2016

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These updated procedures supplement the International Centre for Dispute Resolution’s international arbitration rules in accordance with the independent review process set forth in Article IV, Section 4.3² of ICANN’s Bylaws. These procedures apply to all independent review process proceedings filed after [insert effective date of the Bylaws].

¹ CONTEXTUAL NOTE: These Supplemental Procedures are intended to supplement the ICDR RULES. Therefore, when the ICDR RULES appropriately address an item, there is no need to re-state that Rule within the Supplemental Procedures. The IOT, through its work, may identify additional places where variance from the ICDR RULES is recommended, and that would result in addition or modification to the Supplemental Procedures.

² Formatting has been updated to conform with the Bylaws approved by the ICANN Board of Directors on 27 May 2016 (hereafter the May 2016 ICANN Bylaws).

1. Definitions

In these Updated Supplementary Procedures:

A CLAIMANT is any legal or natural person, group, or entity including, but not limited to the Empowered Community, a Supporting Organization, or an Advisory Committee, that has been materially affected by a Dispute.³ To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.

COVERED ACTIONS are any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a DISPUTE.⁴

DISPUTES are defined as:

(A) Claims that COVERED ACTIONS violated ICANN’s Articles of Incorporation or Bylaws, including, but not limited to, any action or inaction that:

- 1) exceeded the scope of the Mission;
- 2) resulted from action taken in response to advice or input from any Advisory Committee or Supporting Organization that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
- 3) resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
- 4) resulted from a response to a DIDP (as defined in Section 22.7(d)) request that is claimed to be inconsistent with the Articles of Incorporation or Bylaws; or
- 5) arose from claims involving rights of the EC as set forth in the Articles of Incorporation or Bylaws;

³ May 2016 ICANN Bylaws Article IV, Section 4.3(b)(i).

⁴ May 2016 ICANN Bylaws Article IV, Section 4.3 (b)(ii).

(B) Claims that ICANN, the Board, individual Directors, Officers or Staff members have not enforced ICANN’s contractual rights with respect to the IANA Naming Function Contract; and

(C) Claims regarding the Post-Transition IANA entity service complaints by direct customers of the IANA naming functions that are not resolved through mediation.⁵

EMERGENCY PANELIST refers to a single member of the STANDING PANEL designated to adjudicate requests for interim relief⁶ or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for interim relief.

IANA refers to the Internet Assigned Numbers Authority.

ICDR refers to the International Centre for Dispute Resolution, which has been designated and approved by ICANN’s Board of Directors as the Independent Review Panel Provider (IRPP) under Article IV, Section 4.3 of ICANN’s Bylaws.

ICANN refers to the Internet Corporation for Assigned Names and Numbers.

INDEPENDENT REVIEW PROCESS or IRP refers to the procedure that takes place upon the Claimant’s filing of a written statement of a DISPUTE with the ICDR.⁷

IRP PANEL refers to the panel of three neutral members appointed to decide the relevant DISPUTE.⁸

IRP PANEL DECISION refers to the final written decision of the IRP PANEL that reflects the reasoned analysis of how the DISPUTE was resolved in compliance with ICANN’s Articles and Bylaws.⁹

⁵ May 2016 ICANN Bylaws, Article IV, Section 4.3 (b)(iii).

⁶ May 2016 ICANN Bylaws, Article IV, Section 4.3 (p).

⁷ May 2016 ICANN Bylaws, Article IV, Section 4.3 (d).

⁸ May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(i)

⁹ Change recommended for consistency with May 2016 ICANN Bylaws, which refer to an “IRP PANEL decision” rather than a “declaration” (although the same Bylaws state that an IRP PANEL will “declare” certain findings). *See* May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(v) & Section 4.3(o)(iii).

ICDR RULES refers to the ICDR's rules in effect at the time the relevant request for independent review is submitted.

PROCEDURES OFFICER refers to a single member of the STANDING PANEL designated to adjudicate requests for consolidation, intervention, and joinder, or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to its International Arbitration Rules relating to appointment of panelists for interim relief.

PURPOSES OF THE IRP are to hear and resolve Disputes for the reasons specified in the ICANN Bylaws, Article IV, Section 4.3(a).

STANDING PANEL refers to an omnibus standing panel of at least seven members from which three-member IRP PANELS are selected to hear and resolve DISPUTES consistent with the purposes of the IRP.¹⁰

2. Scope

The ICDR¹¹ will apply these Updated Supplementary Procedures, in addition to the ICDR RULES, in all cases submitted to the ICDR in connection with Article IV, Section 4.3 of the ICANN Bylaws after the date these Updated Supplementary Procedures go into effect. In the event there is any inconsistency between these Updated Supplementary Procedures and the ICDR RULES, these Updated Supplementary Procedures will govern. These Updated Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is commenced.

ALT 1: IRPs commenced prior to the adoption of these Updated Supplementary Procedures shall be governed by the Supplementary Procedures in effect at the time such IRPs were commenced.

ALT 2: -IRPs commenced prior to the adoption of these Updated Supplementary Procedures shall be governed by the Supplementary Procedures in effect at the time such IRPs were commenced unless the IRP Panel determines that a requesting party has demonstrated that application of the former Supplementary Procedures would materially

¹⁰ May 2016 ICANN Bylaws, Article IV, Section 4.3 (j)(i).

¹¹ May 2016 ICANN Bylaws, Article IV, Section 4.3 (m).

and unjustly affect judgment on the case as presented by the requesting party and would not materially disadvantage any other party's substantive rights.

Any party to a then-pending IRP may oppose the request for application of the Updated Supplementary Procedures. Requests to apply the Updated Supplementary Procedures will be resolved by the IRP PANEL in its discretion.¹²

In the event that any of these Updated Supplementary Procedures are subsequently amended, such amendments will not apply to any IRPs pending at the time such amendments come into force unless a party successfully demonstrates that application of the former Supplementary Procedures would be unjust and impracticable to the requesting party and application of the amendments would not materially disadvantage any other party's substantive rights. Any party to a then-pending IRP may oppose the request for application of the amended Supplementary Procedures. Requests to apply updated amended supplementary procedures will be resolved by the IRP PANEL in the exercise of its discretion.

3. Composition of Independent Review Panel

The IRP PANEL will comprise three panelists selected from the STANDING PANEL, unless a STANDING PANEL is not in place when the IRP is initiated.¹³ The CLAIMANT and ICANN shall each select one panelist from the STANDING PANEL, and the two panelists selected by the parties will select the third panelist from the STANDING PANEL. A STANDING PANEL member's appointment will not take effect unless and until the STANDING PANEL member signs a Notice of STANDING PANEL Appointment affirming that the member is available to serve and is independent and impartial. An IRP PANEL member's appointment will not take effect unless and until the IRP PANEL member signs a Notice of IRP PANEL Appointment affirming that the member is available to serve and is independent and impartial. In the event that

¹² The issue requires further discussion. Most importantly, we need to understand and address the impact that this change would have on IRPs that are ongoing as of October 1 2016. Would a claimant be entitled to essentially re-start the process to take advantage of a changed page limitation or the updated standard of review, even if a hearing has taken place and the only remaining step is for the Panel to issue a declaration? Could this be limited in some way? ICANN thinks that needs to be a bright line between IRPs filed under the old Bylaws/old procedures, and the IRPs filed under the new Bylaws/new procedures. If there is not, the impact raised above could be heavy. What would it mean to those who didn't have a standard to request a hearing, and had substantial motion practice. What about those who are close to the end who want to make a demonstration now for a hearing? ICANN also argues that this is not within the IOT's scope of authority. (See Footnote 37)

¹³ May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(i).

a STANDING PANEL is not in place when the relevant IRP is initiated or is in place but does not have capacity due to other IRP commitments, the CLAIMANT and ICANN shall each select a qualified panelist from outside the STANDING PANEL, and the two panelists selected by the parties shall select the third panelist. In the event that the two party-selected panelists cannot agree on the third panelist, the RULES shall apply to selection of the third panelist.¹⁴ In the event that a panelist resigns, is incapable of performing the duties of a panelist, or is removed and the position becomes vacant, a substitute arbitrator shall be appointed pursuant to the provisions of this Section [3] of these Updated Supplementary Procedures.

4. Time for Filing

An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 45 days after a CLAIMANT¹⁵

ALT 1: becomes aware or reasonably should have been aware of the action or inaction giving rise to the DISPUTE.

ALT 2: becomes aware, or reasonably should have been aware of the material affect of the action or inaction giving rise to the DISPUTE.

ALT 3: becomes aware of the material affect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twenty-four months from the date of such action or inaction.

In order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.¹⁶

5. Conduct of the Independent Review

It is in the best interests of ICANN and of the ICANN community for IRP matters to be resolved expeditiously and at a reasonably low cost while ensuring fundamental fairness and due process consistent with the PURPOSES OF THE IRP. The IRP PANEL shall

¹⁴ May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(ii).

¹⁵ This issue remains under discussion within the IOT

¹⁶ Currently there are no rules on the timely payment of fees. Inclusion of this language is designed to provide firmer guidance and to ensure that a Claimant is committed to the process.

consider accessibility, fairness, and efficiency (both as to time and cost) in its conduct of the IRP.

The IRP PANEL should conduct its proceedings by electronic means to the extent feasible. [Where **necessary**,]¹⁷ the IRP Panel may conduct live telephonic or video conferences.

The IRP PANEL should conduct its proceedings with the presumption that in-person hearings shall not be permitted. The presumption against in-person hearings may be rebutted only under extraordinary circumstances, where, upon motion by a Party, the IRP PANEL determines that the party seeking an in-person hearing has **clearly** demonstrated that: (1) an in-person hearing is necessary for a fair resolution of the claim; (2) an in-person hearing is necessary to further the PURPOSES OF THE IRP; *and* (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of an in-person hearing.¹⁸ In no circumstances shall in-person hearings be permitted for the purpose of introducing new arguments or evidence that could have been previously presented, but were not previously presented, to the IRP PANEL.

Alt 1: All hearings shall be limited to argument only.

Alt 2: All hearings shall be limited to argument only **unless the IRP Panel determines that a the party seeking cross examination of [a] witness[es] has demonstrated that such cross examination is: (1) necessary for a fair resolution of the claim; (2) necessary to further the PURPOSES OF THE IRP; and (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of witness cross examination.]**¹⁹

Alt 3: [The IRP Panel shall determine, in its discretion, whether or not to permit cross examination of witnesses at any hearing.]

¹⁷ Some members of the IOT would prefer to remove the phrase, “where necessary.”

¹⁸ ICANN continues to have serious concerns about the impact of in-person hearings on cost and time to resolution, and prefers to specify that the requisite demonstration must be made by clear and convincing evidence.

¹⁹ There appear to be a number of views among the IOT. Several members think that cross-examination of witnesses should be permitted as a matter of course, assuming in the case of F2F hearings, that the extraordinary circumstances standard has been met. Others think that cross-examination should be permitted on a case-by-case basis and only where the requesting party demonstrates that the requested cross-examination would meet the 3 part test for “extraordinary circumstances.” ICANN continues to have serious concerns about the cost and delay associated with cross examination of witnesses.

All evidence, including witness statements, must be submitted in writing [X] days in advance of any hearing.

With due regard to Bylaw Section 4.3(s), the IRP PANEL retains responsibility for determining the timetable for the IRP proceeding.²⁰ Any violation of the IRP PANEL's timetable may result in the assessment of costs pursuant to Section 10 of these Updated Supplementary Procedures.²¹

6. Written Statements

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font.²² All necessary and available evidence in support of the Claimant's Claim(s) should be part of the initial written submission.²³ Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence.²⁴ The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.²⁵

7. Consolidation, Intervention, and Joinder²⁶

At the request of a party, a PROCEDURES OFFICER may be appointed from the STANDING PANEL to consider requests for consolidation, intervention, and joinder. Requests for consolidation, intervention, and joinder are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be

²⁰ May 2016 ICANN Bylaws, Section 4.3(o)(vi).

²¹ This is an issue for future consideration within the IOT. This provision maintains the status quo until there is an agreed recommendation to change.

²² This is an issue for future consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

²³ Language modified to reflect broadened scope of IRPs. *See* May 2016 ICANN Bylaws, Article IV, Section 4.3 (i).

²⁴ This is an issue for future consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

²⁵ May 2016 ICANN Bylaws, Article IV, Section 4.3 (o)(ii).

²⁶ There is no existing Supplemental Rule. The CCWG Final Proposal and May 2016 ICANN Bylaws recommend that these issue be considered by IOT. *See* May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(B); CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, 23 February 2016, Annex 07 – Recommendation #7, at § 20.

appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for interim relief.

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the permission of the PROCEDURES OFFICER. CLAIMANT’S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE, but such claims may be asserted as independent or alternative claims.²⁷

In the event that requests for consolidation, intervention, and joinder are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion.

8. Discovery Methods²⁸

The IRP PANEL shall be guided by considerations of accessibility, fairness, and efficiency (both as to time and cost) in its consideration of discovery requests.

On the motion of either Party and upon finding by the IRP PANEL that such discovery is necessary to further the PURPOSES OF THE IRP, the IRP PANEL may order a Party to produce to the other Party, and to the IRP PANEL if the moving Party requests, documents or electronically stored information in the other Party’s possession, custody, or control that the Panel determines are reasonably likely to be relevant and material²⁹ to the resolution of the CLAIMS and/or defenses in the DISPUTE and are not subject to the attorney-client privilege, the work product doctrine or otherwise protected from disclosure by applicable law. ~~In the extraordinary circumstances~~ Where such discovery method(s) are allowed,³⁰ all Parties shall be granted the equivalent discovery rights.

²⁷ See May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(B).

²⁸ There is no existing Supplemental Rule. The [CCWG Final Proposal and] May 2016 ICANN Bylaws recommend that discovery methods be considered by IOT. See May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(D).

²⁹ ICANN NOTE: Materiality requirement aligns with the ICDR Rules.

³⁰ ICANN prefers to retain “in the extraordinary circumstances.”

A motion for document discovery shall contain a description of the specific documents, classes of documents or other information sought that relate to the subject matter of the Dispute along with an explanation of why such documents or other information are likely to be relevant and material to resolution of the Dispute.

Depositions, interrogatories, and requests for admission will not be permitted.

In the event that a Party submits what the IRP PANEL deems to be an expert opinion, such opinion must be provided in writing and the other Party must have a right of reply to such an opinion with an expert opinion of its own.³¹

9. Summary Dismissal

An IRP PANEL may summarily dismiss any request for INDEPENDENT REVIEW where the Claimant³² has not demonstrated that it has been materially affected by a DISPUTE. To be materially affected by a DISPUTE, a Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.³³

An IRP PANEL may also summarily dismiss a request for INDEPENDENT REVIEW that lacks substance or is frivolous or vexatious.³⁴

10. Interim Measures of Protection

A Claimant may request interim relief from the IRP PANEL, or if an IRP PANEL is not yet in place, from the STANDING PANEL. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN action or decision in order to maintain the status quo until such time as the opinion of the IRP PANEL is considered by ICANN as described in ICANN Bylaws, Article IV, Section 4.3(o)(iv).³⁵

³¹ Pursuant to the May 2016 ICANN Bylaws, Article IV, Section 4.3(n) (Rules of Procedure), these Supplementary Rules will govern the format of proceedings. This is an issue for future consideration within the IOT. May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(D).

³² May 2016 ICANN Bylaws, Article IV, Section 4.3(b)(i). Note that the term “requestor” has been replaced with “Claimant” for consistency with IRP terminology.

³³ May 2016 ICANN Bylaws, Article IV, Section 4.3(o)(i).

³⁴ May 2016 ICANN Bylaws, Article IV, Section 4.3(o)(i).

³⁵ May 2016 ICANN Bylaws, Article IV, Section 4.3(p).

An EMERGENCY PANELIST shall be selected from the STANDING PANEL to adjudicate requests for interim relief. In the event that no STANDING PANEL is in place when an EMERGENCY PANELIST must be selected, a panelist may be appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for interim relief. Interim relief may only be provided if the EMERGENCY PANELIST determines that the Claimant has established all of the following factors:

- (i) A harm for which there will be no adequate remedy in the absence of such relief;
- (ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and
- (iii) A balance of hardships tipping decidedly toward the party seeking relief.³⁶

Interim relief may be granted on an ex parte basis in circumstances that the EMERGENCY PANELIST deems exigent, but any Party whose arguments were not considered prior to the granting of such interim relief may submit any opposition to such interim relief, and the EMERGENCY PANELIST must consider such arguments, as soon as reasonably possible. The EMERGENCY PANELIST may modify or terminate the interim relief if the EMERGENCY PANELIST deems it appropriate to do so in light of such further arguments.

11. Standard of Review

Each IRP PANEL shall conduct an objective, de novo examination of the DISPUTE.³⁷

³⁶ May 2016 ICANN Bylaws, Article IV, Section 4.3(p).

³⁷ NOTE RELEVANT TO DISCUSSION REGARDING APPLICATION OF UPDATED SUPPLEMENTARY RULES TO IRPS PENDING ON 1 October 2016: The Standard of Review in these Updated Supplementary Procedures is materially different from the standard in the existing Supplementary Procedures, which read as follows:

The IRP is subject to the following standard of review: (i) did the ICANN Board act without conflict of interest in taking its decision; (ii) did the ICANN Board exercise due diligence and care in having sufficient facts in front of them; (iii) did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

To the extent the IOT believes that a claimant should be permitted to avail itself of the Updated Supplemental Procedures, it must consider how this would impact ongoing proceedings. ICANN further notes that **modifications to the existing standard in place for already-filed IRPs are not specified in the New ICANN Bylaws. Any reach into the ongoing IRPs would require modifications of the supplementary procedures and Bylaws under which those were filed. That is not within the implementation purview of the IOT.**

- a. With respect to COVERED ACTIONS, the IRP PANEL shall make findings of fact to determine whether the COVERED ACTION constituted an action or inaction that violated ICANN’S Articles or Bylaws.
- b. All DISPUTES shall be decided in compliance with ICANN’S Articles and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.
- c. For Claims arising out of the Board’s exercise of its fiduciary duties, the IRP PANEL shall not replace the Board’s reasonable judgment with its own so long as the Board’s action or inaction is within the realm of reasonable business judgment.
- d. With respect to claims that ICANN has not enforced its contractual rights with respect to the IANA Naming Function Contract, the standard of review shall be whether there was a material breach of ICANN’S obligations under the IANA Naming Function Contract, where the alleged breach has resulted in material harm to the Claimant.
- e. IRPs initiated through the mechanism contemplated at Article IV, Section 4.3(a)(iv) of ICANN’S Bylaws shall be subject to a separate standard of review as defined in the IANA Naming Function Contract.³⁸

12. IRP PANEL Decisions³⁹

IRP PANEL DECISIONS shall be made by a simple majority of the IRP PANEL⁴⁰. If any IRP PANEL member fails to sign the IRP PANEL DECISION, the IRP PANEL member shall endeavor to provide a written statement of the reason for the absence of such signature.⁴¹

³⁸ May 2016 ICANN Bylaws, Article IV, Section 4.3 (i).

³⁹ The May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(v), refer to an “IRP PANEL decision” (although they also state that an IRP PANEL will “declare” certain findings in Article IV, Section 4.3(o)(iii)).

⁴⁰ May 2016 ICANN Bylaws, Article IV, Section 4.3(k)(v).

⁴¹ This is an issue for future consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

13. Form and Effect of an IRP PANEL DECISION

- a. IRP PANEL DECISIONS shall be made in writing, promptly by the IRP PANEL, based on the documentation, supporting materials and arguments submitted by the parties.⁴²
- b. The IRP PANEL DECISION shall specifically designate the prevailing party as to each Claim.⁴³
- c. Subject to Article IV, Section 4.3 of ICANN’s Bylaws, all IRP PANEL DECISIONS shall be made public, and shall reflect a well-reasoned application of how the DISPUTE was resolved in compliance with ICANN’s Articles and Bylaws, as understood in light of prior IRP PANEL DECISIONS decided under the same (or an equivalent prior) version of the provision of the Articles and Bylaws at issue, and norms of applicable law.

14. Appeal of IRP PANEL Decisions⁴⁴

An IRP PANEL DECISION may be appealed to the full STANDING PANEL sitting en banc within 60 days of the issuance of such decision.⁴⁵ The en banc STANDING PANEL will review such appealed IRP PANEL DECISION based on a clear error of judgment or the application of an incorrect legal standard. The en banc STANDING PANEL may also resolve any disputes between panelists on an IRP PANEL or the PROCEDURES OFFICER with respect to consolidation of CLAIMS or intervention or joinder.

15. Costs

The IRP PANEL shall fix costs in its IRP PANEL DECISION.⁴⁶ Except as otherwise provided in Article IV, Section 4.3(e)(ii) of ICANN’s Bylaws, each party to an IRP

⁴² May 2016 ICANN Bylaws, Article IV, Sections (s), (t). The May 2016 ICANN Bylaws require the IRP PANEL to “issu[e] an early scheduling order and its written decision no later than six months after the filing of the Claim, except as otherwise permitted under the Rules of Procedure.” While the current language maintains the status quo, consideration should be given to whether maintaining the status quo is sufficient given the clear directive in, and the need to comply with, the May 2016 ICANN Bylaws.

⁴³ May 2016 ICANN Bylaws, Article IV, Section 4.3 (t).

⁴⁴ There is no existing Supplemental Rule. The proposed text is based upon the CCWG Final Proposal, Annex 7, ¶ 16, which provides for en banc appeal “based on a clear error of judgment or the application of an incorrect legal standard.”

⁴⁵ **To discuss with ICDR.**

⁴⁶ This is an issue for future consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, as defined in Article IV, Section 4.3(d) of ICANN's Bylaws, including the costs of all legal counsel and technical experts.

Except with respect to a Community IRP, the IRP PANEL may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.⁴⁷

⁴⁷ May 2016 Bylaws, Article IV, Section 4.3(r).

EXHIBIT 234

[IOT] status

Burr, Becky Contact Information Redacted

Mon Aug 29 22:19:29 UTC 2016

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Based on somewhat limited input to date, and limited attendance at our recent calls, I have revised the current draft Updated Supplementary Rules. I have also created a very short (3 page) deck focused on the open issues. Finally, I have created and attached the form of report I would propose to submit to the CCWG-Accountability to reflect our conclusions (once we get there). You will see that this is a skeleton report only until we reach closure on the open and contested issues. All of these documents are attached. (I apologize in advance if I have misinterpreted or failed to implement your input properly.)

At this point we do not have a call scheduled until September 7. That is unfortunate, as we really need to move these forward to the CCWG and for comment as soon as possible in light of the 1 October transition date. I would very much appreciate your views on the open issues between now and then.

J. Beckwith Burr
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EXHIBIT 235

Updated Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process¹

Revised as of [Day, Month], 2016

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These updated procedures supplement the International Centre for Dispute Resolution’s international arbitration rules in accordance with the independent review process set forth in Article IV, Section 4.3² of ICANN’s Bylaws. These procedures apply to all independent review process proceedings filed after [insert effective date of the Bylaws].

¹ CONTEXTUAL NOTE: These Supplemental Procedures are intended to supplement the ICDR RULES. Therefore, when the ICDR RULES appropriately address an item, there is no need to re-state that Rule within the Supplemental Procedures. The IOT, through its work, may identify additional places where variance from the ICDR RULES is recommended, and that would result in addition or modification to the Supplemental Procedures.

² Formatting has been updated to conform with the Bylaws approved by the ICANN Board of Directors on 27 May 2016 (hereafter the May 2016 ICANN Bylaws).

1. Definitions

In these Updated Supplementary Procedures:

A CLAIMANT is any legal or natural person, group, or entity including, but not limited to the Empowered Community, a Supporting Organization, or an Advisory Committee, that has been materially affected by a Dispute.³ To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.

COVERED ACTIONS are any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a DISPUTE.⁴

DISPUTES are defined as:

(A) Claims that COVERED ACTIONS violated ICANN’s Articles of Incorporation or Bylaws, including, but not limited to, any action or inaction that:

- 1) exceeded the scope of the Mission;
- 2) resulted from action taken in response to advice or input from any Advisory Committee or Supporting Organization that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
- 3) resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
- 4) resulted from a response to a DIDP (as defined in Section 22.7(d)) request that is claimed to be inconsistent with the Articles of Incorporation or Bylaws; or
- 5) arose from claims involving rights of the EC as set forth in the Articles of Incorporation or Bylaws;

³ May 2016 ICANN Bylaws Article IV, Section 4.3(b)(i).

⁴ May 2016 ICANN Bylaws Article IV, Section 4.3 (b)(ii).

(B) Claims that ICANN, the Board, individual Directors, Officers or Staff members have not enforced ICANN’s contractual rights with respect to the IANA Naming Function Contract; and

(C) Claims regarding the Post-Transition IANA entity service complaints by direct customers of the IANA naming functions that are not resolved through mediation.⁵

EMERGENCY PANELIST refers to a single member of the STANDING PANEL designated to adjudicate requests for interim relief⁶ or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for interim relief.

IANA refers to the Internet Assigned Numbers Authority.

ICDR refers to the International Centre for Dispute Resolution, which has been designated and approved by ICANN’s Board of Directors as the Independent Review Panel Provider (IRPP) under Article IV, Section 4.3 of ICANN’s Bylaws.

ICANN refers to the Internet Corporation for Assigned Names and Numbers.

INDEPENDENT REVIEW PROCESS or IRP refers to the procedure that takes place upon the Claimant’s filing of a written statement of a DISPUTE with the ICDR.⁷

IRP PANEL refers to the panel of three neutral members appointed to decide the relevant DISPUTE.⁸

IRP PANEL DECISION refers to the final written decision of the IRP PANEL that reflects the reasoned analysis of how the DISPUTE was resolved in compliance with ICANN’s Articles and Bylaws.⁹

⁵ May 2016 ICANN Bylaws, Article IV, Section 4.3 (b)(iii).

⁶ May 2016 ICANN Bylaws, Article IV, Section 4.3 (p).

⁷ May 2016 ICANN Bylaws, Article IV, Section 4.3 (d).

⁸ May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(i)

⁹ Change recommended for consistency with May 2016 ICANN Bylaws, which refer to an “IRP PANEL decision” rather than a “declaration” (although the same Bylaws state that an IRP PANEL will “declare” certain findings). *See* May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(v) & Section 4.3(o)(iii).

ICDR RULES refers to the ICDR's rules in effect at the time the relevant request for independent review is submitted.

PROCEDURES OFFICER refers to a single member of the STANDING PANEL designated to adjudicate requests for consolidation, intervention, and joinder, or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to its International Arbitration Rules relating to appointment of panelists for interim relief.

PURPOSES OF THE IRP are to hear and resolve Disputes for the reasons specified in the ICANN Bylaws, Article IV, Section 4.3(a).

STANDING PANEL refers to an omnibus standing panel of at least seven members from which three-member IRP PANELS are selected to hear and resolve DISPUTES consistent with the purposes of the IRP.¹⁰

2. Scope

The ICDR¹¹ will apply these Updated Supplementary Procedures, in addition to the ICDR RULES, in all cases submitted to the ICDR in connection with Article IV, Section 4.3 of the ICANN Bylaws after the date these Updated Supplementary Procedures go into effect. In the event there is any inconsistency between these Updated Supplementary Procedures and the ICDR RULES, these Updated Supplementary Procedures will govern. These Updated Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is commenced.

IRPs commenced prior to the adoption of these Updated Supplementary Procedures shall be governed by the Supplementary Procedures in effect at the time such IRPs were commenced.

In the event that any of these Updated Supplementary Procedures are subsequently amended, such amendments will not apply to any IRPs pending at the time such

¹⁰ May 2016 ICANN Bylaws, Article IV, Section 4.3 (j)(i).

¹¹ May 2016 ICANN Bylaws, Article IV, Section 4.3 (m).

amendments come into force unless a party successfully demonstrates that application of the former Supplementary Procedures would be unjust and impracticable to the requesting party and application of the amendments would not materially disadvantage any other party's substantive rights. Any party to a then-pending IRP may oppose the request for application of the amended Supplementary Procedures. Requests to apply updated amended supplementary procedures will be resolved by the IRP PANEL in the exercise of its discretion.

3. Composition of Independent Review Panel

The IRP PANEL will comprise three panelists selected from the STANDING PANEL, unless a STANDING PANEL is not in place when the IRP is initiated.¹² The CLAIMANT and ICANN shall each select one panelist from the STANDING PANEL, and the two panelists selected by the parties will select the third panelist from the STANDING PANEL. A STANDING PANEL member's appointment will not take effect unless and until the STANDING PANEL member signs a Notice of STANDING PANEL Appointment affirming that the member is available to serve and is independent and impartial. An IRP PANEL member's appointment will not take effect unless and until the IRP PANEL member signs a Notice of IRP PANEL Appointment affirming that the member is available to serve and is independent and impartial. In the event that a STANDING PANEL is not in place when the relevant IRP is initiated or is in place but does not have capacity due to other IRP commitments, the CLAIMANT and ICANN shall each select a qualified panelist from outside the STANDING PANEL, and the two panelists selected by the parties shall select the third panelist. In the event that the two party-selected panelists cannot agree on the third panelist, the RULES shall apply to selection of the third panelist.¹³ In the event that a panelist resigns, is incapable of performing the duties of a panelist, or is removed and the position becomes vacant, a substitute arbitrator shall be appointed pursuant to the provisions of this Section [3] of these Updated Supplementary Procedures.

¹² May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(i).

¹³ May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(ii).

4. Time for Filing

An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 45 days after a CLAIMANT¹⁴

becomes aware of the material affect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.

In order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.¹⁵

5. Conduct of the Independent Review

It is in the best interests of ICANN and of the ICANN community for IRP matters to be resolved expeditiously and at a reasonably low cost while ensuring fundamental fairness and due process consistent with the PURPOSES OF THE IRP. The IRP PANEL shall consider accessibility, fairness, and efficiency (both as to time and cost) in its conduct of the IRP.

The IRP PANEL should conduct its proceedings by electronic means to the extent feasible. Where necessary,¹⁶ the IRP Panel may conduct live telephonic or video conferences.

The IRP PANEL should conduct its proceedings with the presumption that in-person hearings shall not be permitted. The presumption against in-person hearings may be rebutted only under extraordinary circumstances, where, upon motion by a Party, the IRP PANEL determines that the party seeking an in-person hearing has demonstrated that: (1) an in-person hearing is necessary for a fair resolution of the claim; (2) an in-person hearing is necessary to further the PURPOSES OF THE IRP; and (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the

¹⁴ This issue remains under discussion within the IOT

¹⁵ Currently there are no rules on the timely payment of fees. Inclusion of this language is designed to provide firmer guidance and to ensure that a Claimant is committed to the process.

¹⁶ Some members of the IOT would prefer to remove the phrase, “where necessary.”

time and financial expense of an in-person hearing.¹⁷ In no circumstances shall in-person hearings be permitted for the purpose of introducing new arguments or evidence that could have been previously presented, but were not previously presented, to the IRP PANEL.

All hearings shall be limited to argument only unless the IRP Panel determines that a the party seeking to present witness testimony has demonstrated that such testimony is: (1) necessary for a fair resolution of the claim; (2) necessary to further the PURPOSES OF THE IRP; *and* (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of witness testimony and cross examination.

All evidence, including witness statements, must be submitted in writing [X] days in advance of any hearing.

With due regard to Bylaw Section 4.3(s), the IRP PANEL retains responsibility for determining the timetable for the IRP proceeding.¹⁸ Any violation of the IRP PANEL's timetable may result in the assessment of costs pursuant to Section 10 of these Updated Supplementary Procedures.¹⁹

6. Written Statements

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font.²⁰ All necessary and available evidence in support of the Claimant's Claim(s) should be part of the initial written submission.²¹ Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence.²² The IRP

¹⁷ ICANN continues to have serious concerns about the impact of in-person hearings on cost and time to resolution, and prefers to specify that the requisite demonstration must be made by clear and convincing evidence.

¹⁸ May 2016 ICANN Bylaws, Section 4.3(o)(vi).

¹⁹ This is an issue for future consideration within the IOT. This provision maintains the status quo until there is an agreed recommendation to change.

²⁰ This is an issue for future consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

²¹ Language modified to reflect broadened scope of IRPs. *See* May 2016 ICANN Bylaws, Article IV, Section 4.3 (i).

²² This is an issue for future consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.²³

7. Consolidation, Intervention, and Joinder²⁴

At the request of a party, a PROCEDURES OFFICER may be appointed from the STANDING PANEL to consider requests for consolidation, intervention, and joinder. Requests for consolidation, intervention, and joinder are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for interim relief.

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the permission of the PROCEDURES OFFICER. CLAIMANT'S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE, but such claims may be asserted as independent or alternative claims.²⁵

In the event that requests for consolidation, intervention, and joinder are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion.

8. Discovery Methods²⁶

The IRP PANEL shall be guided by considerations of accessibility, fairness, and efficiency (both as to time and cost) in its consideration of discovery requests.

²³ May 2016 ICANN Bylaws, Article IV, Section 4.3 (o)(ii).

²⁴ There is no existing Supplemental Rule. The CCWG Final Proposal and May 2016 ICANN Bylaws recommend that these issues be considered by IOT. *See* May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(B); CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, 23 February 2016, Annex 07 – Recommendation #7, at § 20.

²⁵ *See* May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(B).

²⁶ There is no existing Supplemental Rule. The [CCWG Final Proposal and] May 2016 ICANN Bylaws recommend that discovery methods be considered by IOT. *See* May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(D).

On the motion of either Party and upon finding by the IRP PANEL that such discovery is necessary to further the PURPOSES OF THE IRP, the IRP PANEL may order a Party to produce to the other Party, and to the IRP PANEL if the moving Party requests, documents or electronically stored information in the other Party's possession, custody, or control that the Panel determines are reasonably likely to be relevant and material²⁷ to the resolution of the CLAIMS and/or defenses in the DISPUTE and are not subject to the attorney-client privilege, the work product doctrine or otherwise protected from disclosure by applicable law. Where such discovery method(s) are allowed,²⁸ all Parties shall be granted the equivalent discovery rights.

A motion for document discovery shall contain a description of the specific documents, classes of documents or other information sought that relate to the subject matter of the Dispute along with an explanation of why such documents or other information are likely to be relevant and material to resolution of the Dispute.

Depositions, interrogatories, and requests for admission will not be permitted.

In the event that a Party submits what the IRP PANEL deems to be an expert opinion, such opinion must be provided in writing and the other Party must have a right of reply to such an opinion with an expert opinion of its own.²⁹

9. Summary Dismissal

An IRP PANEL may summarily dismiss any request for INDEPENDENT REVIEW where the Claimant³⁰ has not demonstrated that it has been materially affected by a DISPUTE. To be materially affected by a DISPUTE, a Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.³¹

²⁷ ICANN NOTE: Materiality requirement aligns with the ICDR Rules.

²⁸ ICANN prefers to retain "in the extraordinary circumstances."

²⁹ Pursuant to the May 2016 ICANN Bylaws, Article IV, Section 4.3(n) (Rules of Procedure), these Supplementary Rules will govern the format of proceedings. This is an issue for future consideration within the IOT. May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(D).

³⁰ May 2016 ICANN Bylaws, Article IV, Section 4.3(b)(i). Note that the term "requestor" has been replaced with "Claimant" for consistency with IRP terminology.

³¹ May 2016 ICANN Bylaws, Article IV, Section 4.3(o)(i).

An IRP PANEL may also summarily dismiss a request for INDEPENDENT REVIEW that lacks substance or is frivolous or vexatious.³²

10. Interim Measures of Protection

A Claimant may request interim relief from the IRP PANEL, or if an IRP PANEL is not yet in place, from the STANDING PANEL. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN action or decision in order to maintain the status quo until such time as the opinion of the IRP PANEL is considered by ICANN as described in ICANN Bylaws, Article IV, Section 4.3(o)(iv).³³

An EMERGENCY PANELIST shall be selected from the STANDING PANEL to adjudicate requests for interim relief. In the event that no STANDING PANEL is in place when an EMERGENCY PANELIST must be selected, a panelist may be appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for interim relief. Interim relief may only be provided if the EMERGENCY PANELIST determines that the Claimant has established all of the following factors:

- (i) A harm for which there will be no adequate remedy in the absence of such relief;
- (ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and
- (iii) A balance of hardships tipping decidedly toward the party seeking relief.³⁴

Interim relief may be granted on an ex parte basis in circumstances that the EMERGENCY PANELIST deems exigent, but any Party whose arguments were not considered prior to the granting of such interim relief may submit any opposition to such interim relief, and the EMERGENCY PANELIST must consider such arguments, as soon as reasonably possible. The EMERGENCY PANELIST may modify or terminate the interim relief if the EMERGENCY PANELIST deems it appropriate to do so in light of such further arguments.

³² May 2016 ICANN Bylaws, Article IV, Section 4.3(o)(i).

³³ May 2016 ICANN Bylaws, Article IV, Section 4.3(p).

³⁴ May 2016 ICANN Bylaws, Article IV, Section 4.3(p).

11. Standard of Review³⁵

Each IRP PANEL shall conduct an objective, de novo examination of the DISPUTE.

- a. With respect to COVERED ACTIONS, the IRP PANEL shall make findings of fact to determine whether the COVERED ACTION constituted an action or inaction that violated ICANN’S Articles or Bylaws.
- b. All DISPUTES shall be decided in compliance with ICANN’S Articles and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.
- c. For Claims arising out of the Board’s exercise of its fiduciary duties, the IRP PANEL shall not replace the Board’s reasonable judgment with its own so long as the Board’s action or inaction is within the realm of reasonable business judgment.
- d. With respect to claims that ICANN has not enforced its contractual rights with respect to the IANA Naming Function Contract, the standard of review shall be whether there was a material breach of ICANN’S obligations under the IANA Naming Function Contract, where the alleged breach has resulted in material harm to the Claimant.
- e. IRPs initiated through the mechanism contemplated at Article IV, Section 4.3(a)(iv) of ICANN’S Bylaws shall be subject to a separate standard of review as defined in the IANA Naming Function Contract.³⁶

12. IRP PANEL Decisions³⁷

IRP PANEL DECISIONS shall be made by a simple majority of the IRP PANEL³⁸. If any IRP PANEL member fails to sign the IRP PANEL DECISION, the IRP PANEL

³⁵ The standard of review is dictated by ICANN’S Bylaws and cannot be modified or updated without a corresponding Bylaws amendment.

³⁶ May 2016 ICANN Bylaws, Article IV, Section 4.3 (i).

³⁷ The May 2016 ICANN Bylaws, Article IV, Section 4.3 (k)(v), refer to an “IRP PANEL decision” (although they also state that an IRP PANEL will “declare” certain findings in Article IV, Section 4.3(o)(iii)).

³⁸ May 2016 ICANN Bylaws, Article IV, Section 4.3(k)(v).

member shall endeavor to provide a written statement of the reason for the absence of such signature.³⁹

13. Form and Effect of an IRP PANEL DECISION

- a. IRP PANEL DECISIONS shall be made in writing, promptly by the IRP PANEL, based on the documentation, supporting materials and arguments submitted by the parties.⁴⁰
- b. The IRP PANEL DECISION shall specifically designate the prevailing party as to each Claim.⁴¹
- c. Subject to Article IV, Section 4.3 of ICANN’s Bylaws, all IRP PANEL DECISIONS shall be made public, and shall reflect a well-reasoned application of how the DISPUTE was resolved in compliance with ICANN’s Articles and Bylaws, as understood in light of prior IRP PANEL DECISIONS decided under the same (or an equivalent prior) version of the provision of the Articles and Bylaws at issue, and norms of applicable law.

14. Appeal of IRP PANEL Decisions⁴²

An IRP PANEL DECISION may be appealed to the full STANDING PANEL sitting en banc within 60 days of the issuance of such decision. The en banc STANDING PANEL will review such appealed IRP PANEL DECISION based on a clear error of judgment or the application of an incorrect legal standard. The en banc STANDING PANEL may also resolve any disputes between panelists on an IRP PANEL or the PROCEDURES OFFICER with respect to consolidation of CLAIMS or intervention or joinder.

³⁹ This is an issue for future consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

⁴⁰ May 2016 ICANN Bylaws, Article IV, Sections (s), (t). The May 2016 ICANN Bylaws require the IRP PANEL to “issu[e] an early scheduling order and its written decision no later than six months after the filing of the Claim, except as otherwise permitted under the Rules of Procedure.” While the current language maintains the status quo, consideration should be given to whether maintaining the status quo is sufficient given the clear directive in, and the need to comply with, the May 2016 ICANN Bylaws.

⁴¹ May 2016 ICANN Bylaws, Article IV, Section 4.3 (t).

⁴² There is no existing Supplemental Rule. The proposed text is based upon the CCWG Final Proposal, Annex 7, ¶ 16, which provides for en banc appeal “based on a clear error of judgment or the application of an incorrect legal standard.”

15. Costs

The IRP PANEL shall fix costs in its IRP PANEL DECISION.⁴³ Except as otherwise provided in Article IV, Section 4.3(e)(ii) of ICANN's Bylaws, each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, as defined in Article IV, Section 4.3(d) of ICANN's Bylaws, including the costs of all legal counsel and technical experts.

Except with respect to a Community IRP, the IRP PANEL may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.⁴⁴

⁴³ This is an issue for future consideration within the IOT. This provision maintains the status quo until there is a recommendation to change that is agreed upon.

⁴⁴ May 2016 Bylaws, Article IV, Section 4.3(r).

EXHIBIT 236

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AFNIC comment on the updated Supplementary Procedures for IRP

- *To:* comments-irp-supp-procedures-28nov16@xxxxxxxxxx
- *Subject:* AFNIC comment on the updated Supplementary Procedures for IRP
- *From:* Marianne Georgelin <marianne.georgelin@xxxxxxxxxx>
- *Date:* Mon, 23 Jan 2017 15:07:10 +0100 (CET)

Afnic is a registry operator for top-level domains corresponding to the national territory of France (.fr, .re, .pm, .yt, .wf, .tf). and is also the backend registry operator for 15 new generic Top Level Domains. Afnic is a member of CCNSO, Centr, and APTLD.

We welcome this opportunity to share our views on the Supplementary Procedures for IRP through this public comment and to acknowledge the efforts being undertaken by the IRP IOT in updating those rules.

We support the comments made by Spain and Switzerland (through their GAC Representatives) on the necessity to enhance diversity and to warrant a level-playing field in the process (with reference to Section 4.3 (l) and Section 4.3 (j) (iv) of the Bylaws). We agree with their proposal to add to the Supplementary Procedures the appropriate measures to ensure translation and interpretation at no charge during the hearings when requested by the claimant.

The procedures should also ensure that parties with less structured legal resources have enough time to introduce their claims within the time limit set forth for the procedure. We believe that the proposed 45 days time limit is too short to achieve this goal and we therefore agree with the comments supporting its extension to a 6 month period.

Thank you.

Marianne GEORGELIN
Responsable des Politiques de Registre
Senior Policy Manager

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AT-LARGE ADVISORY COMMITTEE

ALAC Statement on the Updated Supplementary Procedures for Independent Review Process (IRP)

Introduction

Leon Sanchez, ALAC Member of the Latin American and Caribbean Islands Regional At-Large Organization (LACRALO) and ALAC Vice Chair, developed an initial draft of the ALAC Statement on behalf of the ALAC.

On 20 December 2016, the first draft of the Statement was posted on the [At-Large Updated Supplementary Procedures for Independent Review Process \(IRP\) Workspace](#).

On that same date, Alan Greenberg, Chair of the ALAC, asked ICANN Policy Staff in support of the At-Large Community to send a Call for Comments on the Statement to the At-Large Community via the [ALAC Announce Mailing List](#).

On 05 January 2017, a version incorporating the comments received was posted on the aforementioned workspace and the Chair requested that Staff open an ALAC ratification vote.

On 10 January 2017, Staff confirmed that the online vote resulted in the ALAC endorsing the Statement with 12 votes in favor, 0 vote against, and 0 abstention. You may view the result independently under: <https://www.bigpulse.com/pollresults?code=6481UiQPPIN59kGiqvkBFxAG>.

ALAC Statement on the Updated Supplementary Procedures for Independent Review Process (IRP)

The ALAC welcomes the opportunity to comment on the “Draft IRP Updated Supplementary Procedures” and hereby submits the following as a formal statement to the Board of Directors:

1. The ALAC recognizes the continued effort to maintain an up-to-date set of rules and procedures applicable to the ICANN’s day to day operations in a bottom-up, multi-stakeholder, consensus driven process.
2. The ALAC appreciates that details have been carefully addressed to avoid any clashing situations between the IRP Supplementary Procedures being updated and those proposed as new IRP Supplementary Procedures.
3. The ALAC specifically recognizes the effort put in drafting an updated set of IRP Supplementary Procedures that address the delicate balance between due process and expedited resolution times that will help provide, both, certainty and celerity to applicants in IRP processes.
4. The ALAC recommends that as we gain experience with these new procedures, there is ongoing monitoring to ensure continued improvement.

The ALAC is confident that this updated IRP Supplementary Procedures, when enacted, will indirectly benefit end users and continue to provide certainty to the DNS.



CENTRE FOR COMMUNICATION GOVERNANCE AT NATIONAL LAW UNIVERSITY, DELHI

Comments on the draft Updated Supplementary Procedures for ICANN's Independent Review Process

The Centre for Communication Governance at National Law University, Delhi (CCG) thanks ICANN for the opportunity to submit this comment.

In examining the Updated Supplementary Procedures (USP) in the context of CCWG-Accountability Final Report and the ICANN Bylaws, our comment identifies areas where the IRP falls short of the Bylaws and the CCWG-Accountability Recommendations. We also make recommendations on improving the USP to comply with the mandate of CCWG-Accountability.

We first provide a brief background to the IRP and then discuss the three areas where the USP needs to be amended. This relates to the provisions on 1) time limit for filing claims, 2) independence and impartiality of independent review panelists and 3) the accessibility of the IRP to claimants from developing countries.

Background

The Independent Review Process (IRP) is very important since it holds ICANN to its mission, preventing overreach.¹ It also attempts to ensure compliance with the Bylaws

¹ Section 1.1 (c) of the ICANN Bylaws clearly limit ICANN's mission by stating that it shall not regulate the content of "services that use the Internet's unique identifiers". Available at <<https://www.icann.org/resources/pages/governance/bylaws-en>> (last accessed 25/01/17). Also see CCWG-Accountability Final Report for WS1, available at <<https://www.icann.org/en/system/files/files/ccwg-accountability-supp-proposal-work-stream-1-recs-23feb16-en.pdf>> at p 33, para 174 (last accessed 17/01/17).



and Articles of Incorporation.² With this in mind, the Cross Community Working Group on Accountability (CCWG-Accountability) focused on strengthening the IRP in Work Stream 1 (WS1).³ These were incorporated into the ICANN bylaws as a fundamental bylaw.⁴ The Supplementary Procedures have been updated to comply with the amended bylaws. The USP however, falls short of many of the recommendations in the CCWG-Accountability Report and the Bylaws as discussed below.

1. Time-limit to file claims

The current supplementary procedure does not stipulate a time limit for filing an IRP. However, Section 4.3 (n) (iv) (A) of the Bylaws⁵ tasks the IRP Implementation Oversight Team (IOT) with developing rules of procedure that include the time within which a claim needs to be filed. Accordingly, the Section 4 of the USP proposes that a claim should be filed with the ICDR (International Centre for Dispute Resolution) “no more than 45 days after a CLAIMANT becomes aware of the material [e]ffect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.”⁶

We understand the need to prescribe time limits for the speedy completion of arbitration proceedings. However, barring all claims after one year of the action or inaction is extremely problematic. ICANN policy processes take place over a long time. It is highly likely that a policy would be implemented more than a year after the Board has approved it. It must be remembered that the IRP is a check on abuse of ICANN’s power, and its protection must be safeguarded.⁷

² Id, CCWG-Accountability.

³ For a full list of CCWG-Accountability recommendations on the IRP, see id, pp. 33-36.

⁴ Section 4.3, ICANN Bylaws, available at <<https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf>> (last accessed 24/01/17).

⁵ Section 4.3 is a fundamental bylaw.

⁶ Section 4, Updated Supplementary Procedures for ICANN’s Independent Review Procedure, available at <<https://www.icann.org/en/system/files/files/draft-irp-supp-procedures-31oct16-en.pdf>> (last accessed 17/01/17).

⁷ Milton Mueller, *Putting Your Rights On The Clock: The IRP Supplementary Rules* (7th January 2017), available at <<http://www.internetgovernance.org/2017/01/07/putting-your-rights-on-the-clock-the-irp-supplementary-rules/>> (last accessed 17/01/17).



CCWG-Accountability's external counsel noted that [emphasis added] “Applying a strict 12-month limit to any IRP claim that commences at the time of the ICANN action or inaction and **without regard to when the invalidity and material impact became known to the claimant, is inconsistent with the Bylaws** (and is inconsistent with the terms of Annex 7 of the CCWG Report).”⁸ The counsel also noted that alignment with Section 4.3 (n) (iv) (A) of the Bylaws⁹ would require the provision of a clause for ‘reasonably should have known’,¹⁰ as well as omission of the strict 12-month limitation period.

It should also be noted that arbitral institutions do not usually impose time limits on the submission of a claim. A survey of leading arbitral institutions such as the International Chamber of Commerce,¹¹ the London Court of International Arbitration¹² and the Stockholm Chamber of Commerce¹³ suggests that this is not a common practice. They do however, impose time limits during the arbitral proceedings. This includes time limits on the appointment of arbitrators¹⁴ and making the final award.¹⁵ The ICDR Rules which govern the IRP also does not impose a time limit on filing claims.¹⁶ In keeping with international practice, we recommend that the USP not contain a time limit on filing claims.

Further, as Professor Mueller notes, since a claimant is time-barred from challenging the policy, a successful challenge to an implementing action does nothing to prevent similar

⁸ Legal Memorandum from Sidley Austin LLP (4th January 2017), available at <<https://mm.icann.org/pipermail/iot/attachments/20170106/9dcc4fb4/Sidley-ResponsetoCertifiedQuestionofCCWGIoT-January42017-0001.pdf>> at p 4 (last accessed 17/01/17).

⁹ ICANN Bylaws, supra, n. 1.

¹⁰ Section 4.3 (n)(iv)(A) of the bylaws states that the Rule of procedure should include “The time within which a Claim must be filed after a Claimant becomes aware or reasonably should have become aware of the action or inaction giving rise to the Dispute”. Supra, n. 8, at p 4.

¹¹ ICC Rules of Arbitration (2012), available at <<http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/>> (last accessed 24/01/17).

¹² LCIA Arbitration Rules (2014), available at <http://www.lcia.org/Dispute_Resolution_Services/lcia-arbitration-rules-2014.aspx#Article_1> (last accessed 24/01/17).

¹³ SCC Arbitration Rules (2017), available at <http://www.sccinstitute.com/media/169838/arbitration_rules_eng_17_web.pdf> (last accessed 24/01/17).

¹⁴ See for instance, Article 12 of the ICC Rules; Article 5 of the LCIA Rules; Article 17 of the SCC Rules.

¹⁵ See for instance, Article 30 of the ICC Rules; Article 43 of the SCC Rules.

¹⁶ Similar to other institutions, ICDR does not impose time limits on filing a claim, but imposes limits on filing counter claims and in the appointment of arbitrators. See, ICDR Rules of Arbitration, available at <<https://www.icdr.org/icdr/ShowProperty?nodeId=/UCM/ADRSTAGE2020868&revision=latestrelease>> (last accessed 24/02/17)

future actions.¹⁷ This is of concern, as the IRP enhancements envisioned by the CCWG-Accountability were meant to “produce consistent and coherent results that will serve as a guide for future actions”,¹⁸ which Section 4 of the USP fails to do. CCG appreciates that the IOT has already taken note of this concern and will be discussing it once the public comment period has ended.¹⁹

2. Independence and Impartiality of Independent Review Panelists

The independence of IRP panelists is essential to the completion of an IRP in a just and transparent manner. Section 4.3 (q)(i) of the ICANN Bylaws requires that Independent Review Panelists be independent of ICANN, its Supporting Organizations and Advisory Committees. Section 4.3(q)(i)(A) requires panelists to disclose any material relationships to the parties and Section 4.3(q)(i)(B) calls on the IOT to develop further independence requirements. Similarly, the CCWG-Accountability proposal recommends that panelists be term limited.²⁰

The USP in Section 3 addresses the issue of independence.²¹ But it merely echoes Section 4.3(q)(i)(A) of the ICANN by laws in requiring the disclosure of material relationships. It does not address the issue of term limits raised in the CCWG-Accountability proposal. The USP also does not contain any new independence requirements as per the mandate of the ICANN Bylaws. In the absence of such recommendations, it is useful to look at internationally accepted standards on the independence of arbitrators.

The independence and impartiality of arbitrators is an important facet of international arbitration. The standards for independence vary based on the circumstance of the case.²² The International Bar Association (IBA) Guidelines on Conflicts of Interest in International Arbitration is a useful, internationally accepted standard that can be applied

¹⁷ Milton Mueller, *supra*, n. 7.

¹⁸ Annex 07, CCWG-Accountability Final Report for WS1, *supra*, n. 1, at p 1.

¹⁹ IOT Meeting #13 (13th January 2017), Notes, recordings and transcripts available at <<https://community.icann.org/pages/viewpage.action?pageId=63149880>> (last accessed 17/01/17).

²⁰ Annex 07, CCWG-Accountability Final Report for WS1, *supra*, n. 1, at p 9, para 41.

²¹ Section 3, Updated Supplementary Procedures for ICANN’s Independent Review Procedure, *supra*, n. 6.

²² For a discussion on independence of arbitrators, see Michael Tupman, “Challenge and Disqualification of Arbitrators in International Commercial Arbitration”, *The International and Comparative Law Quarterly*, Vol. 38, No. 1 (Jan., 1989), pp. 26-52.

to the IRP.²³ Rather than a list of criteria, the Guidelines list general and practical standards that can be applied to different situations of conflict.²⁴ The standards are classified across three lists (red, orange and green) based on the extent of the conflict involved.²⁵

Instead of sending the USP back to the IOT on this issue, we recommend that the USP make a reference to the IBA Guidelines so it may be applied on a case to case basis.

3. Accessibility to Claimants from Developing Countries

Both the ICANN by laws²⁶ and the CCWG-Accountability report²⁷ call for the IRP to be an accessible process. The latter calls on ICANN to establish processes to facilitate access to pro bono representation for community, non-profit other complainants who would not normally be able to use the IRP process.²⁸ However, the USP does not contain any specific rules that enable access to such claimants.²⁹

To make the IRP more accessible, it might be instructive to follow the practices of other international organizations. The World Trade Organization (WTO) for instance makes special provisions to enable Least Developed Countries (LDCs) to access the Dispute Settlement System.³⁰ According to Van den Bossche and Gathii there are three kinds of strategies that can make the WTO dispute settlement system more accessible.³¹ These are

²³ International Bar Association, Guidelines on Conflicts of Interest in International Arbitration, (2014), available at

<<http://www.ibanet.org/Document/Default.aspx?DocumentUid=e2fe5e72-eb14-4bba-b10d-d33dafec8918>> (last accessed 23/01/17).

²⁴ Khaled Moyeed et al, “A Guide to the IBA’s Revised Guidelines on Conflicts of Interest”, Kluwer Arbitration Blog, 29th January 2015, available at < <http://kluwerarbitrationblog.com/2015/01/29/a-guide-to-the-ibas-revised-guidelines-on-conflicts-of-interest/>> (last accessed 23/01/17).

²⁵ Id.

²⁶ Section 4.3 (a) (viii) states that the IRP should “secure the accessible, transparent, efficient, consistent, coherent and just resolution of disputes”.

²⁷ Annex 07, CCWG-Accountability Final Report for WS1, supra, n. 1, at p. 11, paras 60-61.

²⁸ Id, para 60.

²⁹ Article 5 (Conduct of Independent Review) and Article 8 (Discovery Methods) of the USP require the IRP Panel to be guided by considerations of accessibility. However, they do not contain any recommendations on enabling access to the IRP as mentioned in the CCWG-Accountability report.

³⁰ Peter Van den Bossche and James Gathii, “Use of WTO Dispute Settlement by LDCs and LICs”, Trapca 2013, available at < <http://new.trapca.org/wp-content/uploads/2016/04/TWP1304-Use-of-the-WTO-Dispute-Settlement-System-by-LDCs-and-LICs.pdf>> at pp. 51-52 (last accessed 23/01/17).

³¹ Id, at pp. 45-53 (last accessed 23/01/17).



experience based, resource based and rules based strategies.³² Since this comment looks at revising the IRP procedures, rules based strategies within WTO are relevant to this context.

The WTO Dispute Settlement Understanding (DSU) (analogous to the supplementary procedures in ICANN) contains rules that apply specifically to disputes involving developing countries. Article 24 requires that WTO members exercise restraint while bringing disputes against LDC members.³³ It also requires that the Chairman of the Dispute Settlement body help mediate disputes before they go to a WTO panel.³⁴ The Cooperative Engagement Process in Section 4.3 (e) suggests that ICANN like the WTO encourages community members to attempt to settle disputes through mediation before using the IRP. In this context, a special allowance for developing countries could be made in similar terms to Article 24 of the WTO DSU. The USP can be amended to include a similar provision.

Article 27 of the DSU requires that the WTO Secretariat provide support through legal and technical expertise when requested by a developing country member.³⁵ Similarly, the ICANN secretariat can provide for legal and technical support to developing country claimants.³⁶ This can be achieved by a provision in the USP that requires the ICANN secretariat to provide or make provisions to provide legal and technical support where necessary.

In addition to the CCWG-Accountability recommendation on pro bono access, we recommend that ICANN enact rules in the USP to enable better access to the IRP to developing country claimants.

³² Id.

³³ Article 24, WTO Dispute Settlement Understanding, available at <https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#24> (last accessed 23/01/17).

³⁴ Id.

³⁵ Article 27, WTO Dispute Settlement Understanding.

³⁶ Id.



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January 30, 2017

Re: DotMusic Public Comments concerning the Updated Supplementary Procedures for Independent Review Process (IRP)

Dear ICANN and IRP-IOT:

DotMusic appreciates the opportunity to submit public comments concerning the Updated Procedures for the Independent Review Process¹ under the new ICANN Bylaws. Relevantly, DotMusic submitted public comments to ICANN on May 21, 2016 that was also pertinent to the IRP component of the New ICANN Bylaws.²

DotMusic urges that both ICANN and the IRP-IOT strongly consider amending the USP because of significant issues that compromise the credibility, impartiality and independence of the new IRP procedures to hold ICANN truly accountable in light of the Dot Registry IRP Determination,³ the Council of Europe (COE) report *Applications to ICANN for Community-based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective* by Eve Salomon and Kinanya Pijl,⁴ and the ICANN Community gTLD Applications and Human Rights webinar findings and recommendations.⁵ Namely:

New Rule 3. Composition of the Independent Review Panel

The current rule calls into question the Standing Panel's impartiality. According to ICANN's May 2016 Bylaws, Article IV, Section 4.3(j), the Standing Panel members are nominated by ICANN's Supporting Organizations and Advisory Committees, and confirmed by the ICANN Board. This is

¹ ICANN, Public Comments - Updated Procedures for the Independent Review Process, <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>; See <https://www.icann.org/en/system/files/files/draft-irp-supp-procedures-31oct16-en.pdf>

² DotMusic public comments to ICANN, *DotMusic public comments on the Draft New ICANN Bylaws*, May 21, 2016, <https://forum.icann.org/lists/comments-draft-new-bylaws-21apr16/pdfrrv4M1ldlr.pdf>

³ Dot Registry, LLC v. ICANN (.INC/.LLC/.LLP), Independent Review Proceeding Final Declaration, July 29, 2016, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>

⁴ Eve Salomon and Kinanya Pijl, Council of Europe report DGI (2016) 17, *Applications to ICANN for Community-based New Generic Top Level Domains (gTLDs): Opportunities and challenges from a human rights perspective*, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806be175>

⁵ ICANN Webinar, *Community gTLD Applications and Human Rights*, January 18, 2017, <https://community.icann.org/display/gnsononcomstake/Meeting+Notes>; Presentation: <https://community.icann.org/download/attachments/53772757/Powerpoint%20presentation%20webinar%20Eve%20%26%20Kinanya.pdf?version=1&modificationDate=1484753564000&api=v2>; Transcript: https://community.icann.org/download/attachments/53772757/transcript_cwphrwebinar_180117.doc?version=1&modificationDate=1484926687000&api=v2



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problematic because ICANN —the organization that confirmed the IRP Panelists— will be a party before the same Panelists.

The appearance of impartiality implicates due process principles highlighted in the Council of Europe’s Report. ICANN’s May 2016 Bylaws commits ICANN to respect internationally recognized human rights. With such right, due process provides for “a competent, independent and impartial tribunal.” Furthermore, the Council of Europe Report stresses that “ICANN needs to guarantee there is no appearance of conflict of interest:”

It is the independence of judgement, transparency, and accountability, which ensure fairness and which lay the basic foundation of ICANN’s vast regulatory authority. For that reason, ICANN needs to guarantee there is no appearance of conflict of interest.⁶

ICANN will not meet this standard through use of the Standing Panel. To ensure impartiality, eliminate any appearance of conflict of interest and mitigate ICANN’s legal and reputational risk, it is recommended that an independent 3rd-party provider with experience in dispute resolution, such as the International Centre for Dispute Resolution (ICDR), administrate the IRP with neutral, independent Panelists that have no ties with ICANN or the ICANN community.

New Rule 4. Time for Filing

It is recommended that the statute of limitations be extended. Given that ICANN has created a system where it demands that all necessary evidence be filed with the initial written submissions, more than 45 days is necessary to ensure that Claimants are given a full and fair opportunity to present their case. It is interesting to note that the timeframe for filing an appeal of an IRP decision under the proposed rules (60 days) is longer than the existing timeframe for filing an IRP (45 days).

Furthermore, there should be no statute of repose. The 12-month limitation on commencing an IRP, regardless of when Claimants become aware of the relevant action or inaction unnecessarily limits Claimants’ ability to seek redress for ICANN’s actions or inactions. Both the May 2016 ICANN Bylaws and the Council of Europe affirm ICANN’s commitment to transparency. The imposition of a statute of repose encourages non-transparent behavior. If ICANN can prevent Claimants from learning about its actions or inactions for 12 months then Claimants cannot commence an IRP against ICANN.

New Rule 5. Conduct of the Independent Review Panel

The phrase “[w]here necessary” should be removed from the sentence “[w]here necessary, the IRP Panel may conduct live telephonic or video conferences.” Some members of the IOT also suggested to remove the phrase “where necessary.”

⁶ COE Report, *Independent, transparent and accountable decision-making*, p.44



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The parties should be also permitted to engage in an in-person hearing for all IRPs, instead of only under “extraordinary circumstances.” Claimants should have the opportunity to present their arguments directly before the Panel and not have to meet such a high threshold.

Moreover, the parties should be able to present evidence, such as witness statements and expert opinions, at the hearing. The New Rules restrict hearings to legal arguments except under specific circumstances. As stated in the Council of Europe, due process requires a “fair and public hearing” as stipulated by the International Covenant on Civil and Political Rights (ICCPR),⁷ a multilateral treaty adopted by the United Nations that commits its parties to respect the civil and political rights of individuals, including the right to life, freedom of religion, freedom of speech, freedom of assembly, electoral rights and rights to due process and a fair trial:

Due process rights are traditionally known among human right experts to centre on the right to a fair trial and the right to an effective remedy. The right to a fair and public hearing by a competent, independent and impartial tribunal established by law is encompassed within Article 14(1) of the ICCPR and is applicable to both criminal and non-criminal proceedings.⁸

This rule prevents the parties from engaging in a “fair” hearing, as required by due process rights, because the Panel will be unable to personally assess the witnesses and experts, and therefore determine their reliability.

New Rule 6. Written Statements: The requirement to file “all necessary and available evidence” should be removed from the Supplementary Procedures entirely in light of the short deadline to initiate IRP proceedings as well as the reality that both parties should be entitled to file at least one additional set of responsive pleading with such factual and legal support as they deem appropriate.

Furthermore, this requirement contradicts with the new requirement in New Rule 5, which requires that all evidence must be submitted in writing “[X] days” in advance of any hearing. Such a requirement indicates that additional “necessary and available evidence” can be submitted after the initial written submissions and before the hearing.

Further, the Rules must provide for a right of reply that is not limited only to expert evidence. As currently drafted, the Requestor is entitled to only a single, 25-page submission filed simultaneously with its Notice of IRP and one right of reply to expert evidence.

New Rule 7. Consolidation, Intervention and Joinder: The appointment of a Procedures Officer from within the Standing Panel to consider issues of joinder, intervention, and consolidation is

⁷ United Nations, International Covenant on Civil and Political Rights, No. 14668, March 23, 1976, <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>

⁸ COE Report, *Due Process*, p.26; See also Article 13 and 15 ICCPR.



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unfair and liable to generate unnecessary costs. These issues should be decided by the duly constituted IRP Panel already hearing a claim, which will be best placed to gauge whether there is sufficient common ground for joinder or intervention.

New Rule 8. Discovery Methods: The request for discovery is a basic facet of requiring equality of arms between the parties in international arbitration and should not be consigned to the discretion of the of the IRP Panel as a matter of principle but instead the IRP Panel should be required to rule on both parties individual requests for discovery and whether such requests are relevant and material to the claims advanced in the arbitration. In accordance with this, there should not be a complete bar on all depositions, interrogatories, and requests for admission.

Additionally, consider whether it would be appropriate to make reference to the International Bar Association (IBA) Rules on the Taking of Evidence in International Arbitration given the reference in the May 2016 Bylaws to developing “clear published rules for IRP . . . that conform with international arbitration norms . . .” Alternatively, discovery rules could also be drawn from the IBA Rules on the Taking of Evidence.⁹

Respectfully Submitted,

Constantine Roussos
DotMusic
Founder

Website: <http://www.music.us>

Supporting Organizations: <http://www.music.us/supporters>

Governance Board: <http://www.music.us/board>

⁹ International Bar Association, *Practice Rules and Guidelines - Rules on the Taking of Evidence in International Arbitration (2010)*, http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx and <http://www.ibanet.org/Document/Default.aspx?DocumentUid=68336C49-4106-46BF-A1C6-A8F0880444DC>



SUBMITTED VIA PUBLIC COMMENT FORUM AT:

January 31, 2017

Internet Corporation for Assigned Names and Numbers (“ICANN”)
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536
Email: didp@icann.org

Re: PUBLIC COMMENTS FOR UPDATED SUPPLEMENTARY PROCEDURES FOR INDEPENDENT REVIEW PROCESS (IRP) (<https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>)

Dear ICANN:

As the CEO of Dot Registry, LLC (“Dot Registry”), I submit the following public comments.

Dot Registry previously provided written submission of its public comments relating to the 2016 Draft New ICANN Bylaws¹. Dot Registry remains opposed to any process by which anyone, other than a neutral third party, can review an IRP Declaration. Constructing a “Standing Panel” of ICANN insiders or having an “Ombudsman” perform an IRP review when the Ombudsman is reviewed and compensated by the ICANN Board, will only lead to bias, impartiality, conflicts of interest, corruption, and/or discrimination. To date, there is no viable outside independent check on the ICANN Board, including IRP Declarations due to the litigation waiver contained in the Application and Applicant Guidebook.

Accountability Mechanisms, contained in ICANN’s Bylaws, are the only means for an aggrieved party to seek recourse for ICANN Board and ICANN staff actions and/or inactions. The ICANN Board has a 99% success rate at rejecting Reconsideration Requests and enjoys a greater than 75% success rate at prevailing in an IRP. Additionally, an IRP will cost over \$1 million USD. ICANN has managed to stack the odds against an aggrieved party before this issue(s) are even brought to light.

Therefore, there must be a viable mechanism in place for an independent review of IRP Declarations so that the review is applied neutrally and objectively and with fairness and integrity. Dot Registry’s position is that any challenge or review related to an IRP Declaration should only be made in a court of competent jurisdiction.

DOT REGISTRY, LLC

Sincerely,

Shaul Jolles,
Chief Executive Officer

A handwritten signature in black ink, appearing to read "S. Jolles", written over a horizontal line.

¹ See Draft New ICANN Bylaws, Report of Public Comments, at: <https://www.icann.org/public-comments/draft-new-bylaws-2016-04-21-en>

Comments on IRP supplementary procedures

- *To:* "comments-irp-supp-procedures-28nov16@xxxxxxxx" <comments-irp-supp-procedures-28nov16@xxxxxxxx>
- *Subject:* Comments on IRP supplementary procedures
- *From:* "Perez Galindo, Rafael" <RPEREZGA@xxxxxxxx>
- *Date:* Wed, 30 Nov 2016 11:03:48 +0000

Thanks for the opportunity to comment on the draft IRP supplementary procedures as foreseen in <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>.

The selection of English as primary working language may hamper the implementation of the diversity principle that drives the IRP (Bylaws Section 4.3(j)(iv): Reasonable efforts shall be taken to achieve cultural, linguistic, gender, and legal tradition diversity, and diversity by Geographic Region of the standing panel). Hence, appropriate measures should be put in place with regards to provision of translation services for Claimants, in order to warrant a level playing field in the process. The following aspects could be added to the supplementary procedures:

- a) Interpretation services should be granted and provided at no charge if requested by the Claimant.
 - b) Any documents submitted in English should be accompanied by a translation in whole or in part into the language requested by the Claimant.
 - c) For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice or other communication is received, only if the translated documents referred to in the above letter have been sent to the Claimant. Otherwise, the period shall only begin to run when the aforementioned documents have been received.
- I kindly ask that these comments be taken into account by the drafting team.

Best regards

Rafael Pérez Galindo
Spanish GAC Rep.

comments on IRP regarding diversity in language of proceedings

- *To:* <comments-irp-supp-procedures-28nov16@xxxxxxxx>
- *Subject:* comments on IRP regarding diversity in language of proceedings
- *From:* <Jorge.Cancio@xxxxxxxxxxxxxxxx>
- *Date:* Tue, 29 Nov 2016 13:26:24 +0000

Dear ICANN Staff

Thanks for this opportunity to comment on the draft IRP supplementary procedures.

The Bylaws provide that "All IRP proceedings shall be administered in English as the primary working language, with provision of translation services for Claimants if needed."

My suggestion to the drafting team would be that they develop this rule in a fashion that enhances diversity.

For instance, the supplementary procedures could provide, inter alia, the following concretizations of the above rule:

- That translation also means interpretation during hearings.
- That, when translation services are required, they are granted per default (and rejection is ruled out generally).
- Also that the translated documents are provided at the same time as the original English documents or, at least, that the corresponding deadlines only count whenever the translated document has also reached the interested party, etc.

Hope this may be taken on board by the drafting team.

Best regards

Jorge Cancio
Swiss GAC Rep.



**Comment on Updated
Supplementary Procedures
for Independent Review
Process (IRP)**

Status: FINAL

Version: 3

31-Jan-2017

Business Constituency Submission

GNSO//CSG//BC

This document is the response of the ICANN Business Constituency (BC), from the perspective of business users and registrants, as defined in our Charter. The mission of the Business Constituency is to ensure that ICANN policy positions are consistent with the development of an Internet that:

1. Promotes end-user confidence because it is a safe place to conduct business
2. Is competitive in the supply of registry and registrar and related services
3. Is technically stable, secure, and reliable.

The BC welcomes to opportunity to comment on the **Updated Supplementary Procedures for Independent Review Process (USP)**¹. We applaud the work of the IRP Implementation Oversight Team (IRP-IOT) to develop these supplementary procedures.

We note that the community was unable to reach consensus on three issues – the retroactive application of updated supplementary procedures for existing IRPs, statute of limitations for filing an IRP, and the permissibility of witness testimony / cross examinations during IRP hearings. We will comment on each of these issues.

Retroactive Application of Supplementary Procedures

We support the current draft of the USP, which does not permit the retroactive application of supplementary procedures. Retroactive application of the new USP to existing IRPs would be inherently unfair to both of the parties involved in the IRP, causing additional legal expenses and delaying proceedings already underway.

However, one issue that should be explicitly clarified in the scope section of the USP is what vintage of ICANN Bylaws will control for any IRP disputes pending at the time of adoption of the post-IANA transition bylaws. The BC strongly believes that the new Bylaws should control, as these provide a claimant with substantially improved rights. In particular, the decision of the IRP panel is now binding upon ICANN, whereas in the past the ICANN Board could choose to reject the findings of the IRP panel. ICANN must be willing to apply this same standard to pending IRP cases, or else the credibility of its claim to embrace the new accountability mechanisms developed by the community could be suspect.

Statute of Limitations for filing an IRP

The BC has very serious concerns about the currently proposed limitations on the time to file an IRP, which consists of a two-part test. The first part of the test is that the IRP must be filed within 12 months of the date of action or inaction. Moreover, a claimant must file their IRP within 45 days of “becoming aware of the material effect of the action or inaction.” ICANN’s Bylaws indicate that the Rules of Procedure “are intended to ensure fundamental fairness and due process” and that the rules “shall be informed by international arbitration norms.” In our view the proposed time limits for filing an IRP are not fair, do not reflect the reality of the speed at which ICANN moves as an organization, and are not convincingly informed by international arbitration norms.

¹ ICANN public comment page at <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>

With regard to the proposed time limits, it is important to note that the current Rules of Procedure for the IRP process do not have a time limit at all. Moving to a deadline of 45 days from the date of awareness of an action or inaction that gives rise to a dispute is inherently problematic and unfair – particularly at a time when ICANN should be increasing its accountability pursuant to binding commitments to the community.

Additionally, the proposed filing deadlines make little practical sense, particularly in the context of ICANN’s slow moving systems and processes, whereby it can take years for a policy to be developed, approved by the Board, and then actually implemented. And even then, it is possible for the actual implementation of the policy to change at a later date. This very situation is implicitly acknowledged in the Bylaws. Section 4.3(c) (i) states that EC challenges to the results of a PDP are *excluded* from the IRP process, unless the Supporting Organizations that approved the PDP supports the EC bringing a challenge. This exception to an exception is in the Bylaws because the SOs and ACs involved in the CCWG were concerned that ICANN’s implementation of a policy would be outside of the scope of ICANN’s mission or in violation of its Bylaws.

The development of these Updated Supplementary Procedures is a classic example of how slowly ICANN moves, and why ICANN must have more generous timeframes for a claimant to bring forth an IRP. It is now 9 months since the ICANN board adopted the revised Bylaws. The updated procedures are still being drafted, and consensus has yet to be reached on three important aspects of the procedures. The USP should reflect these realities and allow potentially harmed parties to file an IRP throughout the entire lifetime of a policy.

It is critical to note that ICANN’s use of arbitration within its Bylaws is novel. Generally speaking, arbitration is an alternative dispute resolution mechanism that is explicitly agreed upon by two parties, via contract. There are also some instances of binding arbitration clauses being incorporated into the bylaws of for-profit entities, which limited the forum and remedies available to shareholders of those organizations. ICANN’s usage of arbitration, via its Bylaws, to impose an arbitration regime onto individuals and organizations with no shareholder interest or direct contractual relationship with ICANN is unusual. Due to this unusual application of arbitration, it is highly improbable that ICANN can truly adopt rules of procedure that are consistent with international arbitration norms. Arbitration is not widely used in this manner, so we cannot know what is normative from a statute of limitations perspective. Therefore, the IRP-IOT should err on the side of protecting the rights and remedies of the aggrieved party, and not impose arbitrary and unjustifiable deadlines.

Even more troubling is that the courts have relied upon ICANN’s consensus based, multi-stakeholder model to reject attempts at overturning arguably onerous language in ICANN’s agreements with contracted parties. We actually applaud the courts for giving such weight to bottom up, community generated policy.² But at the same time, if courts give the same weight to these Updated Supplementary Procedures, the likelihood of a successful legal challenge to the USP seems dim.

² <https://www.icann.org/en/system/files/files/litigation-ruby-glen-court-order-motion-dismiss-first-amended-complaint-28nov16-en.pdf> (Page 7)

Apart from our other arguments related to the statute of limitations to file an IRP, the current proposed language creates a transitional situation that could result in the inability of a currently harmed party to file an IRP. Consider a scenario where a party is materially impacted by action or inaction by ICANN taken more than 45 days prior to the adoption of the Updated Supplementary Procedures. For whatever reason, the harmed party has not yet filed an IRP. After the new Rules of Procedure are adopted and become applicable to this dispute, ICANN could very easily challenge that the statute of limitations to file an IRP, under the updated rules, has expired. We suggest that the USP be updated to add language that specifically addresses this transition scenario. It is critical for the IRP-IOT to err on the side of preserving the rights of a potentially harmed party in the drafting and implementation of these Updated Supplementary Procedures.

In light of these concerns, the BC recommends that the IRP-IOT impose a moratorium on imposing any time limits related to bringing forth an IRP until further studies can be conducted by the ICANN community to assess the potential impacts of such time limits.

Such a moratorium would make it clear to the ICANN community that ICANN is taking its accountability enhancements seriously. ICANN should support the further study of these issues by ensuring sufficient budgetary resources are in place to engage with third party experts and consultants.

It is imperative that ICANN recognize and act upon our strenuous objection to the proposed statutes of limitations in the Updated Supplementary Procedures prior to their adoption. The proposed limits are unfair, inconsistent with international arbitration norms, and may create substantial concerns around the legitimacy of ICANN as a standalone, multi-stakeholder model organization.

However, if there is not sufficient support from the ICANN community for such a moratorium, then the BC suggests some revisions to the time lines proposed by the IRP-IOT, as described below.

A 4-Jan-2017 legal memorandum was provided to the ICANN CCWG-Accountability IRP Implementation Oversight Team by its Counsel, Sidley Austin LLP. That memorandum addressed whether the draft USP timing language is consistent with the “agreement in principle” on timing of claims asserting a facial challenge, with this conclusion:

As currently drafted, Section 4 of the Draft Supplemental Rules does not capture the Agreement in Principle described above. The current draft language is more limited than the Agreement in Principle in that it allows only for challenges that are brought within 45 days of the date the claimant becomes aware of material harm by an invalid action or inaction *and* in any event within 12 months of the action or inaction giving rise to the claim. Therefore, as currently drafted, a facially invalid action or inaction could not be challenged by a claimant if the material impact to the claimant (harm or injury) arose at a time such that the claim could not be filed within 12 months from the ICANN decision that created the facial invalidity.

ICANN’s Amended Bylaws² (“Bylaws”) control the drafting of the Supplemental Rules. The CCWG-Accountability Final Report³ (“CCWG Report”) also provides helpful guidance. We note that while neither the Bylaws nor the CCWG Report distinguish between IRP challenges on

grounds of facial invalidity versus other grounds, the Agreement in Principle described above does not appear to be facially inconsistent in significant respects with the Bylaws. However, we also note that the Bylaws do not specifically contemplate a 12-month limit on any claims and appear to require that any time limit run from the time at which the claimant became aware of or reasonably should have become aware of the material impact, which the Agreement in Principle does not address. (The CCWG Report also contemplated that the time limit would run from the time at which the claimant became aware of the alleged violation and how it affected them.)

The CCWG's legal Counsel also proposed this substitute language to make the proposed Rules consistent with the Bylaws and final CCWG Report:

A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 45 days after a CLAIMANT becomes aware of or reasonably should have become aware of the material effect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.

Challenges which allege that a COVERED ACTION is invalid for all applications ("facially invalid") may be brought at any time within 45 days after CLAIMANT becomes aware of or reasonably should have become aware of the material effect of the COVERED ACTION giving rise to the DISPUTE without regard to the 12-month limitation.

At a minimum, the BC believes that the proposed substitute language must be adopted, since without it challenges to facially invalid covered actions could no longer be brought more than one year after their adoption, even if their application was in violation of the Bylaws or otherwise gave rise to an IRP claim. *Facially invalid actions should never be time-limited.*

However, adoption of the proposed substitute language would still leave the possibility that an action that was invalid as-applied could be time-barred if the affected party did not become aware, or could not reasonably have become aware, of its material effect until more than twelve months after its adoption. Given the slow pace of actual implementation of ICANN decisions, twelve months is far too short for such a time limitation.

As neither the Bylaws nor the CCWG Report contemplate distinct timing rules for various types of Disputes our preference would be to remove the twelve month limitation for "as applied" disputes as well and simply require that challenges be brought within a set time period after the affected party became, or should reasonably have become, aware of its material effect. Given the time necessary to analyze material effect, consult with counsel, and file an action we believe that the minimum time for filing should be increased to at least one year; noting that such an extended filing limit will also create a space in which the aggrieved party and ICANN may reach a mutually satisfactory settlement without resort to legal challenge.

If an overall time limit for “as applied” disputes is retained it should be substantially longer than twelve months – we would suggest a minimum of three years to assure that where there is material harm and a resulting right to challenge, there is a practical remedy to provide redress.

Permissibility of Witness Testimony / Cross Examinations during IRP hearings

The BC appreciates that the IRP Bylaws and Updated Supplementary Procedures are designed with expediency and cost effectiveness in mind. However, the proposed threshold for witness testimony and cross examination should be less stringent. In particular, we feel that the IRP panel should consider the following factors:

- Is a witness necessary for a fair resolution of the claim?
- Is a witness necessary to further the purposes of the IRP?

The panel should only consider the time and expense of witness testimony after first considering the fairness and furtherance of the IRP and the gravity of actual or potential harm to the claimant.

Further, the panel should only consider the time and expense related to witness testimony and cross examinations if one party to the claim can provide proof that such a delay or expense would create a legitimate and unjustifiable financial hardship. A claimant should not be precluded from offering witness testimony or conducting cross examinations simply because it might increase expenses or slightly delay the resolution of the dispute.

This comment was drafted by Jay Sudowski, with edits by Phil Corwin, Chris Wilson, Marie Pattullo, and Steve DelBianco.

It was approved in accord with our charter.



Comments of the Intellectual Property Constituency Comments on the Draft Independent Review Process Updated Supplementary Procedures

February 1, 2017

The Intellectual Property Constituency (IPC) of the GNSO appreciates this opportunity to comment on the draft Updated Supplementary Procedures for the ICANN Independent Review Process (IRP Supplementary Procedures) developed per the requirements contained in the final report of the Cross-Community Working Group on Enhancing ICANN Accountability (CCWG-Accountability, Work Stream 1) (see <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>).

We commend the IRP Implementation Oversight Team (IOT) for its efforts in drafting updated procedural rules for the IRP to reflect the enhancements provided for in the revised ICANN Bylaws of 1 October 2016. We also appreciate the helpful explanatory Report of the IRP IOT, and note that there were three issues in particular on which the IOT was unable to reach full consensus. We provide our comments on these three issues: application of the updated rules to existing but unresolved IRPs, time limits for filing, and in-person hearings and cross examination. We also provide our comments on the following additional points, which the IPC considers to be of importance: consolidation, intervention and joinder, appeals to the Standing Panel, and costs.

Summary

For the reasons set out more fully in the sections below, the IPC makes the following recommendations for changes to the Draft IRP Updated Supplemental Procedures:

Existing but Unresolved IRPs:

1. Amendments governed by the Bylaws should apply to all IRPs arising from events which post-date the adoption of the revised Bylaws, save to the extent that an issue has already been dealt with under the existing rules.
2. Amendments on which the IOT has discretion should apply to any IRP arising from events post-dating the adoption of the IRP Supplementary Procedures, but not to IRPs which are already underway at adoption.

Timing of the Claim:

1. The adoption of a constructive knowledge element as required under the Bylaws.
2. The 45-day time limit be amended to allow an initial filing window of 90 days from actual or constructive knowledge.
3. Alternatively, whilst not our preferred option, the 45-day deadline could remain in place with the caveat that only a *de minimis* IRP complaint would need to be filed within that window in order to merely provide notice to ICANN and the broader

community, with the ability to file a substantive complaint in a longer period (such as an additional 45 days from the original filing).

4. The 12-month time limit be dispensed with for all Claims, since this is inconsistent with the constructive knowledge element. If not removed for all Claims, this should in any event be removed for Claims of “facial” invalidity, as advised by Sidley and addressed in their revised text.
5. The interplay between the IRP and various other community accountability mechanisms be identified and addressed, and specifically that timing ambiguity and inconsistency be rectified.
6. Payment of the IRP fees should be by reference to the receipt of the invoice from ICDR, rather than on filing the IRP.

Consolidation, Intervention and Joinder:

1. Any third party directly involved in the underlying action which is the subject of the IRP should have the ability to petition the IRP Panel or Dispute Resolution Provider (if no Panel has yet been appointed in the matter) to join or otherwise intervene in the proceeding as either an additional Claimant or in opposition to the Claimant(s).
2. Multiple Claimants should not be limited collectively to the 25-page limit for Written Statements but shall be entitled to their own individual page limits. Unnecessary and unreasonable costs generated as a result can be addressed by the Panel when making costs awards.
3. Requests should be determined by the IRP Panel and not by a Procedures Officer.

Appeals:

1. Appeals be made to an Appeals Panel, being a subset of the Standing Panel, between 5 and 7 members, who did not hear the original IRP and who have no other conflict of interest. The Standing Panel should number sufficient members to allow for this.
2. Costs of the appeal should be in the discretion of the Appeals Panel, but there should be a presumption that a losing appellant will bear the other party’s reasonable costs of the appeal.

Costs:

1. Include language within § 15 to the effect that “Nothing in these IRP Supplementary Procedures is intended to supersede ICDR Rules, Article 20(7) and Article 21(8), including the right to request an interim order allocating costs arising from a party's failure to avoid unnecessary delay and expense in the arbitration”.

Application of the updated rules to existing but unresolved IRPs

The Report of the IRP IOT explains that the IOT was unable to reach full consensus on the applicability of the updated rules to existing but unresolved IRPs. This issue was therefore referred to the full CCWG-Accountability, which decided not to provide for such retroactivity due to concerns as to unintended consequences, including increased complexity and potential Bylaws violations resulting from doing so.

In considering this issue in particular, and the draft IRP Supplementary Procedures in general, it is important to bear in mind the intended purpose behind developing an amended IRP, namely to enhance ICANN's accountability to those impacted by its actions and inactions and specifically "to ensure that ICANN does not exceed the scope of its limited technical Mission and complies with its Articles of Incorporation and Bylaws" (see Para 174 CCWG-Accountability Supplemental Final Proposal on Work Stream 1 Recommendations) and that ICANN should be "held to a substantive standard of behaviour rather than just an evaluation of whether or not its action was taken in good faith"(Para 175 *ibid.*). Consequently, the CCWG-Accountability proposed several enhancements to the IRP "to ensure that the process is:

- Transparent, efficient and accessible (both financially and from a standing perspective).
- Designed to produce consistent and coherent results that will serve as a guide for future actions." (Para 176 *ibid.*).

It is the IPC's view, therefore, that in considering the question of whether the amended rules should have retroactive effect we ought to bear these aims in mind and deliver this increased accountability where possible, without re-opening matters which have already been dealt with. In doing so, the IPC considers that it is necessary to take account of the nature of the amendment, and specifically to consider whether the amendment is one which is governed by the Bylaws, or whether the Bylaws merely grant discretion to the IOT to determine the relevant standards and rules.

Amendments governed by the Bylaws

In the former case – for example the amendment to the standard of review – the relevant provisions were adopted in October 2016 with the amended Bylaws. The implementing rules contained within the IRP Supplementary Procedures should therefore apply to any IRP arising from events which post-date the adoption of the revised Bylaws since that is the point at which all parties became bound. We understand that this is the intention, since the IRP Supplementary Procedures state that "These procedures apply to all independent review process proceedings filed after [insert effective date] of the Bylaws." To the extent, however, that matters have already been dealt with under the old rules in an ongoing IRP we would suggest that they should not be reopened, unless it would be unjust and unreasonable to one of the parties not to do so.

Amendments for which the IOT had discretion

For matters covered by the IRP Supplementary Procedures which were left in the revised Bylaws to the discretion of the IOT, including matters relating to the timing to make a claim, conduct of hearings, and the availability of appeals, these new rules should apply to any IRP arising from events post-dating the adoption of the IRP Supplementary Procedures, but not to IRPs which are already underway at adoption. To provide otherwise could lead to unfairness, since the parties to an IRP could be expected to have taken the existing rules into account when reaching their decision whether or not to proceed, and would not have had the opportunity to consider rules which were not then in existence.

Time limits for filing

Time to bring Claims is too short and has no constructive knowledge element

Although the IPC appreciates the need for finality and closure with respect to the community's ability to bring IRP proceedings, the IPC is concerned by the brevity of the proposed deadlines for filing IRPs – within 45 days of when the complainant becomes aware of the harm and no more than 12 months from the ICANN action or inaction causing the harm. See Draft IRP Updated Supplementary Procedures at 6.

First, this standard limits the filing period based on a potential claimant's actual knowledge of the harm, and does not include a constructive knowledge element, as envisaged in the ICANN Bylaws. See ICANN, Bylaws Section 4.3(n)(iv)(A) ("The time within which a Claim must be filed after a Claimant becomes aware **or reasonably should have become aware** of the action or inaction giving rise to the Dispute.") (emphasis added). Although this formulation is likely an intentional omission by the IOT, imposing too short a time frame based on actual knowledge of a harm caused by ICANN action or inaction could be unduly prohibitive for potential claimants, and could invite "gaming" to extend the limitations period.

Indeed, while certain harms might be readily apparent within 45 days, others, and particularly those that might impact only discrete portions of the community, might reasonably take longer, even potentially longer than the 12-month final limitation on bringing claims following the ICANN action or inaction.

In this regard, we note and agree with the advice of Sidley Austin LLP in their Memorandum dated 4 January 2017. Sidley comments that the 12-month cut off for commencing a claim may have been selected by the IOT as designating the maximum time limit within which the claimant "reasonably should have become aware," and that if so "such a determination would be subject to criticism and it could result in claims being foreclosed before an injury, and hence any knowledge of any injury, had even arisen". Sidley advises that "Applying a strict 12-month limit to any IRP claim that commences at the time of the ICANN action or inaction and without regard to when the invalidity and material impact became known to the Claimant, is inconsistent with the Bylaws (and is inconsistent with the terms of Annex 7 of the CCWG Report)".

Further, even where a harm may become apparent with these windows, it may be very difficult for Claimants to prepare and file an IRP complaint within 45 days of actual notice of the actionable event, particularly in the cases where multiple stakeholders are involved. If a situation arose where the IPC was considering filing an IRP, for example, this is not a decision which could be made by the Constituency's leadership without obtaining the approval of its membership which could, potentially, even require a vote. Since the IPC's membership itself includes a number of organisational members this process of consultation and approval must, inevitably, take a little time. We imagine that other Constituencies and Stakeholder Groups may be in a similar position, as would the full GNSO. A 45-day time limit risks denying ICANN's constituent member groups access to the IRP.

Without prejudice to the further comments made below, therefore, the IPC recommends that:

- 1) The adoption of a constructive knowledge element as required under the Bylaws;

- 2) The 45-day time limit be amended to allow an initial filing window of 90 days from actual or constructive knowledge;
- 3) Alternatively, whilst not our preferred option, the 45-day deadline could remain in place with the caveat that only a *de minimis* IRP complaint would need to be filed within that window in order to merely provide notice to ICANN and the broader community, with the ability to file a substantive complaint in a longer period (such as an additional 45 days from the original filing);
- 4) The 12-month time limit be dispensed with for all Claims, since this is inconsistent with the constructive knowledge element. If not removed for all Claims, this should in any event be removed for Claims of “facial” invalidity, as advised by Sidley and addressed in their revised text.

Interplay with other accountability mechanisms is unclear

1. Cooperative Engagement Process

Prior to the filing of a Claim, parties are strongly encouraged to participate in a non-binding Cooperative Engagement Process (CEP). It is not clear how long a CEP would take, but would likely run up against the 45-day filing period (even if revised). Based on information contained in the schedule of pending CEPs and IRPs published by ICANN, some CEPs take months or even years to complete. Thus, both the 45 day and any 12-month time limit are potentially impossible to meet if there is a CEP. This is an unsatisfactory ambiguity which ought to be directly addressed, either by the CEP stopping the clock, or by the IRP being formally commenced and then stayed pending the CEP. The latter option is not entirely satisfactory, however, since the work in preparing the IRP Claim would need to be done, and the fees paid to ICDR which may prove to have been wasted if the CEP resolves matters. Therefore, the IPC recommends that any CEP that precedes the filing of an IRP Claim toll any filing limitations period associated with the matter.

2. Request for Reconsideration

Similarly, in many cases community members would first file a Request for Reconsideration (RFR) before resorting to the IRP. For reasons similar to those referred to above in relation to the CEP, the filing of a RFR on the issue should also toll the deadline, and the IPC recommends that the IRP Supplementary Procedures should specifically identify and address this interplay between the RFR and the IRP. As with the CEP, the RFR could resolve the matter before the need to file an IRP, but in the event it does not, the deadline for filing the IRP should remain intact.

3. Community Engagement and Escalation

Further, the CCWG-ACCT Report for Work Stream 1 states that “All of these community powers can only be exercised after extensive community discussions and debates through processes of engagement and escalation. The process of escalation provides many opportunities for the resolution of disagreements between parties before formal action is required.” Such “community powers” must presumably include the Community IRP. This escalation and engagement process could not possibly be completed and still allow the 45-day limit to be met (or possibly even a 12-month limitation), thereby potentially denying access to the Community IRP altogether.

The IPC recommends that the interplay between the Community Engagement and Escalation process and any subsequent Community IRP be identified and addressed, and that the deadline for commencement of the Community IRP be tolled.

The IPC believes that it is necessary to amend the filing limitations periods in these ways in order to best serve the underlying goal of providing adequate due process and properly effectuate the enhanced accountability mechanisms. *Cf. Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (discussing discretion of States in erecting reasonable procedural requirements for triggering or foreclosing the right to an adjudication).

Time for Payment of Fees

The requirement to pay the filing fee within 3 business days of filing the request may be impractical. Many entities and organisations require an invoice in order to make such a payment and experience of some IPC members is that ICDR does not issue invoices within such a short timeframe. A more practical solution would be to require payment within a set time of receipt of the invoice from ICDR, and we would suggest that 5 business days is the minimum appropriate time.

In-person hearings and cross-examination

The IPC supports the proposed language which seeks to limit the holding of in-person hearings and calling of live witnesses to only those exceptional circumstances where the requesting party can demonstrate that this is necessary for the fair resolution of the Claim and the furtherance of the purposes of the IRP, and where appropriate balancing consideration has been given to the additional time and costs which would be incurred by all parties. See IRP Supplementary Procedures § 5.

Consolidation, intervention and joinder

Under the existing IRP Supplementary Procedures, the only way for a third party to “intervene” in an IRP proceeding would be for that party to submit a statement at the request of the IRP Panel. See IRP Supplementary Procedures § 5 (“The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, **or from other parties.**”) (emphasis added). The draft Updated Supplementary Rules do not fully resolve IPC concerns about the ability of interested third parties being able to intervene or join an IRP proceeding. First, the draft merely permits **an existing party** to request the appointment of a Procedures Officer to determine whether other parties should be permitted to intervene or join the proceeding. The draft then states that any person or entity qualified to be a Claimant may intervene in an IRP with the permission of the Procedures Officer, but it is not clear what would happen if a party does not request the appointment of a Procedures Officer in the first place. In our view it is not appropriate for such important decisions to be made a Procedures Officer or by the Dispute Resolution Provider; decisions on whether to allow consolidation, joinder or intervention should always be made by the IRP Panel.

In addition, although the IPC understands that IRPs are directed against ICANN, there may be third parties who wish to intervene in support of ICANN's position or to safeguard their own position. This possibility does not appear to be accounted for in the draft which states

only that “Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the permission of the PROCEDURES OFFICER”. In particular, where the IRP is being brought effectively to challenge the decision of an ICANN-appointed panel, such as in the case of a Legal Rights Objection (LRO), the IRP would be brought by the losing party. The LRO itself, however, would have been an action between two or more parties and the winning party or parties have a direct interest in the outcome of the IRP and it is inequitable to deny them the opportunity to request permission to intervene.

To rectify these concerns, the IPC suggests that any third party directly involved in the underlying action which is the subject of the IRP should have the ability to petition the IRP Panel or Dispute Resolution Provider (if no Panel has yet been appointed in the matter) to join or otherwise intervene in the proceeding as either an additional Claimant or in opposition to the Claimant(s). Otherwise, the IRP may not afford appropriate due process for all interested parties (not just those who may be aligned with the claimant or claimants on the issue(s) under review).

We see no reason for restricting all Claimants collectively to the 25-page limit for Written Statements. Even where a third party is participating as an additional Claimant it is not inconceivable that the multiple Claimants will have slightly different arguments and positions they wish to advance. It would appear to be a denial of access to justice to impose this limit collectively. We consider that to the extent that there is some increased cost as a result of the parties submitting their own Written Statements, this can be addressed in any costs award made by the Panel as necessary and appropriate.

Again, these rights of intervention and joinder are necessary to serve the due process goals of the enhanced IRP. *Cf., e.g., Martin v. Wilks*, 490 U.S. 755 (1989) (discussing a four-part test for determining whether a lawsuit can proceed in satisfaction of due process in the absence of a necessary party, including (1) whether “a judgment rendered in the person’s absence might be prejudicial to him or those already parties”; (2) whether the court can reduce or eliminate prejudice by “the shaping of relief or other measures”; (3) whether the judgment rendered without the outsider will be “adequate”; and (4) the costs on the plaintiff of a dismissal for non-joinder.).

Appeals to the Standing Panel (Section 14)

Composition of the Appeals Panel

The Standing Panel is defined as an “omnibus standing panel of at least seven members”. It is thus envisaged that the Standing Panel may consist of more than seven members, even, theoretically, an unlimited number. It may not be practical, therefore, to have the entire Standing Panel hear an appeal *en banc* for the following reasons:

- 1) the number of members may make such a panel unnecessarily unwieldy;
- 2) a Standing Panel which consisted of an even number of members could result in no majority decision being reached (i.e., a tied decision);
- 3) some members of the Standing Panel may be subject to a conflict of interest;
- 4) three members of the Standing Panel will have been the original deciding panellists. This might itself be considered a conflict of interest since it must be extremely difficult for one of the deciding panellists to impartially determine that they made a “clear error of judgment” or applied “an incorrect legal standard”. Certainly there would be

a risk of the appearance or perception of bias which would undermine the appeal process. We also contend that it is contrary to principles of natural justice that those who reached the original decision should participate in the determination of the appeal.

If there is to be an appeal process, the IPC recommends that the appeal be to an Appeals Panel consisting of:

- 1) an odd number of Standing Panel members, being a minimum of 5 and a maximum of 7 members to be selected at random;
- 2) such 5 members to exclude any Standing Panel member who participated in the original decision and any panellists who have a conflict of interest;
- 3) to the extent that the number of available Standing Panellists is fewer than 5, additional Standing Panellists shall be appointed.

Such a solution would not be inconsistent with the Bylaws, which state that “Subject to any limitations established through the Rules of Procedure, an IRP Panel decision may be appealed to the full Standing Panel sitting en banc...” (ICANN Bylaws Section 4.3 (w)).

Costs of Appeal

Although matters of costs should be left to the ultimate discretion of the Appeals Panel, it seems reasonable, in the interests of justice, that there should be a presumption that an unsuccessful appellant will bear their opponents reasonable costs of the appeal. Such a provision ought to discourage frivolous appeals with little or no prospects of success.

Costs (Section 15)

It is common in such proceedings to seek to ensure the good conduct of parties by means of the threat of costs and other sanctions. The ICDR Rules do so at Article 20(7) and Article 21(8). Since the IRP Supplementary Procedures state that in case of conflict between the two sets of rules, the IRP Supplementary Procedures will apply (See IRP Supplementary Procedures § 2), and since the IRP Supplementary Procedures § 15 includes language regarding the treatment of the costs of the IRP, as provided for under ICANN Bylaws Section 4.3(r), the IPC believes it would be beneficial to clarify that no conflict exists in this regard. The addition of language within § 15 to the effect that “Nothing in these IRP Supplementary Procedures is intended to supersede ICDR Rules, Article 20(7) and Article 21(8), including the right to request an interim order allocating costs arising from a party's failure to avoid unnecessary delay and expense in the arbitration” would be beneficial in removing any possible doubt.

Respectfully Submitted,

Intellectual Property Constituency

**Comments of the Noncommercial Stakeholders Group (NCSG)
on the
Updated Supplementary Procedures for Independent Review Process (IRP)**

January 24, 2017

The NCSG appreciates the opportunity to comment on the [proposed supplementary rules](#) that have been released by the Implementation Oversight Team.

The IRP is a very important part of ICANN's accountability arrangements. As NCSG, one of our main concerns is that IRP challenges can be used to prevent ICANN from taking actions that exceed its mission. In particular, we want strong protections against ICANN moving into content regulation and other more extensive forms of regulating Internet users and uses that are not required to coordinate the domain name system.

With that in mind, we have several major objections to the proposed rules: statute of limitations, notice, rights of intervention and remedies.

1. Statute of Limitations. The current Supplementary Procedures for IRP provides a very limited time for a user to challenge an ICANN policy as violating the mission. The challenge must be made within 45 days of the time the person becomes aware of the harm caused but — far more important — after one year from its passage, a decision or policy becomes *completely exempt* from any IRP challenge. The proposed supplementary rules time-limit IRP challenges to a maximum of one year after ICANN's action, thereby immunizing it from any subsequent challenges. This is an extraordinary loophole.

It could easily take 2-3 years after a policy is adopted for it to be actually implemented by ICANN and cause harm. Under these proposed supplementary rules, no one could challenge the rule if the harms were caused a year after it was passed.

Making matters worse, these problems were pointed out on the email list of the working group during the ICANN CCWG process. Indeed, there was general agreement that the time limit was a problem and should be changed. But through a series of unfortunate coincidences and bad decisions, those objections were ignored and the Implementation Oversight Team (IOT) pressed ahead with the originally proposed text.

Time limits make sense when one is dealing with commercial contractual disputes, such as disputes between ICANN and a new top level domain applicant or a registrar. Those disputes pertain to specific decisions of ICANN, not to its overall mission and not to consensus policies that might violate the mission or core commitments. Clearly, we don't want commercial actors to be able to hold ICANN in a state of perpetual uncertainty regarding decisions or actions in the

narrow domain that it regulates. But the time limits make no sense at all when applied to disputes over consensus policies that are alleged to transgress mission limitations. The mission limitations are meant to protect fundamental individual rights, and to permanently constrain ICANN's mission. They are not matters of expediency and are not time-dependent. If a policy allows ICANN to expand its mission beyond its intended remit, the actions it takes under that policy should be subject to challenge at any time.

In attempt to downplay the significance of this problem, some have argued that after a policy becomes immune to IRP challenge, if ICANN takes an action *implementing* an ICANN policy that is itself a violation of the mission limitations or bylaws, that is a separate event. Hence the clock would start again, and we would have another year to challenge the implementing action.

There are many flaws in this interpretation. One obvious one is that such an IRP challenge would not be against the *policy itself*, it would only challenge the implementing action. This means that a successful challenge would not prevent any future implementations of the policy that might transgress mission limitations. Furthermore, the immunity of the policy itself from challenge would stack the deck against challengers.

But there is an ever more serious problem with relying on implementation actions to challenge policies. Only ICANN actions can be challenged under the IRP. So if the implementing action is by a Registry, it cannot be challenged under the IRP. This takes us back to the pre-transition position where only Registries are protected by the IRP, and any other "materially affected parties" are not. Registries, who are acted on by ICANN, would always be able to challenge an implementing action by ICANN. But Registrants, who are acted on indirectly through Registries and Registrars, would quickly run out of time to challenge the policy behind the Registry action and cannot challenge the Registry's implementation. As representatives of registrants (non-contracted parties), NCSG finds this unacceptable. Thus, we respectfully but firmly submit that the 12-month hard time limit on IRP challenges to Board policy decisions must be removed from Section 4.

Our second part of this objection is the brevity of the arbitrary 45-day time limit within which a claimant must act after having become aware of a material harm. Here our objection is not philosophical in nature -- we readily acknowledge that some time limit on action is appropriate, as claimants should not be permitted to "sleep on their rights" once aware of their injury. However, from a practical standpoint 45 days is simply too short a time period for claimants. This is particularly true if the potential claimant is a collective body (like the NCSG) where significant public actions need to be coordinated with numerous members and other stakeholders. Add to this the necessity of finding and retaining counsel (not to mention the mechanics of funding the endeavor) and our view is that 45 days is far too short a time frame within which to reasonably expect action. To be candid we would think that 180 days is an appropriate time frame -- after all most judicial systems world-wide have limitations periods that

are measured in years, rather than days or months. In the spirit of constructive compromise, however, we would be satisfied if the limitations period were increased to 90 days.

The NCSG notes that the legal team from Sidley and Austin that is working with the IOT essentially agrees with the criticism of the IRP supplementary rules we have advanced here. The implementation team had an “agreement in principle” that “An action/inaction by ICANN that is facially invalid (i.e. it could not be implemented in a way that did not violate the Articles or Bylaws) could be challenged anytime.” The Sidley-Austin analysis concludes,

As currently drafted, Section 4 of the Draft Supplemental Rules does not capture the Agreement in Principle described above. ...[A]s currently drafted, a facially invalid action or inaction could not be challenged by a claimant if the material impact to the claimant (harm or injury) arose at a time such that the claim could not be filed within 12 months from the ICANN decision that created the facial invalidity.

The Sidley-Austin report goes on to state that:

It may be that the IRP Subgroup has determined that 12 months is the period in which a claimant reasonably should have known of the action or inaction giving rise to the Dispute in all circumstances (or in all circumstances other than where the challenge is on facial invalidity grounds); however, we think such a determination would be subject to criticism and it could result in claims being foreclosed before an injury, and hence knowledge of any injury, had ever arisen.

We believe that the legal advice provided confirms our concerns; moreover, the legal experts concluded that “Exempting facial challenges from the 12-month rule would not create limitless jurisdiction.”

2. Notice

In the real-world, an Appellant seeking to overturn a decision he/she/it lost or a regulation he/she/it does not like must provide notice to the Appellee. It’s a fundamental part of due process to allow everyone directly-involved in an underlying proceeding to come together to participate in its appeal.

But those who lose arbitration decisions, e.g., Community Objections at the International Chamber of Commerce (created as part of the New gTLD procedures) have no such obligation. The losers of such Objections can (and do) file CEP and IRP actions without ever telling the winners that these actions have been filed. Further, it may be weeks before ICANN published the notice telling the world that such challenges have been filed.

It made be further weeks before the filings and pleadings of the IRP proceeding are published by ICANN on its webpage, and such a website is quite obscure and followed by only a handful of parties to begin with. It is likely to be well into the process before Communities (and other directly-impacted parties) have any idea that filings against their claims, winning decisions and interests have even been filed.

The same injustice will arise when a Consensus Policy is challenged (which it may be under the ICANN Bylaws). There is currently no requirement that the Claimant filing an IRP must give notice to the Supporting Organization which created and passed the Consensus Policy. Such lack of notice is a violation of due process - the Supporting Organization and its Stakeholder Groups the right to know that a challenge has been raised -- they have the right to timely and "actual notice."

As discussed above, in a commercial arbitration there are traditionally only two parties, so notice is not an issue. But with the expansion of access to the IRP proceeding - for a range of new types of disputes- actual notice now not only makes sense, it is critical to protection of the fundamental rights of all the parties.

It makes no sense when there are directly-involved additional parties -- such as noncommercial Communities who have fought the high barriers of a Community Objection and prevailed - to be left out of a challenge to their decision when the losing party (the applicant in this case) files an IRP proceeding with ICANN.

It further makes no sense when the IRP is acting as a "Constitutional Court" to review a Consensus Policy that the whole of the Supporting Organization that negotiated that Consensus Policy is left out. ICANN Counsel is outstanding, but it is the Supporting Organization and the ICANN Community that negotiated, wrote and passed the Consensus Policy and they, too, must know when a challenge to that policy is filed.

Actual notice - requiring the Claimant to file copies of its Request for an IRP together with all pleadings, exhibits, appendices, etc, is a standard part of due process in litigation and dispute forums around the world - and as easy as adding appropriate "cc's" to the email filing the claim with ICANN.

3. Right of Intervention

Currently, the IRP *Updated Supplementary Procedures* only have the disgruntled party and ICANN as the parties to the proceedings. All others have to apply to accepted -- and the first argument the Claimant's Counsel makes is "No!" That's not the procedure in any other litigation forum which practices due process. Everywhere else, all parties to the underlying proceeding have the ***right to intervene -- the right to be heard in the challenge to their proceeding.***

Here too, such a Right of Intervention (a material change to Section 7 of these Procedures) must be added.

It only makes sense as ICANN was not a party to the underlying proceeding and does not know the arguments made. Working with ICANN, a winning party or Community must have the right to represent its own interests.

Should the winning party not have the time and resources to fully engage in the IRP, they should at least be able to file proceedings analogous to *Amicus Briefs* to inform the IRP Panel of information that is materially-relevant to the proceeding and of which the winning party may be in sole possession.

Similarly, for a challenge to a Consensus Policy, the Supporting Organization and its Stakeholder Group must be in a position to defend their work. The negotiation of the PDP in a Working Group takes months and even years. The research done, the negotiations made, the public comment received, and the compromises sought are all part of the record which the Stakeholder Groups will know. No single party, perhaps a company upset with the compromise, should be allowed to unilaterally challenge or seek to renegotiate a Consensus Policy without all other equally-engaged parties being allowed on an equal basis into the "IRP Room."

3. Emergency Panels and Interim Measures of Protection Must be Openly Heard with All Relevant Parties Present

It is very easy to believe something is an emergency when you only hear one side. IRP Panels and Emergency IRP Panelists are being asked to make major decisions without hearing from all sides who are directly-impacted by a decision.

So an IRP Panel may hear that a Winning Party is seeking to stop the implementation of a Consensus Policy (pending an IRP Proceeding that may take months or longer). What would be the impact of such a delayed implementation -- or implementation actually stopped after having commenced?! ***Clearly, all of those directly impacted by delay of a Consensus Policy (including registries, registrars, and registrants) must be allowed to comment on the impact of that delay. If the Emergency Request impacts contracts already passed, EU Privacy Shields already in place, etc., it is the party directly impacted by the delay or cessation of the policy that will be in the best position to comment on the directly harm of its even temporary cessation.***

The IRP Panel or Emergency Panelist has the right and obligation to hear about the harms from all sides or it cannot properly evaluate "[t]he balance of hardships" as required by the *IRP Supplementary Procedures* in Section 10.

4. Returning a Consensus Policy to the ICANN Board and the Supporting Organization Which Wrote It to be Rewritten

After many months or even years of work, Supporting Organizations produce Consensus Policies. If on review through this new IRP “Constitutional Court” proceeding, the IRP Panel finds that some portion of the Consensus Policy does not comply with ICANN Bylaws or process and needs to be rewritten, who should do that?

In the real world, appellate courts remand such laws and regulations back to the experts who created them -- back to the legislators and regulators. Then, those groups review those portions of the rules that need be reviewed and rewritten and do so pursuant to their rules -- and with full notice to their Communities.

We’ve stepped into the IRP as a Constitutional Court without adequate consideration of the limitation of their powers. Like appellate courts in countries, the IRP should only be judging what and what is not consistent with ICANN Bylaws. The hard work of rewriting those sections of the Consensus Policy that were invalidated below to the communities that created the rules in the first place.

Accordingly, the IRP Panels should send invalidated portions of Consensus Policies back to the ICANN Board which should send it back to the Supporting Organization that created them. Such must be the rules written into the *IRP Supplementary Procedures* “Standard of Review” (Section 11).

In summary, NCSG expects the supplementary rules to be modified to meet the following criteria:

- The IRP has to protect registrants, not just contracted parties.
- There should be no fixed time limit on the rights of Internet users to challenge a policy that is alleged to take ICANN beyond its mission or otherwise violate the fundamental bylaws.
- IRP challenges need to be able to challenge policies, not just implementations, otherwise registrants are unprotected against registries and registrars.
- While it is reasonable to set a limit on the period in which a registrant is harmed by a policy and files an IRP challenge to the policy, 45 days is too short. Three months is more appropriate given the need for ordinary registrants to consult with lawyers and assess the damage caused by a policy.

We further look forward to the supplementary rules being evaluated and wisely updated to resolve critical due process issues pointed out above and ensure to directly-impacted, materially-affected parties:

- Actual notice,
- Rights of intervention,
- Rights to be heard in emergency proceedings evaluating “interim measures of protection” and “balance of hardships,” and especially
- Remedies of the IRP Panel when a portion of a Consensus Policy is set aside. Clearly the Community must be called upon to rewrite this Consensus Policy together and through its well-established procedures.

We greatly appreciate your upcoming work in these areas.

Submitted to: comments-irp-supp-procedures-28nov16@icann.org

January 27, 2017

Karen Mulberry
Director, Strategic Initiatives
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

Re: Updated Supplementary Procedures (USP) for Independent Review Process (IRP)

Dear Ms. Mulberry:

The International Trademark Association (INTA) appreciates this opportunity to comment on the on the draft Independent Review Process (IRP) Updated Supplementary Procedures (USP) prepared by the IRP Implementation Oversight Team (IOT). INTA generally supports the changes that have been proposed in the USP. Nonetheless, we do have some concerns around four issues; the definition of standing, the time for filing a written statement, the scope and application of the USP to pending independent review proceedings (IRP), and the limitations on discovery. We are pleased to contribute our thoughts and recommendations below.

1. Standing to File an IRP Should Include Actual or Imminent Injury or Harm.

The Updated Supplemental Rules build the legal concept of standing into the definition of CLAIMANT. In particular, a CLAIMANT is defined as being limited to a party “materially affected by a Dispute” and to be “material affected” a claimant “must suffer an injury or harm that is directly and causally connected to the alleged violation.” This is a fairly restrictive view of standing because it fails to offer a remedy for imminent injury or harm. For instance, the United States, which has conservative standing requirements, allows for standing where a complainant can show “actual or imminent invasion of a legally protected interest.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130, 119 L. Ed. 2d (1992). This standard enables a CLAIMANT to avoid harm which may allow for a more just outcome rather than to wait until injury or harm is inflicted by an action or inaction. As such, INTA recommends that the definition of CLAIMANT is revised as follows:

A CLAIMANT is any legal or natural person, group, or entity including, but not limited to the Empowered Community, a Supporting Organization, or an Advisory Committee, that has been materially affected by a Dispute. To be materially affected by a Dispute, the Claimant must suffer an actual **or imminent** injury or harm that is directly and causally connected to the **conduct complained of**.

Please note that this same definition is repeated in the USP at Section 9 which allows for a summary dismissal for such lack of standing. INTA suggests that Section 9 be clarified as allowing summary dismissal based upon a lack of standing and that the revised definition, as proposed above, is implemented. The standard of actual or **imminent** injury or harm should also be inserted into the USP at Section 11.d. which governs the standard of review for claims that ICANN has not enforced its contractual rights with respect to the IANA Naming Function Contract.

2. The USP Should Be Applied Retroactively to All Pending IRPs

The USP provision regarding Scope (USP 2) states that the USP shall apply in all cases submitted to the ICDR after the date the USP goes into effect. We submit that the effective date of the USP should be October 1, 2016 which corresponds to the completion of the IANA Transition and the adoption of ICANN's new Bylaws. If the USP does not apply retroactively to the date the Bylaws took effect, there will be inconsistency between the Bylaws and the rules of procedure governing IRPs commenced prior to the USP effective date. Furthermore, to the extent that the USP may be said to represent ICANN's present policy regarding fairness and due process, this could undermine confidence in proceedings governed by the old procedural rules. INTA recommends that for any IRP commenced after the date the new bylaws became effective and before the date the USP becomes effective, there be a mechanism whereby one or more parties to the proceeding may ask for the USP to govern the proceeding, provided there is no material disadvantage to any party's substantive rights. The text of Rule 2 of the USP contains language that could be used to define the process and articulate the relevant tests.

3. Time for Filing a Written Statement is Inadequate

USP Rule 4 states that "a CLAIMANT shall file a written statement of a DISPUTE with the International Centre for Dispute Resolution (ICDR) no more than 45 days after a CLAIMANT becomes aware of the material effect of an action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction."

INTA believes that the 45 day period for filing a written statement with the ICDR is insufficient for a claimant to adequately analyze and develop a bona fide claim and prepare a written submission. Given the likely complexity of any such claim and issues such as geographic distance among relevant parties, INTA is concerned that 45 days will almost never be an adequate amount of time for gathering, collating and analyzing all the necessary information for mounting an IRP. The result is likely to be a chilling effect on claims of this sort because the costs and benefits of filing a written statement will be outweighed by the low likelihood of success due to the lack of sufficient time to obtain and organize the relevant facts, consider the issues and prepare appropriate submissions. INTA recommends adopting a 90 day deadline.

In addition, INTA has concerns that the ultimate deadline for commencing an IRP, namely 12 months from the date of the action or inaction giving rise to the claim, is also insufficient. INTA suggests that the IOT consider increasing this time period from 12 to 24 months, as it is plausible that the effect of an ICANN Board or ICANN staff action or inaction may not be known to a party within 12 months of the action or inaction.

4. Certain Discovery Methods Should be Allowed based on a Good Faith Need for Information

USP Rule 8 provides that “depositions, interrogatories, and requests for admission will not be permitted.” INTA is concerned that a blanket prohibition on depositions, interrogatories and requests for admission will prevent a claimant from discovering facts that are necessary to its case. INTA believes that witness testimony and interrogatories are important methods of discovery that should not be peremptorily ruled out. Claimants preparing claims of this nature are unlikely to have all the necessary facts in their possession, and in some cases the facts will be difficult to acquire through the documentary discovery outlined in USP Rule 8. To ensure fairness and allow for adequate discovery, INTA recommends that a claimant be given an opportunity to demonstrate a good faith need for either a deposition or interrogatories based on the standard used to determine whether a witness is necessary at the hearing, namely, that the deposition or interrogatory requests (1) are necessary for a fair resolution of the claim; (2) are necessary to further the purposes of the IRP; and (3) considerations of fairness and furtherance of the purposes of the IRP outweigh the time and financial expense of the deposition and/or interrogatory requests. INTA would support that a limited number of requests for admissions be allowed. Moreover, the Updated Supplemental Rules permit relevant and material documents to be withheld on the nebulous grounds that the documents are “otherwise protected from disclosure by applicable law.”

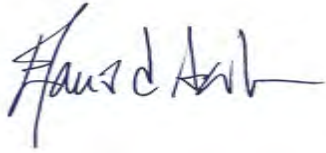
INTA believes that the reference to other “applicable law” is too vague and could encompass, for instance documents that are subject to a confidentiality agreement. In addition, this standard allows parties to forum shop and re-locate documents to jurisdictions that have laws protecting disclosure of documents outside of international legal norms. INTA recommends that, to the extent documents are subject to confidentiality restrictions, that the parties should be able to produce documents subject to a protective order. Moreover, INTA suggest striking “otherwise protected from disclosure by applicable law” and replacing it with “otherwise protected from disclosure by a valid order of a court with competent jurisdiction.”

5. About INTA

INTA is a 137 year-old global not for profit association with more than 6,400 member organizations from over 190 countries. One of INTA’s goals is the promotion and protection of trademarks as a primary means for consumers to make informed choices regarding the products and services they purchase. INTA has also been the leading voice of trademark owners within the Internet Community, serving as a founding member of the Intellectual Property Constituency of ICANN. INTA’s Internet Committee is a group of over 200 trademark owners and professionals from around the world charged with evaluating treaties, laws, regulations and procedures relating to domain name assignment, use of trademarks on the Internet, and unfair competition on the Internet, whose mission is to advance the balanced protection of trademarks on the Internet.

Should you have any questions about our comments, I invite you to contact Lori Schulman, INTA's Senior Director of Internet Policy at **Contact Information Redacted**

Sincerely,

A handwritten signature in dark ink, appearing to read "Etienne Sanz de Acedo". The signature is fluid and cursive, with a long horizontal stroke at the end.

Etienne Sanz de Acedo
Chief Executive Officer

ISPCP

The Internet Service Provider and Connectivity Provider Constituency

ICANN

30 January 2017

ISPCP Comments on ICANN Updated Supplementary Procedures for Independent Review Process

The Internet Service Provider and Connectivity Providers Constituency (ISPCP) welcomes the opportunity to submit comments on the ICANN Updated Supplementary Procedures for Independent Review Process (IRP). See: <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>.

The ISPCP's comment on the Updated Supplementary Procedures for Independent Review Process, a.) expresses concern about the proposal of a 45-day clock, b.) recommends an explicit definition that the Standing Panel is comprised of at least seven members, and c.) recommends including sections relevant to the language accommodations for dispute resolution, as recommended by the International Center for Dispute Resolution.

ISPCP Concern About Timing and Time Tables

The ISPCP is concerned that the time limit of 45 days is impractical given the ICANN process and nature of such rules of procedure. Specifically, the ICANN bylaws indicate the rules of procedure “are intended to ensure fundamental fairness and due process” and “shall be informed by international arbitration norms”. As there are *currently no time limits to bring forth an IRP*, moving to a system that now has a 45-day clock would not be acceptable especially as current precedent demonstrates there being no time limit for any such matters. The proposed time limits are both unreasonable and novel, so could reduce ICANN's accountability to the community.

The proposed times do not reflect the reality of how slowly ICANN's processes move. Policy development, board adoption and actual implementation can take years. How can someone be expected to determine if they will be harmed by a policy within the suggested 45 days, when such harm could take years to fully appreciate? This novel approach seeks to impose an arbitration system on largely non-contracted parties, who have not consented in contractual form to these rules of procedure. This is vastly different from a situation where two parties explicitly consent to dispute resolution terms via a contract. Due to this, ICANN should and must err on the side of caution when allowing a party to bring an action.

Therefore, the ISPCP encourages ICANN to reconsider those time limits and revert to timelines that are more practical for stakeholders engaged in the Independent Review Process. This would include, if necessary, a moratorium on the adoption of any time limits in the Updated Supplementary Procedures, until some further studies can be done to analyze the potential impacts of such time limits.

Other Matters of Support, Clarification, or Concern

The ISPCP supports the efforts of the IRP Implementation Oversight Team, the ICANN legal team, and the external counsel of the CCWG-Accountability in reviewing, updating, and providing these Supplementary Procedures for comment. The need for review procedures that adhere to international standards is an admirable goal for an organization such as ICANN given its depth and breadth of global activity and impact.

Thus, the ISPCP supports the use of the International Centre for Dispute Resolution's (ICDR) procedures to amend the current Review Process:

1. The ISPCP supports the explicit statement that the Standing Panel is comprised of at least seven members, and recommends retaining this language in the final draft submitted to the ICANN Board. However, while the number of members is indeed mentioned in a prior section of the ICANN Bylaws, the ISPCP believes it would be useful to clarify and emphasize the size of the Standing Panel for the benefit of those claimants bringing a dispute.
2. The ISPCP is concerned about the lack of mention of language accommodations. The ICDR, in its guidance documents for drafting dispute resolution documents, recommends including a description of the language of the arbitration immediately following the definition of the place(s) of arbitration. While the draft text adequately describes the importance of location and region by allowing virtual hearings, the question of language or accommodation is not addressed. The ISPCP asks that appropriate text regarding language be included. Again, even if the expectations for language and ICANN's are defined elsewhere in the Bylaws, it is beneficial to restate them here in the IRP section.

The ISPCP thanks members, volunteers and the IRP Implementation Oversight Team, the ICANN legal team, and the external counsel of the CCWG-Accountability for their work on this process and stands ready to assist.

This comment was drafted by the ISPCP's Public Comment Drafting team. It was approved for submission through the regular January 2017 ISPCP mailing list approval process.

Submitted on behalf of the ISPCP Constituency.

Mark McFadden

The standing requirement ("materially affected") is too restrictive

- *To:* comments-irp-supp-procedures-28nov16@xxxxxxxxxx
- *Subject:* The standing requirement ("materially affected") is too restrictive
- *From:* Karl Auerbach <karl@xxxxxxxxxxxx>
- *Date:* Fri, 2 Dec 2016 07:43:00 -0800

The standing requirement that one be "materially affected" is excessively legalistic and narrow.

ICANN exists to serve the community of internet users. Many ICANN policies affect huge numbers of people - the number is measured in the millions if we encompass only domain name registrants and exclude those who are merely affected less directly.

The "materially affected" limitation adopted from United States court practices. The rationale for those court practices does not apply to ICANN.

The "materially affected" standard ought not to apply to questions raised by a member of the public about an act of ICANN, an entity whose very existence is premised on benefiting the public interest.

The proposed "materially affected" standing limit will further empower those who have financial interests in matters regulated by ICANN and correspondingly disempower those who merely suffer, en masse, a shared harm that is difficult to measure on an individual basis.

The foundation for standing should be broadened to recognize several factors. At a minimum it should encompass any person who uses a domain name, IP address, or IANA protocol parameter. At a minimum it should encompass any person or entity listed in any "whois" entry. It ought to encompass any person or entity that constitutes the "public" as construed by the California law of "public benefit" corporations under which ICANN has obtained its legal existence. Ideally, as has been said "the internet is for everyone", and thus "everyone" ought to have standing to complain when ICANN goes awry.

--karl--

Karl Auerbach

(Former publicly elected member of the ICANN Board of Directors for North America)

The 45 day/12 months time limits seem unreasonably short

- *To:* comments-irp-supp-procedures-28nov16@xxxxxxxxxx
- *Subject:* The 45 day/12 months time limits seem unreasonably short
- *From:* Karl Auerbach <karl@xxxxxxxxxxxx>

- *Date: Fri, 2 Dec 2016 07:19:00 -0800*

The proposed limits on filing - 45 days after becoming aware (and within a 12 month limitation window) are significantly too short.

Given the significant and evolving complexity of ICANN's structure and its layers of organic documents and procedures, only the most affluent of people or organizations could comprehend, research, and write a proper submission in a mere 45 days. As a consequence these time periods effectively shut out most members of the internet community - and, correspondingly, will increase the relative authority of those interests that have enough money to hire services - usually in the form of a large and expensive law firm - to react within the small time window.

By-the-way, are those 45 days calendar days or business days?

The twelve month limit will act as a kind of concrete that locks-in decisions in which the ill aspects take a long time to emerge and be understood. Moreover, many aspects may not emerge until put into actual practice; and we know from experience that in ICANN, it often takes years to transform a decision into practice so that its effects may be perceived. In addition, if an action of ICANN violates its principles then the door to correction ought to never be closed.

The 45 day period ought to be changed to be least six months (180 days) after awareness; and the 12 month limit ought to be at least doubled, or better, removed entirely.

--karl--

Karl Auerbach

(Former publicly elected member of the ICANN Board of Directors for North America)

Fletcher, Heald & Hildreth, P.L.C. Comments in Response to the New Draft of the “Updated Supplementary Procedures” for ICANN’s Independent Review Process

Thank you to the IOT Team for its hard work on the *Draft Updated Supplementary Procedures*. We have analyzed them closely and respectfully submit there is a long way to go until they are complete. To ensure “fundamental fairness and due process” (guaranteed by *Draft Updated Supplementary Procedures*, Section 5, *Conduct of the Independent Review*), we share the following critically necessary changes to the provisions addressing Notice, Intervention by Right, Opportunity to heard in review of Emergency Petitions, and the scope of remedies IRP Panels may provide in certain types of hearings.

We are particularly concerned about the effect of the proposed *Updated Supplementary Procedures* in two specific circumstances:

- Challenges to decisions from Another Arbitration Tribunal; and
- Challenges to a Supporting Organization’s Consensus Policy.

These are the IRP actions that may be taken pursuant to “decisions of process-specific expert panels” and resulting “from action taken in response to advice or input from any Advisory Committee or Supporting Organization” under ICANN Bylaws, Sections 4.3(b)(iii)(2) and (3).

I. Review of All Arbitration Tribunals (e.g., “Decisions of Process-Specific Expert Panels”)

In the ICANN Applicant Guidebook for New gTLDs, the Community and the Board created 3 forums for disputes to be handled by well-regarded, international Dispute Resolution Providers. They are:

- a. The World Intellectual Property Organization (WIPO) for New gTLD Legal Rights Objections;
- b. The International Chamber of Commerce (ICC) for Community Objections; and
- c. The International Center for Dispute Resolution (ICDR) for String Confusion Objections.

The Applicant Guidebook expressly rejected any avenue of appeal from the decisions of these arbitration tribunals. Upon losing the dispute, the rules required an applicant to withdraw their New gTLD Applications. A few applicants nonetheless were permitted to use the IRP to challenge the decisions – but without the Winning Parties’ who had prevailed in the original dispute being present! As a matter of fundamental fairness and due process, winning parties must be given notice of, and be allowed to participate in, such challenges.¹

¹ It is easy for a losing applicant to file a Request for an IRP based on the argument that another arbitration forum made a decision that is “inconsistent with the Articles of Incorporation or Bylaws.” But such a proceeding acts as an appeal of the decision of the underlying arbitration tribunal and is grounded in facts and arguments of the underlying proceeding to which ICANN was not a party. The winning party is a much-needed part and a rightful voice of this IRP proceeding.

To protect and effectuate interested parties' fundamental right to participate effectively in an IRP review of an arbitration tribunal's decision, we propose three essential procedural safeguards.

**A. PROVIDE ACTUAL NOTICE TO ALL ORIGINAL PARTIES TO
AN UNDERLYING THIRD PARTY PROCEEDING**

First, the rules of the *Updated Supplementary Procedures* should provide actual and timely notice of any appeal of or other post-decision challenge of any underlying decision to (a) all parties to the underlying arbitration proceeding and (b) plus notice to the underlying tribunal provider (called the "Dispute Resolution Provider" in the New gTLD Applicant Guidebook).

Fair is fair: all affected entities should know when an appeal or challenge to a dispute has been brought, and very few people actually read and follow ICANN's IRP page. (Further, initial notices, briefs and other filings in IRP actions are often posted weeks after they were filed – creating a disadvantage for other materially affected parties from the start.)

Such actual notice is fully consistent with the rules governing the original dispute. For example, all Dispute Resolution Providers for New gTLD Objections (e.g., WIPO, ICC, and ICDR) require that ALL Notices, Filings, Pleadings, and Communications of the Parties to the DRP – from the very start of the Community, String and Legal Rights Objections – be copied in realtime and, at the time of filing be sent to all other parties in the proceeding. Fundamental fairness and due process in the IRP require nothing less.

Accordingly, the *Updated Supplementary Procedures* must include a new Notice Provision, to include:

1. **"Where the filing invokes New ICANN Bylaws Section 4.3(b)(iii)(A)(3) – i.e., the Covered Action 'resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws' – the Claimant must:**
 - a. **Send a copy of its Notice of Independent Review Process and its Request for Independent Review Process together with all statements, exhibits, attachments, legal authorities, witness statements, and other reports or materials to all Parties to the original "process-specific expert panel" proceeding and decision;**
 - b. **Use the most recent email addresses available for the Representatives of the Parties: i.e., either those email addresses used by the expert panel when that panel provided its decision to the Parties or, if the Claimant has actual knowledge of a change of email address, to the new email address of a Representative of a Party (e.g., where a law firm has merged and changed email addresses) and submit a signed, scanned statement attesting to the electronic delivery of all of the materials commencing the proceeding to all Parties to the Underlying Decision and to the Dispute Resolution Provider and list the names and email addresses of those who were sent these filing materials; and**
 - c. **If a Claimant does not comply with the above procedures within 24 hours of submitting its Request for IRP, the process shall terminate.**

2. ICANN Staff shall send a follow-up notice of Commencement of the IRP proceeding to the Dispute Resolution Provider that administered the “process-specific expert panel” and to all Parties to that decision.

3. The Claimant, ICANN, and the IRP Panel and Administrators shall send to the Dispute Resolution Provider and all Parties to the underlying proceeding all correspondence, filings, and communication with ICANN, the IRP Panel, and the IRP Forum Provider. No part of an IRP dispute involving a third-party “process-specific expert panel” shall take place ex parte. All Parties to the underlying proceeding shall be copied on all matters in the IRP unless they “opt-out” by email to ICANN and the IRP Forum and request to be removed from distribution.”

B. PROVIDE A MANDATORY RIGHT OF INTERVENTION TO ALL PARTIES TO THE UNDERLYING ARBITRATION PROCEEDING FOR WHICH REVIEW IS SOUGHT

Second, the Updated Supplementary Procedures must permit any party to an arbitration proceeding resolving a gTLD dispute to intervene as a matter of right in an appeal of or other post-decision challenge to the arbitral decision. While losing Claimants may dream of enter into a room with ICANN alone to privately challenge their losing decision in an underlying tribunal, such private challenges are fundamentally unfair and a violation of due process to the winning party and every other party that participated earlier. Such challenges also are inconsistent with the legal systems of all developed countries. All parties to the underlying proceeding should have an equal opportunity to be heard.

(Due to the “consolidation” that is recommended in the ICANN rules for third-party proceedings, such as the Community Objections, there can be multiple parties in such a proceeding. Each party has a right to be heard and participate.)

Winning parties (and other losing parties) may or may not choose full participation in an IRP proceeding, as they may not have the time, inclination, or funding to do so. To assure that at least cost is no barrier for such parties’ voices, concerns, and defenses to be heard, the following critical options should be added to the Updated Supplementary Procedures to ensure that all relevant information is made available to the IRP Panel:

To Section 7. Consolidation, Intervention, and Joinder, add:

“A. As a matter of right, any Party or Parties to the decision of a “process-specific” expert panel shall be entitled to participate in an IRP proceeding challenging that decision as a matter of right. In such a case, any Party to the underlying proceeding may:

- 1. Submit a “Request to Intervene as a Full Party.” The other Party or Parties may then participate fully in:**
 - a. The selection of the IRP Panelists;**
 - b. Any pre-hearing motions, including Emergency Petitions, Procedural Pleadings (e.g., Motions to Dismiss for Lack of Standing or Timeliness), and Substantive Pleadings (e.g., reasons to reject the pleadings for lack of merit);**
 - c. Any Discovery that is conducted; and**
 - d. Any Hearings that are held.**
 - e. Parties who chose to intervene in this full manner shall be responsible for their share of the costs of the IRP Panel, which shall be shared equally**

with the side that they are supporting (e.g., ICANN’s side or Claimant’s side). Such a “Request to Intervene as a Full Party” must be reviewed by the ICDR to verify the claim of Party status in the underlying proceeding is truthful. Upon such verification, intervention will be allowed. No argument against such intervention will be allowed by the IRP Forum and, if made, will be denied.

2. Alternatively, any Party or Parties to the decision of a “process-specific” expert panel shall be entitled individually, collectively, or in combination thereof, to file a “Friend of the IRP” Brief in response to:
 - a. Claimant’s Request for Independent Review Process;
 - b. Any Pre-Hearing Motions, including Requests for Emergency Relief and Procedural Pleadings (e.g., Motions to Dismiss for Lack of Standing or Timeliness); and
 - c. Any Additional Memoranda, Supplemental Memoranda, Post-Hearing Briefs and similar substantive material presented to the IRP Panel.

Submissions by the Winning Party or Parties of “Friend of the IRP” Briefs and Responses shall be of the same lengths as that allowed to the Claimant’s Briefs and Responses with respect to length, with the same right to file exhibits, witness statements, evidence, and similar materials under IRP rules.”

[Note: while ICANN Counsel is excellent, ICANN was not involved in the preparation or presentation of the briefs, arguments, hearings or other proceedings of the underlying dispute. It was the Parties, e.g., the Community and the Applicant (Community Objections) or another Registry and the Applicant (String Confusion) that presented the case below. Their briefs and arguments are not published and are generally only partially reflected in the decision of the Underlying Dispute Resolution Panel. As the decision of the underlying tribunal may be reversed, the actual arguments, evidence and reasoning presented in the underlying dispute are highly relevant to the IRP Panel and best presented by those who made the arguments. The Party that won the Underlying Proceeding is in the best position to defend its interests and must be allowed to do so.]

C. REQUIRE THE IRP PANEL TO HEAR FROM ALL PARTIES TO THE UNDERLYING PROCEEDING BEFORE DECIDING UPON ANY REQUEST FOR INTERIM RELIEF OR DEMAND FOR INTERIM MEASURES OF PROTECTION

Third, IRP Panel should be barred from stopping enforcement of the underlying decision or granting other interim relief to a Claimant until the Winning party in the underlying dispute has an opportunity to be heard regarding such relief. While it may be appropriate for losing parties (e.g., the Claimant) to seek to stop the underlying decision from going into effect, ***it is not fair to do so without hearing from the Winning Party or Parties about the harm that will take place if the decision is delayed in its implementation.*** As a matter of fairness and due process, no request for Interim Measures of Protection (provisions set out in Section 10 of Updated Supplementary Procedures) must be allowed to take place without hearing from all other parties to the underlying proceeding; these are the parties who the delay will most immediately impact.

To implement this principle, the following language must be added to Section 10 of the *Updated Supplementary Procedures*:

To Section 10. Interim Measures of Protection, add:

“B. No Request for any of the Interim Measures of Protection sought by the Claimant (including, but not limited to, “prospective relief, interlocutory relief, or declaratory or injunctive relief” shall be heard by the IRP Panel, Emergency Panelist, or any other appointed party, without giving the Winning Party or Parties, and other parties as appropriate, a full, fair, equal, and timely right to be heard.

- 1. The Winning Party or Parties from any Underlying Arbitration Tribunal shall be entitled to be heard on any or all of the following factors, including:**
 - (i) Harm arising from any Interim Request of the Claimant (or Other Parties that may be added);**
 - (ii) Both: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and**
 - (iii) The balance of hardships and the harm to the Winning Party (Parties) should the Underlying Decision be further delayed in its implementation.”**

[**Note:** As was true in Part I.B, above, ICANN was not a party to the underlying proceeding, so ICANN Counsel would not know the deep, substantial, and real monetary and other harms that may befall the Winning Party should implementation of the decision it won be further delayed or suspended – perhaps for weeks, months or years. Further, how can a Panelist weigh the “balance of hardships” (Section 10 (iii)) without hearing from both sides?]

II. Review, Appeal or Challenge to the Consensus Policy of a Supporting Organization

The second, key area of concern regarding the Updated Supplementary Procedures centers on the provisions for reviewing, challenging, or changing “Consensus Policies created by Supporting Organization.” See ICANN Bylaws, Section 4.3(b)(iii)(2). Truly, and with respect, what do senior commercial arbitrators know about our ICANN Multistakeholder Process, and why should ICANN Counsel alone be required to defend the Community’s Consensus Policy – without the Supporting Organization and Stakeholder Groups that negotiated the Consensus Policy in good faith (and great effort) – should these groups choose to participate?

As everyone in our Community knows, and as the revised Bylaws affirm, the Multistakeholder Community charters, negotiates, drafts, edits, reviews comments on, and finalizes Consensus Policy Recommendations. The Council of the Supporting Organization – e.g., the GNSO Council – accepts them (as appropriate), and the ICANN Board approves them (when appropriate and upon review by the Advisory Committees). The ICANN Staff serves as a facilitator of the Supporting Organization’s Policy Development Process, but not the negotiators. In the case of a challenge, therefore, should not the Community be allowed to defend its Consensus Policy alongside ICANN Counsel?

To enable a Supporting Organization to defend one of its Consensus Policies, it needs: a) timely notice to the Supporting Organization of an IRP filing against such a one of its consensus policies, and b) the full

opportunity by the Supporting Organization (and its Stakeholder Groups) to present arguments and evidence in defense of the Consensus Policy in the IRP proceeding.

Further, how far may an IRP Panel go in its ruling on a Consensus Policy dispute? We respectfully submit that fundamental principles of fairness and due process require an IRP Panel not revoke a Consensus Policy unilaterally, but to send back to the Community those parts of the Consensus Policy that it determines need to be revised and reworked.

By analogy, a court that reviews a challenge to regulation generally is not permitted to substitute its own judgment for the expert agency that wrote that regulation. Under the concepts of “judicial remand” and “limited review,” judges generally may not rewrite laws and regulations, but must send them back to the legislators and agencies that wrote them to be reviewed and reworked with the public. For example, In the United States, federal courts regularly find sections of new regulations that they determine are contrary to law or arbitrary and capricious. In such cases, those courts generally send these sections back to the regulatory agency that wrote them – e.g., the Food & Drug Administration, the Federal Trade Commission or the Federal Communications -- to be revised through the public notice and comment procedures of the US Administrative Procedure Act. See 5 US Code Section 706, Scope of Review.

For Consensus Policies, it is only fair that the IRP Panel that invalidates a portion of the policy must send it back to the ICANN Board for revision. The ICANN Board should, in turn, return the invalidated portion of the Consensus Policy to the Supporting Organization for review and revision (with the Community).

We recommend the following three specific changes below to implement this principle.

**A. PROVIDE ACTUAL NOTICE TO THE ICANN SUPPORTING ORGANIZATION,
STAKEHOLDER GROUP, WORKING GROUP CHAIRS AND ICANN COMMUNITY
THAT DEVELOPED THE CONSENSUS POLICY BEING CHALLENGED**

The Updated Supplementary Procedures should supplement its new Notice Provision (adding to Section I.A above), to include:

“4. Where the filing invokes a challenge to an ICANN Consensus Policy, adopted by a Supporting Organization and accepted by the ICANN Board pursuant to the public notice and comment processes of the ICANN Process, Actual Notice to the Supporting Organization and Stakeholders that adopted the Consensus Policy must be provided, as follows:

- a. The Claimant shall send a copy of the Request for IRP and its Initial Written Statement, with all evidence, exhibits, and attachments, to the Council Chair of the Supporting Organization that enacted the Consensus Policy, the heads of each Stakeholder Group in the Supporting Organization and the Chair(s) of the Working Group that developed the Consensus Policy;**
- b. The Claimant shall submit a signed, scanned statement to ICANN and the ICDR attesting to the electronic delivery of all of the materials commencing this proceeding to all Parties listed in subsection 1 above, and list the names and email address of those who were sent these materials, within 24 hours of submitting its Request for IRP, or this proceeding will terminate; and**

- c. **Within 3 business days of receiving the Notice of IRP and/or Request for IRP in any action involving a Consensus Policy, ICANN Counsel shall publish a Notice of the IRP Action and Details of the Challenge to an Adopted Consensus Policy in the then-current place where ICANN posts matters open for public comment (currently <https://www.icann.org/public-comments#open-public>). (The goal being to provide notice of a challenge to ICANN policy in the place where the Community is most likely to read about policy changes.)**
5. **The Claimant and ICANN shall continue to send electronic copies of all filings, pleadings, requests, and correspondence of the IRP to the Council Chair of the Supporting Organization that passed it, the heads of the Stakeholder Groups, and Chair(s) of the Working Party that created the Consensus Policy unless any party or parties requests to be removed from the distribution list.**

B. MANDATORY RIGHT OF INTERVENTION TO THE IRP FOR THOSE WHO PARTICIPATED THE CREATION OF THE CONSENSUS POLICY AND THOSE WHOSE INTERESTS ARE REPRESENTED IN OR AFFECTED BY IT.

The Updated Supplementary Procedures also should permit those most closely involved in enacting a particular Consensus Policy to participate by right in any proceeding to modify or repeal it. Allowing a single disgruntled stakeholder to challenge and renegotiate a Consensus Policy with ICANN Counsel alone in their own corporate or personal interest is unfair and does not serve the interests of the Multistakeholder Community. Accordingly, the following changes must be made to the Updated Supplementary Procedures to ensure fair and balanced representation of all materially-affected parties in the right to participate in an IRP Proceeding:

To existing Section 7. Consolidation, Intervention, and Joinder, add:

“The Council of the Supporting Organization that passed the Consensus Policy, any and all Stakeholder Groups that participated in the development of the Consensus Policy, and any and all Chair(s) of the PDP WG that wrote or reviewed the Consensus Policy may intervene as of right in this IRP proceeding.

- a. **The Council that enacted the Consensus Policy may participate in the choice of Panelists without cost or any escrow payment requirement;**
- b. **The parties listed above, separately, collectively, or in several groups, shall be entitled to submit “Friend of the IRP” briefs to respond to any initial submissions by the Claimant, any supplemental submissions of the Claimant, or other submissions by the Claimant.**
- c. **The parties listed above, separately, collectively, or in several groups, shall be entitled to participate in any hearing that is held, whether online, by telephone, in person, or by other means.**
- d. **The length of the responsive submissions of the parties above shall be the same as the length allowed the Claimant for the submission with respect to which the responsive submission is filed.**

[Note: Similar to Sections I.B and I.C above, ICANN Counsel is outstanding, but never participated in the day-to-day negotiations and compromises of the Policy Development Process. Rather, it was the Community members who researched, reviewed, discussed, debated, drafted and edited the Consensus

Policy; these Community members will be most familiar with the Consensus Policy’s arguments and defense. Since the IRP Emergency Panelist holds the power to “stay” or stop implementation of a Consensus Policy and the full IRP Panel holds the power to reverse or overturn an ICANN Consensus Policy – the result of years of work – it is critical to due process that the Community that participated in the creation of this policy have the right, ability, and opportunity to fully and fairly defend it.]

C. LIMIT WHAT THE IRP PANEL CAN DO WHEN OVERTURNING A CONSENSUS POLICY – STANDARD OF REVIEW AND REMEDIES

Certainly the IRP Panel has the power to set aside a Consensus Policy as a violation of the ICANN Bylaws. But how likely is that after months and years of stakeholder input, Community review, Council review and Board review?

More likely is the situation where the IRP Panel finds some aspect of the Consensus Policy to be contrary to ICANN Bylaws – some part, but not all or even most of the Consensus Policy.

Precedent in other areas teaches that when a Community writes a rule that Community should have the right to revise the rule – consistent with any direction or guidance that a judge or tribunal might offer. It is a principle of judicial restraint that a court that sets aside a portion of a regulation or legislation *must send it back to the expert agency that created it to revise it* – consistent with the Community-based proceedings it used originally. To achieve fairness and due process, such must be the case here.

Consistent with this principle, the Updated Supplementary Procedures should be modified as follows:

To the end of Section 11, *Standard of Review*, add:

“The IRP Panel may not substitute its judgment for that of the Supporting Organization’s Council or the ICANN Board by rewriting a Consensus Policy. After hearing from all Materially-Affected Parties of the Supporting Organization (including Stakeholder Groups) and Co-Chairs of the Working Group who choose to participate, the Panel may determine that all or a portion of a Consensus Policy is contrary to ICANN Bylaws.

If the IRP Panel makes such a determination, it shall provide one or more of the following remedies:

- 1. Identify to the ICANN Board the specific portions of the Consensus Policy that it found to violate the ICANN Bylaw;**
- 2. Indicate what portions of the Consensus Policy (if any) do not violate the ICANN Bylaws;**
- 3. Remand the Consensus Policy to the ICANN Board for review with the Council that adopted it in accordance with the IRP Panel’s decision; and**
- 4. Indicate whether the Panel recommends that the Consensus Policy should be suspended pending Board and Supporting Organization review and rewriting.**

Prior to any determination by an IRP Panel that a Consensus Policy should be suspended pending Board and Supporting Organization review and revision, the IRP Panel must request input from the materially-affected parties and the Supporting Organization and its Stakeholder Groups whether any harms or dangers may arise from the Policy’s suspension.

The IRP Panel must provide notice to the materially affected groups and an adequate opportunity for them to be heard regarding (a) the harms they may suffer from the Policy’s suspension and (b) other courses of action that the Panel should consider taking in lieu of such suspension.”

III. Additional Issues for This Proceeding and the Cooperative Engagement Process (“CEP”) Discussion

A. Fairness and Due Process Require That Equivalent Changes in Notice and Mandatory Right of Intervention be Made to ICANN’s Cooperative Engagement Process

While not the subject of this comment proceeding, Claimants challenging “decisions of process-specific expert panels” or Consensus Policies must not be allowed to negotiate privately with ICANN via the Cooperative Engagement Process (CEP). The CEP -- ICANN’s pre-IRP negotiation – empowers its participants to resolve their differences prior to bringing an IRP claim. The whole idea is avoid the IRP filing. *Accordingly, it is consistent with fairness and due process for CEP negotiations to include all directly impacted and materially affected parties in the negotiations, should they choose to participate, so that they have the power to represent and protect their own interests.*

Therefore, we ask that the IOT share these comments with the CEP Work Stream 2 Subgroup and recommend that that subgroup make equivalent changes to the CEP that are equivalent to the proposed changes submitted here for the *Updated Supplementary Procedures* of the IRP.

B. Strongly Urge the IOT Not to Copy Entire Bylaw Sections into the IRP Updated Supplementary Procedures

We are surprised to see large sections of the *Updated Supplementary Procedures* copied from the ICANN Bylaws. While we can understand references to the Bylaws, wholesale copying can lead to problems, particularly if there develop inconsistencies between the two versions. Which one should parties follow?

To avoid this unnecessary problem, we recommend that the *Updated Supplementary Procedures* simply reference relevant ICANN Bylaw sections. Then the researcher can check the relevant Bylaws section and return to the *Updated Supplementary Procedures* for additional guidance.

For example, the definitions section might state:

1. “Definitions

The definitions of Claimant, Covered Actions and Disputes are set out in Section 4.3(b) of the ICANN Bylaws.”

[Continue with definitions of “Emergency Panelist” and other terms not defined in the Bylaws.].

C. Review of the International Centre for Dispute Resolution Itself

Every institution needs a review process. If the International Centre for Dispute Resolution (“ICDR”) institution and IRP process is the review for the ICANN Board and its decision, who acts as the reviewer of the ICDR? What is the review process for the ICDR work and the quality of its Panels’ ability to follow the rules as set out in the ICANN Bylaws and the IRP Updated Supplementary Procedures?

We would urge the IOT to give this important oversight issue some thoughts – and action.

In conclusion, thank you for your consideration of these comments.

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LINX reply to IRP implementation consultation

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Executive Summary

This submission is addressed exclusively to the “Time for Filing” section (the “timing rule”) of the “Draft Supplemental Rules of Procedure for the Independent Review Process” (the “Draft Rules”), and responds to the public consultation launched on 28 November 2016.

We consider that the proposed timing rule is ill-judged, and should be withdrawn.

- The 45 day limit for filing a claim is too short, and will prevent parties who did not have advance notice of the issue and extensive familiarity with ICANN, from fair access to the IRP procedure.
- The 12 month fixed limit from the date of the action is not merely too short, but miscalculated. The timing rule should be based on the date of knowledge of the harm that ICANN’s action gave rise to, rather than calculated from the date of the action itself. To do otherwise would unjustly exclude important cases from being heard by the IRP.

Both these flaws are serious, but it is the latter that we consider catastrophic. The effect of the latter will be to seriously undermine, and in many cases utterly negate, the enforceability of the Mission limitation that was a key commitment by ICANN in the 2016 transition. The seriousness of this commitment is shown by statements in the bylaws promising ICANN’s accountability as enforced through an accessible, transparent and just resolution of dispute by the Independent Review Process.

We submit detailed, point-by-point analysis of the bylaws to show that the proposed timing rule is inconsistent with the bylaws, and that the only timing rule acceptable under the bylaws would be one based on the aggrieved party’s actual or imputed knowledge of the harm they have suffered.

As the IRP Implementation Oversight Team, in presenting the Draft Rules, did not see fit to offer a justification, we have addressed some points that we believe might have been made in their defense. We consider fears that a more permissive timing rule would expose ICANN to unlimited uncertainty; we find these unconvincing. ICANN is protected very effectively by the strictly limited nature of remedies available under the IRP. Nor do we find plausible the notion that greater access to the IRP would expose ICANN to a broader legal risk in civil courts. More generally, we do not agree that it is better to err on the side of an expeditious process: in our view, too strict a timing rule is as bad as too lax. We examine the case for relaxing the rule on Standing, but conclude it would neither be appropriate nor an adequate substitute for correcting the flawed timing rule. And finally we explain why the possibility that the Empowered Community might bring a challenge is no substitute for ensuring that the individual right to bring an IRP case is genuinely available to a materially affected party, as the 2016 transition and the ICANN bylaws promise.

For these reasons we recommend that the proposed timing rule in the Draft Rules be withdrawn. A replacement should be developed and systematically compared against the obligations in the bylaws, before being published for further public comment together with a reasoned justification.

About LINX

The London Internet Exchange, LINX, is a membership organisation for network operators. LINX operates Internet Exchange Points, IXPs, in the UK and the USA, and represents the interests of its membership on certain matters of public policy. We do not claim that our positions are supported in every respect by every one of our 740 members, but believe that the positions we take are substantially supported by our community, and in the interests of the sector as a whole, rather than any particular company or business model. Over more than 20 years, policy makers in government and other institutions have come to recognise the value of LINX's voice on behalf of the operator community.

Introduction

This submission concerns only one element of the proposed "Draft Supplemental Rules of Procedure for the Independent Review Process" (hereinafter, for brevity, the "Draft Rules"), namely section 4, "Time for Filing". It responds to the public consultation on the Draft Rules launched on 28 November 2016.

We argue that this section is defective, in that its effect would be to unduly limit (and in some cases potentially entirely exclude) a materially affected party from being able to bring an IRP case in respect of certain classes of alleged violations of the bylaws. We focus specifically cases based on allegations that ICANN had acted in a manner that was ultra vires the Mission, and so in breach of Section 1.1(b) of the bylaws, and cases based on allegations that ICANN had passed a policy that aims to restrict Internet content, in breach of Section 1.1(c).

We note, and agree with the reasoning by Sidley, independent counsel to the CCWG, that this defect would make the Draft Rules themselves inconsistent with the bylaws. In particular, we consider the Draft Rules incompatible with Section 4.1 (which sets out the purpose of ICANN accountability and review) and Section 4.3(a) ("Purposes of the IRP"), especially subsections (i)-(iii) and (vii).

The proposed timing rule

The Draft Rules state

“4. An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 45 days after a CLAIMANT becomes aware of the material affect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.

In order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.”

We understand this to mean that the latest time a claimant may initiate an IRP dispute is the earlier of

- i) 45 days after they become aware of the material effect of the action or inaction giving rise to the dispute; and
- ii) 12 months from the date of ICANN’s action or inaction giving rise to the dispute.

It is important to note that time runs out when either of these conditions are met.

It is also important that a dispute can only be commenced by a “CLAIMANT”, a defined term limited to a person “that has been materially affected by a Dispute”. The Draft Rules also state “To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation”.

The proposed timing rule suppresses access to the IRP

The “one year” fixed limit may prevent a materially affected party from ever having an opportunity to bring an IRP case

Under the Draft Rules, a party does not qualify as a CLAIMANT, and so may not bring an IRP case, unless they have suffered an injury or harm.

It is possible that more than 12 months will elapse between an action by ICANN and that action actually causing harm to a particular party.

A party that is likely to be harmed by an ICANN action, even if they are aware of the likelihood and would wish to challenge the action more promptly, is prevented from bringing an IRP case until they have suffered harm. It is possible that, in a given case, a specific harm may materialise only after at least 12 months have passed since the date of the action complained about. In such circumstances, the aggrieved party would be entirely precluded from accessing the IRP: for at least the first twelve months, because they had not yet suffered harm, and subsequently because the time for filing had expired.

A party that suffers harm from an ICANN action that materialises (at least, in respect of themselves) only more than 12 months after the action complained about, is therefore deprived entirely of the opportunity to access the IRP.

Illustrative example

To illustrate the problem in practice, we turn to the ancient dispute between those that believe a boiled egg should only be opened by cracking the shell at the round end (the “Big-Endians”) and those that believe a boiled egg should be opened by cracking the shell at the pointy end (the “Little-Endians”) .

Let us suppose that ICANN falls under the influence of Big-Endians and adopts the following policy:

No domain name shall be used to advance Little-Indian beliefs or practices. All Registry Agreements shall be amended to require all Registries to suspend or cancel domains that have been used for that purpose.

Such a policy would be a blatant violation of Section 1.1(c) of ICANN’s bylaws, which prohibit ICANN from seeking to restrict Internet content.

We should consider, however, how it is likely to play out. Once such a policy is passed, there is likely to be a lengthy implementation phase. ICANN will need to decide whether to specify the precise terms that must be imposed on domain registrants (in the Registration Agreement) to carry out this policy, or whether to leave it up to the Registry to specify those terms itself. If ICANN decides to dictate the terms, it must also decide what they must be. This is likely to be the subject of public consultation. ICANN will also need to decide whether to establish a global process for hearing complaints about violations of this policy and issuing adjudications (as with the Uniform Dispute Resolution Policy for allegations of trademark infringement) or to leave it up to Registries to police and enforce the policy. If it chooses to establish a global process, this will likely take a substantial period to develop and implement; it will doubtless involve at least one public consultation, but it is easy to imagine it requiring several.

Once ICANN has decided how the policy is to be implemented, Registries will need a period of grace to adjust their own Registrations Agreements so as to ensure that new registrations are covered by these terms. If they have been left with the duty to consider an act upon complains of violation of the policy, they will need to establish a process for this too.

Finally, it is likely that Registries will only be able to impose the new terms on registrants of existing domains as and when those domains come up for renewal. With gTLD domains most commonly being registered on a two-year renewal cycle, but very often for periods of up to ten years, it is easy to see that it could take many years before any given domain is subject to the policy.

Accordingly, a particular party, being a strong exponent of Little-Indian principles, might not themselves be directly affected by the policy for many years, before finally themselves being told that their domain is forfeit for violation of the policy. During this interim, they will be precluded from challenging ICANN’s blatant overreach.

When they do finally suffer harm themselves, namely the loss of their domain and with it their preferred publishing outlet for Little-Indian beliefs, their complaint is clearly against

¹ For further information on the dispute between the Big-Endians and the Little-Endians, see Swift (1726).

ICANN. Their objection is not against their Registry for having misapplied the policy: they do not deny that they are Little-Endians, nor that the main purpose of the domain they have registered is to support the publication of Little-Endian views, nor do they deny that this is a clear violation of the policy. They do not deny that the policy requires the cancellation of their domain, nor allege that the Registry has acted unreasonably or excessively in the light of the policy. Nor is their complaint that ICANN staff have somehow misapplied the policy, limiting a discretion that the Registry ought otherwise to have had to permit them to use their domain in some limited way to support Little-Endian Practices. No: the aggrieved party's complaint is simple, straightforward, and utterly compelling: ICANN acted illegitimately in passing the policy in the first place, tainting all that followed. The required remedy is equally clear: ICANN must withdraw the policy, freeing Registries to accept Little-Endian business once more.

The fact that the Draft Rules would prevent the aggrieved Little-Endians from bringing an IRP case as soon as the policy is passed is unfortunate; the fact that they would also prevent them from doing so once they lose their domain is unconscionable. It is also a clear violation of the intent of the CCWG Final Report, and of the bylaws.

The example of the Big-Endian/Little-Endian dispute may seem whimsical, but the general situation described above is far from fanciful: on the contrary, we describe what is very likely to occur if ICANN should ever decide to seek to restrict a certain type of Internet content. This was precisely the overreach Section 1.1(c) of the Bylaws sought to prevent. Indeed, it has been argued that Section 1.1(c) is superfluous: any action that violated it would also constitute a violation of the more general restriction to the Mission contained in Section 1.1(b). But this threat was considered so serious that it was important to make explicit and highly visible that ICANN was precluded from such activity. How damning, then, would it be to adopt rules of procedure that prevent complaints of this most serious violation from ever being heard?

45 days is an unreasonably short limit for parties not "ICANN insiders"

Under the Draft Rules, an IRP dispute may only be initiated by filing "a written statement of a DISPUTE with the ICDR no more than 45 days after a CLAIMANT becomes aware of the material affect of the action or inaction giving rise to the DISPUTE".

In order to do this, after becoming aware of the harm they have suffered, the aggrieved party will need to complete the following steps:

- i) to trace the cause of the harm, and to identify ICANN as the root cause;
- ii) connected with the preceding, to discover ICANN's existence, to understand its role and how it relates to the matter at issue;
- iii) to understand, probably on the basis of legal advice, that an ordinary legal dispute with ICANN is not indicated;
- iv) to discover that there is an IRP process;
- v) to understand the limited remedies available in an IRP case;
- vi) to learn how the IRP process is conducted and, in particular, the means to initiate it;
- vii) to learn about the permissible grounds for bringing an IRP cases, and to assess their own case against those criteria;

- viii) to discover and learn about the likely costs of bringing an IRP case, including the possibility of being liable for ICANN’s costs, and to assess and make a decision upon their willingness to incur them;
- ix) to draft a statement of complaint setting out their claim, in terms based upon the ICANN bylaws alleging violation of the same
- x) to finally take the decision to go ahead and to actually file with the ICDR

While longstanding and active members of the ICANN community, including Registries, Registrars and other regular ICANN meeting attendees (“ICANN insiders”) can reasonably be expected to know all of (i)-(v) and to understand a fair portion of (vii-viii), by virtue of that participation, parties with no previous engagement with ICANN, such as Registrants (who might well have cause to bring an IRP case) and other non-contracted stakeholders often will not.

45 days is a tight deadline even if you are fully prepared, know the issue is coming, and all you have to do is draft and submit your case. For parties who have an extensive learning curve to climb before reaching the point of being able to draft a submission, so short a deadline would be exclusionary.

The 45 day limit unfairly discriminates in favour of ICANN insiders, in contravention of the Fundamental Commitments

One of the “Fundamental Commitments” in the ICANN bylaws is that it should Section 1.2(a)(v) of the bylaws provides that it is a Fundamental Commitment to:

“Make decisions by applying documented policies consistently, neutrally, objectively, and fairly, **without singling out any particular party for discriminatory treatment (i.e., making an unjustified prejudicial distinction between or among different parties)**” **(emphasis added)**

Section 2.3 of the Bylaws further provides

“ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.”

For the reasons stated in the previous section, the timing rule proposed in the Draft Rules would make a material difference on the accessibility of the IRP between at least two clearly identifiable classes of potential claimants, namely contracted parties and other regularly engaged members of the ICANN community, on the one hand, and other stakeholders on the other. In short, ICANN insiders would have a much more realistic prospect of being able to access the IRP to challenge ICANN and hold it accountable, while those without a pre-existing relationship would not have a realistic opportunity to do so.

It is also worth noting that most ICANN actions occur in consequence of, and indeed in furtherance of, the actions of the community that is less disadvantaged by the proposed timing rule.

Given these facts, the proposed timing rule constitutes a prejudicial distinction between different parties. No justification for such a distinction has been offered nor, it is submitted, could one be found, let alone one that constitutes a “substantial and reasonable cause”.

The Bylaws require a realistic opportunity to bring an IRP case

The purposes of ICANN accountability generally, and the IRP specifically, are set out in the bylaws

Section 4.1 of the bylaws sets out the purpose of ICANN's various accountability and review procedures, stating:

ARTICLE 4 ACCOUNTABILITY AND REVIEW

Section 4.1. PURPOSE

In carrying out its Mission, ICANN shall be accountable to the community for operating in accordance with the Articles of Incorporation and these Bylaws, including the Mission set forth in Article 1 of these Bylaws. This Article 4 creates reconsideration and independent review processes for certain actions as set forth in these Bylaws and procedures for periodic review of ICANN's structure and operations, **which are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws**, including the transparency provisions of Article 3 and the Board and other selection mechanisms set forth throughout these Bylaws.

Section 4.3(a) of the bylaws defines the purpose of the IRP specifically:

Section 4.3. INDEPENDENT REVIEW PROCESS FOR COVERED ACTIONS

(a) In addition to the reconsideration process described in Section 4.2, ICANN shall have a separate process for independent third-party review of Disputes (defined in Section 4.3(b)(iii)) alleged by a Claimant (as defined in Section 4.3(b)(i)) to be within the scope of the Independent Review Process ("IRP"). The IRP is intended to hear and resolve Disputes for the following purposes ("**Purposes of the IRP**"):

- (i) Ensure that ICANN does not exceed the scope of its Mission and otherwise complies with its Articles of Incorporation and Bylaws.
- (ii) Empower the global Internet community and Claimants to enforce compliance with the Articles of Incorporation and Bylaws through meaningful, affordable and accessible expert review of Covered Actions (as defined in Section 4.3(b)(i)).
- (iii) Ensure that ICANN is accountable to the global Internet community and Claimants.
- (iv) Address claims that ICANN has failed to enforce its rights under the IANA Naming Function Contract (as defined in Section 16.3(a)).
- (v) Provide a mechanism by which direct customers of the IANA naming functions may seek resolution of PTI (as defined in Section 16.1) service complaints that are not resolved through mediation.
- (vi) Reduce Disputes by creating precedent to guide and inform the Board, Officers (as defined in Section 15.1), Staff members, Supporting Organizations, Advisory Committees, and the global Internet community in connection with policy development and implementation.

(vii) Secure the accessible, transparent, efficient, consistent, coherent, and just resolution of Disputes.

(viii) Lead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction.

(ix) Provide a mechanism for the resolution of Disputes, as an alternative to legal action in the civil courts of the United States or other jurisdictions.

This Section 4.3 shall be construed, implemented, and administered in a manner consistent with these Purposes of the IRP.

(emphasis added)

The purpose of the IRP Rules of Procedure is set out in the bylaws

Section 4.3(n) of the Bylaws provides

(n) Rules of Procedure

(i) An IRP Implementation Oversight Team shall be established in consultation with the Supporting Organizations and Advisory Committees and comprised of members of the global Internet community. The IRP Implementation Oversight Team, and once the Standing Panel is established the IRP Implementation Oversight Team in consultation with the Standing Panel, shall develop clear published rules for the IRP ("Rules of Procedure") **that conform with international arbitration norms and are streamlined, easy to understand and apply fairly to all parties.** Upon request, the IRP Implementation Oversight Team shall have assistance of counsel and other appropriate experts.

(ii) **The Rules of Procedure shall be informed by international arbitration norms and consistent with the Purposes of the IRP.** Specialized Rules of Procedure may be designed for reviews of PTI service complaints that are asserted by direct customers of the IANA naming functions and are not resolved through mediation. The Rules of Procedure shall be published and subject to a period of public comment that complies with the designated practice for public comment periods within ICANN, and take effect upon approval by the Board, such approval not to be unreasonably withheld.

(iii) The Standing Panel may recommend amendments to such Rules of Procedure as it deems **appropriate to fulfill the Purposes of the IRP**, however no such amendment shall be effective without approval by the Board after publication and a period of public comment that complies with the designated practice for public comment periods within ICANN.

(iv) **The Rules of Procedure are intended to ensure fundamental fairness and due process** and shall at a minimum address the following elements:

(A) The time within which a Claim must be filed after a Claimant becomes aware or reasonably should have become aware of the action or inaction giving rise to the Dispute;

[...]

(C) Rules governing written submissions, including the required elements of a Claim, other requirements or limits on content, time for filing, length of statements, number of supplemental statements, if any, permitted evidentiary support (factual and expert), including its length, both in support of a Claimant's Claim and in support of ICANN's Response;

[...]”

(emphasis added)

The permitted purposes of the Draft Rules is exhaustively defined in the bylaws, and adherence to those purposes is mandatory

The framework for the purpose of the IRP set out in the bylaws is exhaustive. It is abundantly clear from the above-quoted provisions of the bylaws that it is mandatory for the Draft Rules to support the purposes set out in those sections, and no other. While these purposes allow for considerable latitude in the Draft Rules to adopt, and allow a broad discretion as to whether one particular proposal or another would better support the purposes set out, they do not allow ICANN the discretion to balance these purposes against other purposes that cannot be found in the bylaws.

It is not a permitted purpose of the Rules of Procedure to seek to secure certainty for ICANN

Accordingly, it is not legitimate for ICANN to adopt a timing rule that would admittedly limit access to the IRP on the basis of a claim that it achieves a fair balance between the purpose of the IRP and ICANN's administrative convenience.

This does not necessarily prevent ICANN from adopting Draft Rules that contain some form of time bar. It would be potentially legitimate to adopt a time bar if it could show that allowing claims to be filed any later would *reduce* fundamental fairness and *undermine* due process, contrary to Section 4.3(n)(iv). By contrast, it would not be not legitimate to adopt a time bar on the basis that the purposes of the IRP have been sufficiently achieved and a shorter deadline would benefit ICANN by creating certainty that its actions will stand, not if allowing claims to be filed after the deadline date would better advance the purposes of the IRP, and not undermine any of them. Certainty for ICANN is not an objective authorised by the bylaws.

It is not a permitted purpose of the Rules of Procedure to seek to secure prompt action by claimants for its own sake

It is also worth noting that the bylaws do not contain anything that directly imposes on claimants a duty to act promptly. Accordingly, ICANN is not authorised to adopt rules for the purpose of requiring claimants to act promptly for its own sake: promptness may be required in order to achieve one of the specified purposes, but that must be justifiable. It is not legitimate to say that “Claimants could reasonable file within (a given period) and so they may not file outside that period” without further justification.

The Bylaws require a rolling time bar

The Bylaws authorise ICANN to adopt “Rules governing written submission including ... time for filing”, Section 4.3(n)(iv)(C). However that provision is directed toward written submissions, rather than the more platonic notion of the initiation of a process. The Bylaws speak more specifically of limits on when an IRP can be initiated in Section 4.3(n)(iv)(A)

(iv) The Rules of Procedure are intended to ensure fundamental fairness and due process and shall at a minimum address the following elements:

(A) The time within which a Claim must be filed **after a Claimant becomes aware or reasonably should have become aware** of the action or inaction giving rise to the Dispute;

(emphasis added)

This clearly indicates that the bylaws envisage that the deadline for initiating an IRP case should be calculated relative to when the Claimant became aware or reasonably should have become aware of the action or inaction giving rise to the dispute, and not relative to the date on which the action giving rise to the dispute took place.

Accordingly, the 12-month fixed deadline contained in one leg of the proposed timing rule in the Draft Rules is not authorised by this clause of the Bylaws.

Section 4.3(n)(iv) is non-exhaustive as to the “elements” that the Rules of Procedure may address, merely setting out a minimal set of elements that *must* be addressed by those rules. Nonetheless, it is submitted that since Section 4.3(n)(iv)(C) describes *how* the deadline for the initiation of an IRP case should be addressed (namely, relative to the date of the Claimant’s knowledge rather than relative to the date of the action), ICANN does not have the authority to adopt a rule that addresses that issue in a contrary manner.

In the alternative, even if that clause is not determinative on its own, it is submitted that the clause clearly strongly indicates a rolling deadline, and contraindicates a fixed one. When read in combination with other parts of the bylaws, the bylaws as a whole prohibit a fixed deadline.

It is therefore submitted that the requirement proposed in the Draft Rules that an IRP claim “may not be filed more than twelve (12) months from the date of such action or inaction” must be removed, and that no limit may be adopted that is calculated relative to the date of the action.

The Bylaws prohibit time-barring cases that should be heard

The bylaws are highly explicit on the important purposes served by the IRP.

Amongst other things, the IRP forms a vital mechanism for ensuring that ICANN conforms to its Mission and does not stray beyond that Mission, nor engage in explicitly prohibited activity². It avoids the need for recourse to the civil courts, an especially important goal given that stakeholders are based in no specific jurisdiction but come from all nations of the

² Section 4.3(a)(i)

world³. In particular, the IRP secures the transparent and just resolution of disputes, and ensures that the mechanism to ensure that is accessible to all materially affected parties⁴.

These purposes cannot be fulfilled if cases are unnecessarily barred.

Part of this purpose requires that the settlement of disputes must be just. It may be that in particular classes of cases, the passage of time may prevent an IRP hearing from arriving at a just resolution: over time, memories fade, witnesses cease to be available, documents are lost. This would justify a time bar for cases of this type. But these concerns speak to the effects of time on *factual evidence* that may be required in a particular case in order to achieve a just resolution. No such consideration applies to cases that are purely legal in nature, such as a claim that a particular activity is in its entirety ultra vires the Mission or prohibited by Section 1.1(c) of the bylaws (as with the case given in the illustrative example described earlier in this document).

It may therefore be suggested that the question should be considered whether any time bar at all should be applied for cases that do not rely on factual evidence, other than to establish standing.

Whatever the outcome, we submit that the IRP should always retain the discretion to hear a case notwithstanding that a time bar has been exceeded, if the IRP believes both that it is necessary to hear the case to achieve a just result, and that the passage of time is unlikely to compromise the integrity of the outcome.

The IRP IOT acted arbitrarily and without justification in its selection of a proposed time bar text

The Draft Final Report of the IRP Implementation Oversight Team (IOT) describes the timing rule it proposes for the Draft Rules, but offers no justification for the rule it proposes. There is no reasoning whatsoever.

There is no evidence that the IOT considered the extensive requirements set out in the bylaws for the rules of procedure, not that it even took those requirements into account when developing its proposal, much less that it sought to systematically evaluate its proposal against those requirements.

We believe that the IOT should withdraw the current Draft Rules, either to proceed with a version that omits the timing rule, or to bring forward a replacement proposal with a new timing rule. If the IOT wishes to bring forth a timing rule, it should restart its consideration of this issue, develop a new proposal on a timing rule, and subject this proposal to systematic analysis against the requirements in the bylaws, before presenting a reasoned proposal for new Draft Rules in relation to this matter in a new round of public comment.

Because the IRP IOT failed to offer reasoning, it is left to us to construct, as well as to analyse, possible justifications for the rule.

³ Section 4.3(a)(ix)

⁴ Section 4.3(a)(vii)

Fears of harmful effects of late challenges are unwarranted or overblown

While we have focussed on potential IRP challenges to ICANN policy, as in the illustrative example, we are aware that others are more focussed on potential challenges to ICANN administrative decisions such as new gTLD delegations, as in previous IRP cases conducted under the old, pre-transition bylaws. There may be a fear that without a strict, fixed deadline for filing an IRP challenge, ICANN would be exposed to the risk of very late reversals of decisions that others rely upon, such as the delegation of top level domain registries.

We think this concern is misplaced.

Basing the timing on the knowledge of being affected will force early challenge by gTLD applicants and others similarly situated

It would be a mistake to confuse a timing rule that was calculated from when the materially affected party became aware of the harm they had suffered, or should have been aware of it, with abolishing the time bar altogether. A time bar calculated based on the party's knowledge is still an effective and significant limit.

A person who is directly involved in an ICANN process will know (or ought to know) how the process affects them immediately, or very soon. The clock may then start on a knowledge-based timing rule.

For example, if an applicant to run a gTLD Registry believes they have been mistreated in the applications process, the time would run from the point when the applicant became aware that it was not going to be assigned to run the gTLD. This is not a long delay.

The occasion when the date of the action and the date of knowledge of the affect will differ materially will be when a party was not affected for an extended period, and so had no right to challenge earlier.

The limited remedies available under the IRP protect ICANN

There are only strictly limited remedies available to successful claimants under the IRP. This limits ICANN's exposure dramatically, and so significantly undermines any argument that ICANN needs to be protected from late claims.

Under the IRP the only remedy available is a finding that ICANN has acted inconsistently with the bylaws.

The IRP does not have the power to make money awards to successful claimants as compensation for their loss. Permitting IRP claims to be filed late therefore does not expose ICANN to a long-running potential for compensation.

Nor does the IRP precisely have the power to require ICANN to correct its fault. Admittedly, a finding that ICANN has acted inconsistently with the bylaws carries with it an implicit requirement that ICANN cease acting in that prohibited fashion, and an instruction to forbear from acting in such a fashion in the future. However, it does not necessarily amount to an instruction to undo what has been done, certainly not if undoing it is outside ICANN's reasonable control. For example, if ICANN were found to have breached its bylaws in the award of a registry contract to a particular applicant, thereby unfairly prejudicing the

interests of a competing applicant, we would expect ICANN to take the decision again (possibly, but not necessarily, awarding the registry to the previously unsuccessful applicant) if ICANN had only reached the stage of deciding to make the award; by contrast, if the award had been made and executed, and the initially successful applicant had established a proprietary interest in the new registry, we would not expect that an IRP ruling finding fault in the award process would require ICANN to shut down or transfer that registry.

We therefore find fears that late claims would compromise ICANN's ability to operate its essential functions effectively to be unconvincing.

The Draft Rules can neither extend nor reduce access to the civil courts

It would be a mistake to think that adopting any particular timing rule in the Draft Rules would affect ICANN's liability to be sued in the ordinary civil courts.

The civil courts have their own rules on standing (which are likely to be more restrictive, in important respects, than the Draft Rules) and on time for filing. Their rules are unaffected by the Draft Rules. If a person is aggrieved at an ICANN action, they may be heard in civil courts if they have a cause of action, they have standing, they file in time, and the court has jurisdiction, and if they satisfy any other relevant requirements. We should not believe that adopting a more restrictive timing rule for the IRP will help to keep civil litigants out of the civil courts; it will not, nor should it. Similarly, adopting a timing rule in the Draft Rules that gives more extensive access to the IRP will not give anyone a right to be heard in civil court that did not already have it.

Other policy considerations

Too strict a time limit is as bad as too lax

It would be a mistake to approach the question of the time for filing solely from the perspective of "how long do claimants need in order to ensure a fair process?": this can easily result in an unduly short period being selected for failure to foresee all future eventualities. It is better to begin with the question "At what point is a claim so late that the lateness itself undermines the fairness and equitability of the process?". This approach lends itself more easily to a proper demand for a legitimate justification for debarring a claim, which is more likely to lead to a just result, not to mention compliance with the purposes set out in the bylaws.

Relaxing the rule on standing is prohibited by the bylaws and would create its own problems

The illustrative example we have offered demonstrates that for important classes of challenge, under the current limitations to standing in the Draft Rules it may not be possible to initiate an IRP challenge for many years, even if it is known in advance that a challenge is appropriate.

This begs the questions: would it be better to relax the rules on standing?

Unfortunately, in our view, this creates its own problems. Considering the example of a challenge to an ICANN policy as being ultra vires (as in the illustrative example), if the rules of standing were relaxed so as to accept not only those that had experienced actual harm, but also those that might reasonably expect to experience harm in the future, then a broad class of potential claimants is created. At that point, if there were a flood of claimants, how would the IRP decide between them? Would the IRP designate someone as a class

representative? There is already a procedure for collective representation through the Empowered Community; the standing rules are intended to provide for vindication of individual rights, not collective action.

We therefore view with caution the option of relaxing the rules on standing so as to enable early review of challenges to ICANN actions that might otherwise be subject to challenge only after a protracted delay. Nonetheless, we accept that substantial delay in review is a problem; we recommend that this issue be subject to further study.

Community challenge is not an adequate substitute for an individual right

The community cannot be relied upon to challenge breaches of ICANN’s bylaws by using the power of the Empowered Community to initiate the IRP. In particular, it cannot be relied upon to challenge breaches of the Mission limitation or the prohibition on restricting Internet content: ICANN generally acts at the behest of its community, so if ICANN were to breach the Mission limitation it is quite plausible that it would be doing so with the consent and support of its community (at least in the sense of regular community “insiders”). This is especially true because a considerable degree of community consensus is needed to exercise Empowered Community rights; even significant opposition to an ICANN action within the ICANN community may be insufficient to cause the Empowered Community to initiate the IRP. Nonetheless the Mission limitation exists to protect the interest of a broader community of stakeholders, who might be harmed by ICANN overreach but who do not and should not be obliged to regularly engage in ICANN decision-making processes. This must be capable of being enforced through an individual IRP case, even if the Empowered Community fails to act.

Moreover, the bylaws seek to protect not only the rights of the community, but also the rights of the individual affected party: a materially affected party who has been harmed by ICANN’s breach of the bylaws should not be deprived of his right to challenge ICANN in the IRP merely because the community has failed to act.

Conclusion: the proposed timing rule in the Draft Rules is both bad policy and fails to conform to the requirements of the bylaws

The proposed timing rule in the Draft Rules unfairly and unreasonably prevents challenge to ICANN actions that breach the bylaws and bring material, concrete and particularised harm to affected parties only after an extended period has elapsed. In so doing, the Draft Rule denies such parties the benefit of the protection of the IRP promised by the Bylaws – a protection that was one of the major achievements of and conditions for the 2016 transition.

If these Draft Rules are adopted, the whole ICANN community will suffer, because it will largely negate some of the most important commitments in the bylaws and the transition process, namely the promise that ICANN will act only within a limited, defined Mission, and that it would not exploit its role in the DNS to bring about content or business service restrictions on the Internet. The timing rule proposed in these Draft Rules would make any IRP challenge unavailable in most such cases.

We believe that it is incumbent on ICANN to honour its commitment to accountability, and adopt Draft Rules that enable, support and reinforce access to the a fair and just review of its actions through the IRP. The timing rule in these Draft Rules does not do so. It should be withdrawn.

Recommendations

1. The current timing rule in the Draft Rules should be withdrawn.
2. Any future timing rule should be calculated relative to the later of the following the dates:
 - a. The date that the claimant became aware, or reasonably should have become aware, that they have suffered harm
 - b. The date that the claimant became aware, or reasonably should have become aware, of ICANN's action or inaction that is said to have given rise to that harm.
3. Any future timing rule should cut off no sooner than necessary to secure the purposes of the IRP; this will be much longer than 45 days.
4. The IRP Panel should be given the discretion to hear claims filed after they are out of time under the timing rule adopted, if they believe that doing so would advance the purposes of the IRP.
5. The IRP IOT should reconsider the timing rule, and bring forward a fresh proposal. In conducting that reconsideration, the IRP IOT should systematically assess the options against the requirements set out in the bylaws.
6. The IRP IOT should publish its new proposal for a further round of public comment. In doing so, it should also publish the reasons justifying its recommendation.

Comments of Paul Rosenzweig and Brett Schaefer
On the Draft Supplementary Procedures for the Independent Review Process

On November 28, 2016, ICANN published a draft of the Updated Supplementary Procedures for the Independent Review Process (IRP) for public comment. This comment reflects the observations of Brett Schaefer and Paul Rosenzweig of The Heritage Foundation (Heritage) to the Draft Supplemental Procedures. Heritage is a research and educational institution—a “think tank”—focused on U.S. domestic and international public policy and is a member of the Non-Commercial Users Constituency of the Generic Names Supporting Organization.

In our view, one particular aspect of the draft (Section 4, relating to the “time of filing” a complaint) should not be adopted in its current form because doing so would divest stakeholders of significant ability to challenge Board actions that allegedly violate the Bylaws of the Corporation.

The draft proposal addresses the question of the “time for filing” of a complaint as follows: Section 4 establishes that IRP claims must be filed “within 45 days of the date on which a claimant first becomes aware of the material affect of the action or inaction giving rise to the dispute, but in any case, no more than twelve (12) months from the date” of the alleged Bylaws violation. In other words, filing of a claim of a Bylaw violation may never occur more than 12 months after the date of adoption of the Bylaw.

We believe this proposal improperly limits the ability of claimants to challenge alleged Board Bylaw violations and divests the internet community of a valuable tool for restraining Board behavior. As a result, we think the proposal should be modified to a pure discovery rule by striking the last clause establishing an outside time limit of 12 months. In other words, the time for filing a complaint should be “within 45 days of the date on which a claimant first became aware” of the ground for his complaint.

We are well aware of counter arguments. There is value in statutes of limitation and repose – especially in a commercial context where detrimental reliance on decision making will be high. But the proposal, as drafted, leaves open the prospect of an irremediable wrong – a Bylaw violation whose affect manifests itself to the public and to potential claimants more than 12 months after adoption of the offending Bylaw. In a Machiavellian world, one can imagine the beneficiary of a Board decision waiting 13 months before implementing it to purposefully avoid IRP review. In a more realistic world we can imagine many scenarios in which the implementation of a Board decision takes longer than 12 months to have an appreciable effect on the internet community. Under either scenario, the prospect of a wrongful Board action that is immune from IRP review simply because of the passage of time should be rejected. As a public non-profit organization devoted to openness and transparency ICANN should not limit the ability of its stakeholders artificially to avoid review of its actions.

The draft proposal attempts to mitigate this concern by asserting that ICANN board interpretations of policy that allegedly violate the Bylaws will still be subject to a separate statute of limitations that runs from the date of the offending interpretation. While a salutary admonition, this effort is insufficient to ease our concern for two reasons: First, as guidance in a report, the interpretation of the “time of filing” provision is not binding on subsequent IRPs. It may be a correct interpretation (and it is certainly one we would support) but it may also be one that is rejected by the IRP who may, for example, adopt a

“relation back” doctrine as a way of time-barring some complaints. Second, the proposed mitigative report language does not address the problem of delayed implementation – that is the situation where a Board decision that violates the Bylaws is not implemented for more than 12 months, such that its adverse effects are not felt before the period of limitations has expired. When combined with the provision limiting the initiation of IRPs to those who are materially affected by a Board decision, the draft in its current form is likely to oust many valid claimants from the ability to challenge Board actions.

Indeed, this seemingly procedural provision may have critical practical consequences. The IRP process is intended to be the principal means of countering the potential for ICANN mission creep. And the constrained mission is seen as the single most significant innovation of the Accountability process. The ability of the IRP to act as a check on mission creep is critically weakened by a time-constrained IRP because a Board decision’s impact on the mission may not become evident until after implementation and application in future circumstances.

Finally, we note that the 12-month period of limitation has been deemed by outside counsel to be inconsistent with the just-adopted new ICANN Bylaws. According to Sidley & Austin: “Applying a strict 12-month limit to any IRP claim that commences at the time of the ICANN action or inaction and without regard to when the invalidity and material impact became known to the claimant, is inconsistent with the Bylaws (and is inconsistent with the terms of Annex 7 of the CCWG Report).” For this reason alone, Section 4 must be modified.

In short, and not to put to fine a point on it, in this instance the need for commercial certainty must, in our view, yield to the equitable notion that every valid complaint should have access to an independent forum for review. As drafted, with the 12-month cutoff, we do not support the current text of Section 4 and strongly urge its modification.

Time for filing - revisited

- *To:* <comments-irp-supp-procedures-28nov16@xxxxxxxxxx>
- *Subject:* Time for filing - revisited
- *From:* "Richard Hill" <rhill@xxxxxxxxxx>
- *Date:* Sat, 14 Jan 2017 10:26:31 +0100

Following up on my previous message regarding time bars, I've given more thought to the matter and I think that it is important, for legal certainty, to set clear time bars that distinguish appeals against a policy per se from appeals against a decision based on a policy.

Presumably people who are concerned about ICANN's policies follow the policy development process, or are associated with entities that follow the process, so they can be presumed to be informed when a new policy is adopted. However, for the sake of legal certainty, ICANN should publish a clear statement to the effect that a new policy has been approved by the Board and is available on its web site. This would be the equivalent of the publication of law or government rule in the official register.

And obviously people who are affected by a specific decision based on a policy will be informed of the decision. So in that case the time bar should start to run from the time of notification of the decision.

It seems to me that a 30-day time bar would not be too stringent in light of common administrative law practices, but, given the diverse nature of people affected by ICANN's decisions, I think that a 60-day period should be allowed for claims filed against a policy per se.

In the interests of simplicity, I think that the time bar should be the same for claims against a specific decision.

On the basis of my previous comments on time bars, and on the above, I would propose to replace the current text of article 4, Time for Filing, with the new text shown below.

Best,
Richard

4. Time for Filing

An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 60 days after:

- a) ICANN has announced that a new policy has been approved by the Board and published on its web site, if the claim is directed against the policy per se; or
- b) the CLAIMANT has been notified of a decision giving rise to the DISPUTE; or

c) ICANN has failed to take action by a deadline specified in its bylaws or applicable policies; or

d) if none of the above applies, CLAIMANT becomes aware of the material effect of an action or inaction giving rise to the DISPUTE; provided, however, that in this case a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.

In order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.

An IRP PANEL may exceptionally accept a tardy statement of a DISPUTE if CLAIMANT proves that it was unable to act within the time for filing despite having exercised due diligence, provided that a motivated request for acceptance of a tardy statement of DISPUTE, and the statement of DISPUTE itself, are filed within 60 days of the day on which CLAIMANT is able to act.

Specific comments

- *To:* <comments-irp-supp-procedures-28nov16@xxxxxxxx>
- *Subject:* Specific comments
- *From:* "Richard Hill" <rhill@xxxxxxxx>
- *Date:* Fri, 13 Jan 2017 21:10:59 +0100

I offer the following specific comments:

Regarding article 5, Conduct, I support the language that restricts in-person hearings. As mentioned in my previous comment, I see the IRP as a kind of administrative law proceeding, and, in my experience, in-person hearings are not usually required for such proceedings, because the evidence is normally found in written documents, and written pleadings on the legal issues suffice to inform the arbitrators. This is particularly the case when, as here, the applicable law is relatively concise, consisting in our case of the ICANN bylaws and policies.

Regarding article 6, Written Statements, I do not support page limits on briefs. Pursuant to the fundamental right to be heard, parties should be free to submit briefs of whatever length they consider appropriate. (This comment also applies to the last paragraph of article 7.)

Regarding article 14, Appeal, you may wish to consider making the grounds for appeal more precise. You could consider the grounds for appeal of the UN labor-dispute process, which are:

- (a) Exceeded its jurisdiction or competence;
- (b) Failed to exercise jurisdiction vested in it;
- (c) Erred on a question of law;
- (d) Committed an error in procedure, such as to affect the decision of the case; or
- (e) Erred on a question of fact, resulting in a manifestly unreasonable decision.

The rules for the UN labor dispute appeal process cited above are at:

<http://www.un.org/en/oaj/appeals/basicdocs.shtml>

Alternatively, you might consider a simpler, but still precise formulation, based on the grounds of appeal permitted by the Swiss Federal Tribunal (supreme court) namely:

- (a) error of law, including error of procedure;
- (b) manifest error on a question of fact, susceptible of affecting the outcome of the case.

You may wish to specify that, on appeal, the full Standing Panel will be bound by the facts found by the first-instance panel, except to the extent that the appellant can prove that there was a manifest error on a question of fact, susceptible of affecting the outcome of the case, or to the extent that the appellant can prove that there was an error of procedure in establishing the facts, susceptible of affecting the outcome of the case.

Regarding article 15, Costs, I would suggest that, on appeal, the appellant should bear the costs if it loses, otherwise it is likely that many first-instance decisions will be appealed. You might wish to consider adding something like the following:

"On appeal, the full Standing Panel will normally provide for the losing party to pay administrative costs and fees of the prevailing party, unless the particular circumstances of the case justify a different allocation of costs and fees."

Best,
Richard Hill

Time bars

- *To:* <comments-irp-supp-procedures-28nov16@xxxxxxxx>
 - *Subject:* Time bars
 - *From:* "Richard Hill" <rhill@xxxxxxxx>
 - *Date:* Thu, 12 Jan 2017 10:04:50 +0100
-

Since ICANN is analogous to a government regulatory body for what concerns certain aspects of Internet naming and addressing, the IRP is analogous to an administrative law review/litigation.

Most legal systems have special rules for administrative law, even if the regular courts handle litigation. Most distinguish two separate types of challenges: a challenge to a rule (or policy) versus a challenge to a specific decision taken under some rule (or policy). In the US, these two types of challenges are referred to as a challenge to the rule making versus a challenge to an adjudication, see for example:

https://en.wikipedia.org/wiki/United_States_administrative_law

In administrative law, there are time bar for both types of challenges, see for example

<https://www.isba.org/sections/adminlaw/newsletter/2010/07/achecklistforjudicialreviewofanadministrativeagencyde>

The fact that there is a time bar for challenges to a policy does not prevent subsequent challenges to decisions taken under that policy.

The reason for the time bar on challenges to a policy per se is to provide legal certainty: people are entitled to know what the rules are that they have to follow. If a policy can be challenged at any time, then nobody can know what the rules are.

And, again, the fact that a policy cannot be challenged per se after a certain time does not prevent challenges to specific decisions taken under the policy.

Best
Richard Hill

Registries Stakeholder Group Statement

Issue: Updated Supplementary Procedures for Independent Review Process (IRP)

Date statement submitted: 31 January 2017

Reference URL: <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>

RySG Comment:

The Registries Stakeholder Group (RySG) welcomes the opportunity to comment on the Updated Supplementary Procedures for Independent Review Process (IRP).

Timing of Claim-Filing:

With respect to the issue concerning the time within which an IRP claimant must file its claim or lose the ability to have IRP review the claim, the RySG is aware of the concerns raised by a number of commenters, including the concerns raised by Milton Mueller in his [blog](#)¹ on this issue.

The RySG thinks a claimant under the IRP process should be given a fair time within which to make their claim and urges the IRP IOT to review the timing issue again because the proposed timing is not fair. The IRP IOT should ensure that the claims-filing period allows a reasonably fair window for making claims so that ICANN can be appropriately held to remaining within Mission by IRP proceedings. The IOT might also consider eliminating the 45 day limitation from 'discovery' of a claim in favor of a single 'hard' limitations period of one year, with up to thirty days thereafter to pay the filing fee.

In addition, the RySG is concerned that there is a lack of clarity in the claims-filing period with respect to the impact on the period of intermediary proceedings aimed at more informally handling disputes, e.g. the CEP, the filing of a reconsideration request, and the like. We strongly believe that any claims filing period must be suspended during the pendency of these intermediary steps aimed at resolving disputes.

Also respecting timing, the RySG urges the IRP IOT to revise the limit with respect to possible IRP claims by the Empowered Community to ensure that there is sufficient time for the EC to file a complaint, taking into consideration the time required for the EC to execute its escalation process and prepare materials required for filing of a claim.

¹ http://www.internetgovernance.org/2017/01/07/putting-your-rights-on-the-clock-the-irp-supplementary-rules/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+internetgovernance%2FabwE+%28IGP+Blog%29

Parties

With respect to Sec. 7 (Consolidation, Intervention and Joinder) -- The IRP panel should consider whether it (as a panel) or a "Procedures" officer from within the standing panel should make these decisions in particular cases. The IRP panel will have better judgment as a panel what might be the best approach in any one case.

Discovery

With respect to Sec. 8 (Discovery Methods) -- The panel should have the power to allow other forms of discovery on a limited basis if it deems appropriate, and also should have sanctions power to compel compliance or to provide consequences for non-compliance.

Time limits

- *To:* comments-irp-supp-procedures-28nov16@xxxxxxxxxx
- *Subject:* Time limits
- *From:* Steven Sullivan <steven.sullivan@xxxxxxxxxx>
- *Date:* Tue, 10 Jan 2017 16:21:39 -0500

Time limits for correcting an error in policy does not make sense. There should be no time limit for correcting an error. So if any problem arises in the future and time has elapsed then we all have to live with the problem because you implemented a time limit. This is just bad policy. Wrong and bad policy is not what we want.

Se

EXHIBIT 237

RECORDED VOICE: This meeting is now being recorded.

DAVID MCAULEY: Thank you. Welcome all, this is David McAuley speaking, and we have a small group so far, but in the past, a number of people have come in several minutes late, which is fine, so I would like to press on. We're close to the five person rule, but I think we're in shape that we can roll on right now. What I'd like to first do is ask if there is anybody on the audio bridge who is not in the Adobe room to please identify themselves.

Hearing none, then I ask if there is anybody on the call so far that has any changes to announce to their statements of interest. [AUDIO BREAK] Hearing none, I will assume that is the case. I just heard someone come in on the call, if that's someone that is on the audio bridge only, could they please identify themselves?

REG LEVY: This is Reg Levy.

DAVID MCAULEY: Hi Reg, David McAuley here, thank you. That leads in to my introduction of Reg. Reg is acting in the capacity of a chairing skills coach to me, and she participated in the last call, and she will participate in this call in background, not as a participant in the group. And so I appreciate everybody's understanding in that respect. So,

Note: The following is the output resulting from transcribing an audio file into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.

we've covered the administrative matters, and I'd like to get into the agenda.

Again, we're a small group, but we have enough to press on and I would like to make a record and press on and get to some of these issues. So I hope that you have seen the agenda that I sent out earlier in the week. Once we get past the administrative stuff, we move next to the work timeline and the impact on the staff report, and hope you've had a chance to look at that. I'd like to discuss it now.

The current timeline looks for us to have a staff report done on the public comments to the draft rule by March 29th. Obviously, that is no longer going to work. And so we need to set a new date and we need to do it in this meeting, in order to have sufficient time that the changed date can be announced prior to the 29th, and that takes a little bit time to do that. In my memo, I suggested that we move it to May 29th. I'm sorry did someone want to say something? I might've hear something.

BERNARD TURCOTTE: No, it was just me, David, I was just saying correct.

DAVID MCAULEY: Okay, thanks, Bernie. What has to happen between here and the new day, whatever date we choose – let me just stop for a second and ask if the person that just joined us on audio only, would they please identify themselves?

LIZ LE: Hi, this is Liz Le from ICANN.

DAVID MCAULEY: Thank you. We're just talking about a new date for the staff report. The things that have to happen between here and that staff report are we need to complete our work, that is, come to consensus on how we're going to handle public comments, and as you okay, there are a number of comments, some of them complex and very good, thoughtful comments that we need to work through. In addition, we need to pass our thoughts past Sibley, I believe, at least in my opinion we do, to make sure that we get a reality check, so that what we're doing, what we're suggesting passes legal muster.

We then need to then hand it over to Staff, so that they can write it up with some direction from us as to what we intend, and have all that done by May 29th. If we choose that date, which I'm suggesting, there's still a lot of work to do between here and there, and there is no rule against us beating that date.

So I'm now going to open the floor to anybody that would like to have any comments on setting a new date, and that being the date of May 29th. If anybody that would like to say anything, please feel free. I'm not seeing any hands, so I'm wondering if I could see green ticks or expressions of "aye," if that means that people are agreeing to the new date of May 29th.

Okay, is there anybody that wants to put a red tick up and object to that date? You can clear the green ticks now. I see no objections, and so I'm going to assume, the, that we have just the date of May 29th. And so

I'll mention to Bernie and Brenda to please act on that as the new date and do what you need in that respect. I see Kavouss' notes in the chat asking me to slow down, and I'll do my best to do that. Thank you Kavouss.

Next on the agenda is a brief report by me to this group about some comments I made during ICANN58 in Copenhagen. And it's something that we've expressed in our letters to SOs and ACs, as well. And that is we have notified SOs and ACs that under the bylaws, specifically 4.3J, they have a role coming up now in the near future, to consider people who apply to become members of the standing panel and the SOs and ACs have the lone role of nominating people to the standing panel, at least seven, and the bylaws are perfunctory in this respect. It really just sort of indicates that they will do it.

What it says in 4.3J is, "The supporting organizations and advisory committee shall nominate a slate of proposed panel members from the well qualified candidates identified for the process." And so they're going to need help, and I have said that the IOT would be willing to act in a helpful capacity, and it's something I think we've discussed before. But I just wanted to make sure it's on our radar screen.

We can discuss it soon, I might instigate a discussion on the list, thoughts on how we might do this. We might create a small team to do it, that would be helpful, we might do it as a group. If anybody has any thoughts on this topic, I would open the floor to them now to sort of help us move this particular bit forward.

Okay, I may then instigate a discussion on the list, but if this group, the SOs and ACs are going to need help organizing themselves, our role would be administrative, not inserting ourselves in their role of nominating, but helping them with our understanding of the bylaws, et cetera.

Next we move on to public comments review. Before we move to the timing issue and Malcolm, let me again mention that I need volunteers. Before I do that, I want to note that Kavouss' hand is up. Kavouss, please take the floor.

KAVOUSS ARASTEH:

Yes, on SOs and ACs to nominate candidates to the panel, the qualifications of those people are those which are referred to in the bylaws, is that so?

DAVID MCAULEY:

Yes, that's correct, Kavouss. The 4.3J and 4.3Q I think are the sections in the bylaws that describe the qualifications that someone would have to have to become a member of the standing panel. And so as I understand it, ICANN will release an expression of interest, and I'm going to ask Sam to comment on that in just a minute, an expression of interest document inviting people to apply to become members, and from the bucket or the pool of people that do apply, ICANN or the SOs and ACs will parse through those applications to sort of put them in two separate piles, those who are very well qualified, and those who may be qualified, but don't fit into the well-qualified bucket.

And then from the well-qualified candidates, the SOs and ACs will nominate members to the standing panel. That nomination, by the way, is subject to board approval, not to be unreasonably withheld. Does that answer your question, Kavouss?

KAVOUSS ARASTEH:

Yes, it answered my question, but something you have not covered during the Work stream 1 in the bylaw of all the qualifications, and I don't want to change anything, to add anything, but something that needs to be understood, that the first among the qualifications, must or should have been involved in the issue of the IRC during the first work stream. I have heard some people, there have never been any discussions and so on, so forth, and they line up other people to support them, so the quality person is not only something that people should judge, but it comes from the background and experience in the preparation in the discussions, knowing all of these things.

So I don't know how ICANN will take that into account. I hope that they will into account in the first meet, which I call it a short meet or I call them the [inaudible] for participants to be designated by the SOs and ACs. So I'm just referring to ICANN to be quite sure that the people have all qualifications required, because this is a very, very sensitive and very important issue, members of the panel. Thank you.

DAVID MCAULEY:

Thank you, Kavouss. Sam, you have your hand raised, so I will invite you to take the floor.

SAMANTHA EISNER:

Thanks, David. So just on a bit of an admin, on the administrative side, where our internal team is working on finalizing a document that will be previewing with this group before we would post on ICANN's website. We think that it's appropriate to get the view of the IOT on the document, to check that we're meeting the spirit of the bylaws and the qualifications that we're putting up and the things that we're including in there.

And then, to Kavouss' point, we're drafting to the specifications that are in the bylaws, and again, the IOT will have a chance to look at it, and then as David was noting, there is a vetting process, so we go through and we check out what is well-qualified, and then work with SOs and ACs to then make our appointments.

So if there are other qualifications that aren't necessarily listed in the documents, but that the SOs and ACs do apply against that list of other well-qualified applicants, that's something that certainly the committee could discuss, how they wanted to do that work, to take into account the typed of experience we're bringing in. But from our side, we're drafting it to the bylaws and some general standards, and aren't trying to insert any additional requirements that weren't vetted earlier.

DAVID MCAULEY:

Thank you, Sam. Do you have any estimate on timing that you'll give us the document to take a look at?

SAMANTHA EISNER: Yeah, we're just doing a final pass through it, and we're – I had hoped that we had something out last week during Copenhagen, but we weren't able to do that, but we're hoping that we can get something out to you guys next week.

DAVID MCAULEY: Thank you, Sam. Okay. So, moving on, I'm going to ask Malcolm to take the floor in just a minute. And the goal here is to follow up on Malcolm's discussion last week addressing the issue of the time for filing claims, which was the subject of a number of comments, not least Malcolm's own.

I will ask you, Malcolm, as you go through this, to please keep an eye on time, and we're going to hope to move along, I would like very much to get into the next issue during this call. And so, Malcolm, I will pay attention to the queue, but I may also put my hand up, because if I have comments, I'll be commenting as a participant and not as the lead, and so I'll be watching the queue for you, but if it's okay, I'll hand you the floor now.

MALCOLM HUTTY: Thank you, David. I apologize to anyone on the call that finds it hard understand me, I'm afraid I'm suffering from a bit of a cold at the moment. I hope you can hear me clearly. Okay, so to run through this quickly, firstly, the last meeting we had which was slightly sparsely attended, wasn't really decision making meeting, it was one where we provided the analysis of the public comments received and as

preparation I had a breakdown of that, which was presented at the meeting and we had a discussion, but no decisions were taken.

In short, though, to summarize very briefly, there were a number of comments who objected to the way the timing rule had been presented, on the grounds that it was either A, too short, or that the basis from which the calculation was done was wrong in their opinion, and that it needed to be based on when the harm was done or when the harm was known to the claimant, rather than on a fixed date as the date of the action, that might prevent the claimant from making a claim at all.

So there was a discussion about that, but no conclusions were reached. I did suggest that there was point out in the public comments that was the first threshold question that would need to be reached before we went to any further issues, which was the proposal from the business constituency, that there should simply be a moratorium on the timing issue.

Nobody on that call said that there was any support for that, but if there was not support for that, then we need to look at options for moving forward, and the structure of the rest of the session that I've got on this slide, that shows basically the main focus on that main point of contention, as to how the time is calculated, and also how it should be.

And then a small number of relatively minor and relatively un-contentious points have also been raised, that should be given consideration, but are not likely to be as substantial points of discussion as that main issue. So first off, is there anyone on this call that would

now wish to step in and speak in favor of just simply a moratorium and just dropping this topic? If there are none, and I see David.

DAVID MCAULEY:

Malcolm, I did want to say I paid very close attention to the list and other than in the comment, I haven't seen support for a moratorium, and I personally as a participant would argue against a moratorium. I think we need to move on and get the rules in place. Thank you.

MALCOLM HUTTY:

Okay, thank you. I was thinking personally, I would have been content with that outcome, but I see no support for it, and so speaking in a sort of subdivision chair role, I think we can now say that there is just simply no support for this as a proposal, and we can now discard it.

So if we can now move to the next slide, as to how time is calculated. This raises what I think is the main issue that has been raised, and in particular, on this next slide we see the proposal that David brought up on the last call, and he and I have worked together for formulating into more clear words, the attempt to resolve the main issue that was raised by most of the respondents to the public comments.

And that proposal is this; to say that the rule on timing should be that the claimant must file their claim no later than the later of the two following dates, that's so many days after the date of harm, or if later, so many days after the date that the claimant became aware of the harm, or reasonably to have been aware of it.

So the effect of that would be, if we pick for example six months, that would say that six months after you've been harmed, that's the time that you have got for filing, you've got to do it within six months after you've been harmed, unless for some reason you weren't aware that you had been harmed, and if that were the case, then it would be six months after when you aware that you had been harmed, or if it's a shorter time than that, when you reasonably had been aware of it.

And to clarify the second bullet point here, that does mean when you ought to have been aware of it, or when you were actually aware of it, if you should have been aware of it beforehand, then that's the date that counts. But in practicality, it's likely to mean so many days after the harm, unless there is some reason that you don't know, and then when it is that you do know, or should have known.

So that's the proposal that was brought up in the last meeting, and with no disagreement in the last meeting, but it was sparsely attended, we worked on it together. We both believe that this would address the main of the objections that were raised by the public commenters, so I put it to the group. I see David's hand and Kavouss' hand. David are you first, or is that an old hand?

DAVID MCAULEY:

No, that's a new hand, and thank you Malcolm. I think you alluded to it, but the one thing that I wanted to mention about this slide is I agree with you that if we can come up with whatever the number of days is, 45, 90, 180, whatever goes in as XX, if we can agree on that, then I'm fine with this, except to say, just to be a little bit more clear about it, I

think you said this, but to be a little bit more clear, the subparagraph 2, where it says, "X days after the date claimant became aware of the harm, or ought reasonably to have been aware of it," to me, that would be best qualified by saying whichever of those two dates is earlier.

And so I agree that it would be the later of the two dates, but with respect to this subparagraph alone, I think there are two potential dates there, when someone became aware of the harm, or should have been aware of the harm, the operative date there in that subparagraph is whichever of those two is earlier. That's my comment. Thank you.

MALCOLM HUTTY:

Okay. So if we then add the word, "earlier" just on the end of that second subclause, so it reads, "X days after the date claimant became aware of the harm, or ought reasonably to have been aware of it, -- if earlier – would that satisfy?"

DAVID MCAULEY:

Yes, I think so. Thank you.

MALCOLM HUTTY:

Yes, Kavouss? We can't hear you. I believe Kavouss has been disconnected, and we are attempting to recontact him at this point.

DAVID MCAULEY:

While we're waiting for Kavouss, I'm just wondering if anyone has thoughts on what should be the XX? What's the number of days? It

sounds like 45 was not well received, and there have been some other suggestions. Did you want to address that now, Malcolm?

KAVOUSS ARASTEH: Yes I am on the call. What we're doing is later than the latest, this is very awkward, not later than the latest...

MALCOLM HUTTY: Perhaps it would be more elegant to say before the latest following date.

KAVOUSS ARASTEH: The wording, but not later than the latest, is not understandable for many people, like me. Maybe for you it's good, but for me it doesn't have any sense. Thank you.

MALCOLM HUTTY: Okay, I see people in the chat, Kavouss that they find it hard to hear you, but if I may repeat what I understood you to say, you found the phrase, "Not later than the latest," to be difficult to understand, and it could be rephrased in a way that was easier to be understood, which I'm sure can be done. I think at this stage we're looking for the principle here, and I'm sure the lawyers will find a way of phrasing it that works best, but we're looking for the principle. So maybe if "They must file before the later of the following two dates" or something like that. Any other phrasing that means the same thing, I'm sure would be acceptable.

DAVID MCAULEY: Malcolm, you have a hand up from Sam.

MALCOLM HUTTY: Sam, please go ahead.

SAMANTHA EISNER: Hi Malcolm, thanks. I just wanted to find out if with this phrasing the IOT is considering removing a suggestion that there is any outside time limit on an IRP, and it's solely based on when someone would find out about harm, is that what I should understand?

MALCOLM HUTTY: It's not only based on when someone finds out about harm, it is based on firstly the date that the harm occurs, or later, if they find out about this, or ought to have found out about this. So we'd expect that in most cases it would be based on the date that the harm occurs, although there is a possibility that if the claimant wasn't aware of the harm at that time, it could be extended, but no more later than when they reasonably ought to have been aware of it.

Sam, if you are alluding to the change from a fixed date, that there is no reference to the date of harm, I would refer you in part to the legal advice we received from our independent counsel, which said we needed to move away from a fixed date to one based on the date of knowledge. And we are in some respects responsive to that.

SAMANTHA EISNER: Right, I understand the need based on the timing of a date from when harm occurs, that's not what I'm asking about, but for the subsection 2, how long after an act could someone bring a claim? Whether we put in 180 days in there, or whatever, is it something that a claimant could bring five years after? Is that a reasonable reading of this? That's what I'm trying to get to.

MALCOLM HUTTY: I think it would be really most unlikely that anyone would say that it took five years for them to become aware that they had been harmed by it, and to sustain that was reasonable for them not to have been aware of it for that long. So what we are really looking at in that subparagraph is yes, if it's based from the date of the harm, and if you weren't aware of it immediately, then you can have longer, but only so long as is reasonable, such that you ought reasonably to have been aware of it.

DAVID MCAULEY: And while Sam is considering your response, Malcolm, I just wanted to note that you have two hands following Sam. Kavouss is next, and then after Kavouss is Greg Shatan.

MALCOLM HUTTY: And I think while Sam is considering that, we'll move to Kavouss.

KAVOUSS ARASTEH: I don't understand the difference between one and two. Let me explain. A harm occurred. Someone [inaudible] identify that harm. Then what you are saying in one and what you are saying in two, why are there two different? The harm, and as well as the harm? What is the difference? What are we going to say here? It's not very clear. Can you kindly explain what you mean by one and two? Either of them is understandable, but both of them, I don't understand. Thank you.

MALCOLM HUTTY: Kavouss, I think it is possible it may well be that the second paragraph includes the first, but we would expect in most cases that the claimant was aware of the harm at the instant that it occurred, and it would only be in exceptional cases when the claimant was not aware of it. So that's why it has been described in this fashion. But I think that we should try to get away from the precise wording of this. What we're looking for is an agreement on principle here. Do we agree on this basic principle, and if we do, then we can leave it to the lawyers to find some way of phrasing it more elegantly than I have been able. Does that satisfy, Kavouss?

KAVOUSS ARASTEH: Yes, if we are talking about principle, from the time both the principle one and two would there, right? So both of them you want to keep, and then later on at the end, we go with one of them, but not both, right?

MALCOLM HUTTY: I think, if I understand what you're saying correctly, yes.

KAVOUSS ARASTEH: Okay, no problem. Thank you.

MALCOLM HUTTY: Greg Shatan, you have the floor.

GREG SHATAN: We do need both one and two, and they are not the same, and I don't know whether two will be an exceptional case or not. One covers the date on which some harm actually occurred, and two covers the date that the claimant found out that the harm occurred, or should have found out the harm occurred, if they had been acting reasonably. Now there are a number of different ways, I don't know if we need to go through hypotheticals on these.

An example that has no relevance to ICANN, but it's an easy one, if you have a house in the woods, very far from the nearest neighbors, and it burns down on July 1, you don't go there until August 1. July 1st is the date from which one counts from, and August 1st would be the date of two. And if there is some unreasonable amount of time to spend away from one's summer home, even if you never go to the summer home and never actually find out about it, it should be assumed that you would have somebody reasonably looking in on your house at least a couple times a year, then that you reasonably ought to have been aware of it would be, say, six months after it happened.

Now you could argue about the exact point, but the point is that these are three different points in time and all of them need to be considered as potential end date. If you go only after the date of the harm, then you're basically creating a rule based on the date of occurrence, that has nothing to do with particularly circumstances of the plaintiff, and that could be very unfair to a plaintiff who does not become aware of things.

Again, we could run through a number of hypotheticals, I'm sure we could think of some, where awareness would not become immediate. The harm may take a while to occur, the harm may take a while to be seen, the harm may take a while to reasonably have been seen.

Finally, I would say that this kind of two-prong construction here is absolutely the standard for these kinds of result end dates, quibble about the language here or here, I'm sure that there is some canned language we could find that is maybe a little better, but conceptually this is spot on, and I don't think we need to do anything to change this. There is the point that Sam raised, which is the point of repose, whether it will be some date after which the activity occurred, as opposed to a harm based date, and that's a question.

I guess a lot of that is base, so I'm not sure why you have difficulty following the logic. Your house burns down on July 1, you don't know about it. August 1st you go and see that your house burned down, and you know about it. You never go to your house, at some point you should have gone to your house, you should have been aware of it. Those are three dates are all different. And all those should be taken into account.

Finally, if we're talking about changes to the bylaws, I'm not sure that there should ever be repose in challenging a harm that results from a change to the bylaws, so I think we need to talk about what activity we're talking about, before we make any blanket rules. Thanks.

MALCOLM HUTTY: Thank you, Greg. Sam, you have the floor.

SAMANTHA EISNER: I think we're converging, the issue of whether one and two make sense, I think they do, and we can refine the language a bit, but I think the concepts in there, timing it from that, are important. I do think, as Greg was phrasing it, that the issue of ultimate repose, I think we still have an obligation to look at the purposes of the IRP, if the purposes of the IRP and accountability are to reach some point of certainty of action, and that things will stand that were done, that maybe it does make sense to have some sort of external time limit on it.

The repose, if something didn't cause harm, if you didn't find out it didn't cause harm within five years, why would we entertain it and upset everything that has been relying upon that issue for five years? Because someone decided that they were harmed by it earlier. That's an issue to be handled in a different way. Maybe circumstances have changed, so the policy really needs to be changed instead of being challenged against the bylaws. There could be multiple things that need to happen.

So I think we still need to keep in mind the ultimate purpose of the IRP in considering whether or not there is an outside limit on the issue of repose while we still maintain the timeframe being from when you found out when the harm happened, or when you should have known about the harm. I think that the issues here aren't necessarily problematic, it's the question of could you always bring a harm, even if it happened 5, 10 years later, that's the issue I think we're concerned about.

MALCOLM HUTTY:

Thank you, Sam. Okay, I think I can summarize then. At this point there appears to be a consensus of support for this approach, although it can be handed over to the lawyers to refine the wording of it. Sam is still raising the question of repose, but on the other hand it is noted that all the public comments that spoke to this issue, spoke against the principle of repose and our independent legal counsel had advised us that the potential for repose was not consistent with the bylaws as they stand today. So I would recommend to the group that we agree that further repose beyond this is not something that we can do, it's not within our power to recommend to do.

I see Kavouss saying that you oppose such a complicated and complex concept. Kavouss, we are saying that we will refine and clarify how this is put, the principle here is that you must file no later than the date of harm, or if it's later than that, the date that you should reasonably have become aware of the harm, or actually did become aware of it.

And if you should reasonably have become aware of it before you became aware of it, then it's when you should reasonably become aware of it that matters. And I don't know how to put it more clearly than that, but I'm sure the lawyers will help. I don't know if I can move forward or if we should continue this topic. David, please.

DAVID MCAULEY:

Thank you, I wanted to do two things. One is, as the leader of the call, let me just ask, I heard a phone entry, so I wanted to ask if there is someone that is now participating who is on audio only and has not identified themselves before, and if so, would they please identify themselves?

REG LEVY:

David, this is Reg again, I got disconnected.

DAVID MCAULEY:

Thanks, Reg. And then Malcolm, I just wanted to comment too. I think Sam and Greg get to the difficulty here, and I agree that you and I worked up what is on the screen, I have no problem with that, and I certainly agree with that, but the question has been raised, should there be in addition to this, a third paragraph that says in any event there is a date of repose.

And what we're trying to do is balance equities between claimants and ICANN, and there is equity on both sides, I think, to be served. The one thing I wanted to note as I was listening to Sam is that in the IRP process, it's not the only remedy that someone has. There's always

litigation. Someone can go to a court somewhere if they have true grievance.

MALCOLM HUTTY:

David, I'm not sure that's correct. In many cases, contracted parties I believe give up the right to go to a court and submit to the IRP as their only form of possible arbitration. Is that not correct?

DAVID MCAULEY:

Okay, that's a fair point. Thank you. But I guess what I'm getting at, too, is the equities on both sides. So I can see the reasonableness of this. I do want to ask you to move on. I think you can move on, but my hope, and I think the hope of others, is that we can close this issue today.

We might give Sam a chance to come back. She asked where did this comment come from, to maybe look at this a little bit more closely and specifically, so I think we're making great progress, I don't have any quarrel with that. But we might have to do some work on list following it up. I would encourage you to move on, if you can.

MALCOLM HUTTY:

Okay, in that case, I'll move on. We'll note that this is still a topic that Sam is raising an objection to. I would like to read into the record a comment Greg makes in chat, to change "no later than" to "on or before," which achieves the same effect while avoiding the double use of the word "later," which Kavouss, in particular, was objecting to. But before we move on, I'd like to read that into the record.

Now if we can move to the next slide, please. Regardless of how the time is calculated, we have the question of how long is allowed, based on when it is calculated.

DAVID MCAULEY: Malcolm, you have one remaining hand from Kavouss.

MALCOLM HUTTY: Oh, I do? Kavouss, I beg your pardon, please go ahead.

KAVOUSS ARASTEH: I would say that we need some sort of preamble for one and two. If one before talking of the date, which will say harm has occurred and claimant is aware of the harm on the date of its occurrence, then you introduce one. Two, harm has occurred and the claimant is not aware of the harm until later date, then we have to distinguish between the two before going to any dates. Two different cases. So it will be defined to quite clearly mention what are the two cases. Thank you.

MALCOLM HUTTY: Thank you, Kavouss. Moving to the next issue, we [inaudible] what we decide on the previous issue, we have the question of how would the XX be filled out? We had previously said 45 days to file and most public commenters responded, in fact, I think every public commenter that spoke to this issue, said that 45 days was too short. The most popular suggestion was 180 days, or six months, and the second most popular

suggestion was 90 days, or three months. I simply turn to the group and ask for your views on what would be an appropriate balance to strike?

DAVID MCAULEY:

Malcolm, hi, it's David, and I've raised my hand as a participant. Let me do two things. Let me just read Sam's comment, which is a wrap up on the issue we just discussed, and is a prelude, I think, to what she will say on the list. Sam's comment is, "From what we can find on Sibley's advice, they noted that a one year bar on claims could stand and they provided other advice on the facial invalidity issue that we are no longer discussing."

Now, turning to the number of days, it seems that the most popular was 180, and the second most popular was 90. Maybe we could come to something in the middle, like 120; 180 seems long to me, but that's just my personal view. I recognize that 45 days may be too quick within which to react, but I could go for 90 or 120, I would be supporting something like that. Thank you.

MALCOLM HUTTY:

Okay, I note that links did not actually recommend a particular time, but said that the test that we should ask ourselves is how long is so long that it would undermine the ability of the IRP to reach a fair decision. So perhaps I could ask the group, how long do you think would be too long, such that memories would fade, evidence would disappear, and then the IRP can reach a fair decision. Opinions please. If your hand is raised, go ahead.

KAVOUSS ARASTEH: Yes, my hand is raised because we have discussed at the beginning about the 45 days and we proposed that, but the way I understand it is most popular, or less popular, I think is based on a few comments, I think we should request logical and not propose a longer time, so I'm in favor a maximum of 90 days, but not more than that. Thank you.

MALCOLM HUTTY: Okay, Kavouss in favor of maximum 90. I read Greg in the chat saying, "120 days, we need to look at the timing of the empowered community and give it time to work."

Okay, so have the most popular suggestions are 180, then 90. Kavouss also saying no more than 90. And then a compromise being offered and seconded at 120. Is it possible for us to compromise on 120? It will be very useful if we could get this cleared up, if we could agree and compromise this now, we will have achieved something. Do I hear anyone objecting us agreeing to compromise on 120? Okay, David?

DAVID MCAULEY: Well, I was going to say, I could support Kavouss, too. I was either 90 or 120. If there is a hard feeling that more than 90 is too much, I could easily support 90, or I could support a compromise. I just want to go beyond 45, I think that's fair, and if we can stay under 180, I think that is excessive, myself, it's a personal view, that's all.

MALCOLM HUTTY: My personal view, actually, is that we are asking ourselves the wrong question as to how long is necessary and instead we should be asking how long impairs the operation of the IRP. I don't think that 180 days impairs the operation of the IRP, so I would go for whatever the longest compromise we could raise, so I'll add myself to the voices in a personal context, for 120. But David, you seem to be content with either 90 or 120?

DAVID MCAULEY: I am, and I would simply ask if there is anyone in the group that would object to 120? I know Kavouss has mentioned a hard cap of 90 days. Is there anyone else that would object to 120? Kavouss, your hand is up again?

KAVOUSS ARASTEH: Yes, if everybody agrees with 120, I don't want to be only one objecting to 120, I'll go with the others.

MALCOLM HUTTY: Kavouss, your spirit of compromise is greatly appreciated, and I'm delighted that we can close out one of the issues on this difficult topic on this call. Thank you. Please let the record reflect that the group has agreed on 120 days.

Bernie notes that there are 10 minutes left in the call. Now there are some other issues that were raised. The issue that we have just dealt with is the most complex and difficult topic. The remaining slides I have show what those issues are, and we will have to come to them at some

time, but I turn to David to ask, would you like me to proceed through those issues, or would you like to the other non-timing related issues in this call?

DAVID MCAULEY:

Thank you, Malcolm. I would like to pursue the timing issues henceforth on the list. If it's okay, I would like to initiate a discussion about the joint issue. But saying that, we've recognized Sam has some comments to make on list, and there are some additional issues as you point out. I think we've made great progress, and I thank you Malcolm for taking the lead on this. But let me move to the next issue, if no one has any concern with that. So, Brenda, if you could put the other slides up, the ones that I sent. The slides, by the way, are really just talking points.

What I've put up on the first slide, is as we consider issues revolving jointer, let's remember two fundamental bylaw provisions that are sort of the backdrop for this discussion and all discussions, and one is that the IRP is intended to secure just resolution of disputes and that the rules of procedures of the IRP are meant to ensure fundamental fairness and due process. And so in that context, I wanted to note that a number of commenters talked at jointer.

We have jointer issues raised in the context of parties that were involved in other panel decisions below. For instance, we're talking here about expert panel decisions, which are now subject to IRP review. These are things likes string confusion and legal rights objections, those kinds of things. And so there is a request of people who effectively won

their cases below, are not ignored, if a claimant is unsatisfied with that panel's decision, goes to IRP, and could have a right to join. That's one of the issues about jointer.

The second bullet says that there is an issue over should a procedures officer from the panel decide questions of jointer, or should the panel decide questions of jointer. And then I think it was the IPC who said there should be a an express indication that there isn't a page limitation for other parties, so if we can scroll down to the next slide.

I mentioned two parties that commented. One is a law firm Fletcher, Hale, and Hildreth, I think Robert Baldwin was the author. But there is another author here who is the prime mover in this particular case, and that's Cathy Kleiman, who many of us know as a participant in the GNSO.

And then the GNSO's IPC also commented, and I should note that the non-commercial stakeholder group, and I failed to put them on a slide, that was my inadvertence, the non-commercial stakeholder group has made points that largely are similar to those made by the law firm Fletcher, Hale, and Hildreth. Cathy, in Robert Baldwin's note, asked for a couple of things to be done in the jointer issue. I see I have 6 minutes left. So I'm basically setting the table for further discussion.

One is, they would like actual notice to go to all the original parties in the expert panel decision that's being challenged. Two, they ask for a mandatory right of intervention, that is for people to be able to join, to people who were parties in the panel. That doesn't mean they have to intervene, that means they have a right to intervene.

And then three, there would be a right for parties to be heard prior to an IRP panel making an award of some intermediate remedy, like putting an action on hold, intermediate relief. Those are the things that motivated them and they thought that these rules address. The IPC said, and by the way, the non-commercial stakeholder group followed very much along those lines.

The IPC did, as well, using the words, "directly involved" in the action below, it should have a right to intervene, and I believe it was the IPC that said anybody that comes in as a party should have the ability to file equally detailed statements, whatever the limit is, I think it's 25 pages.

So, there are ways that we can approach this. I think it's a fair request that involved below who won at the expert panel, and now see their win being challenged, should be able to be parties, and should have a right to be parties, I can see that. We can also consider whether there are ancillary parties that might have a right to file an amicus brief, a friend of the court kind of brief. But as I set the table, I shouldn't take up all the air time, so let me just open the floor to ask if people want to comment on this subject, I mean, we're going to have to do more work on it, I'll have to address it in our next call, but are there people that would like to make a comment? And I see Sam Eisner's hand is up, so I'm going to ask Sam to comment.

SAMANTHA EISNER:

Thanks David. So, this is not actually about the substance of the recommendations and jointer, and the question of whether or not people are appropriate to be part of it, particularly as if it relates to a

panel decision that other parties were involved in, et cetera, I think we do need to be careful as we consider these, that we recall what the definition of disputes are, and that we don't write rules that allow people to re-litigate a panel decision through the IRP, but make sure that any one that we would allow jointer, or for this instance, using the example of the expert panel, that it's tethered to whether or not that expert panel decision resulted in a violation of ICANN bylaws or articles, and that we make sure that we tailor any jointer to supporting that discussion within the IRP.

Because we're not granting the IRP the ability to re-litigate things, we're granting the IRP the ability to make a determination on whether or not an action violated ICANN's articles or bylaws. So, I think we just need to be careful, if we intend to include jointer rules, that we make sure that the purpose of them is well described and limited to the purposes of the IRP.

DAVID MCAULEY:

Thanks, Sam. I think that's an excellent comment, and I was basically assuming it, but I think I should have said it. So, I agree. None of the things that we're talking about should enlarge, or can enlarge, in my opinion, enlarge on what the bylaws provide. So, the people that are theoretically joining as parties that would be considered under jointer here, are going to be sort of on ICANN's side of things.

In other words, bending the case against the claimant. And so my expectation is that the claimant is going to bound to make the claim that the panel decision violated the articles or the bylaws, and it's going

to be a high bar to meet. So, I think you made a very good point. Thank you for that.

I promise to the group to address this further in our next call. By the way, our next call is next week. Is that correct, Bernie?

BERNARD TURCOTTE: Yes, I've posted it in the chat.

DAVID MCAULEY: Okay, thanks Bernie.

KAVOUSS ARASTEH: David, is that 27th? The 27th of March is Monday, Thursday is not the 27th.

DAVID MCAULEY: Oh, I believe the call is on Thursday, a week from today, which would be 30th, thank you Kavouss. But in any event, I have to go through this a little bit further, but I wanted to set the table and start the juices flowing on this issue, because I'm going to be looking for comments next week.

It seems to me that there are some legitimate comments about people having a right to join as a party, and I think that if you take a look at the slides and maybe some of the comments, those three comments, non-commercial stakeholder group, ITC, and the law firm, Fletcher, Hale, and

Hildreth, you will get a good feel for what the issues are, and I look forward to further discussion.

We have about a minute for any other business, and so I'll ask if anybody else has any other business that they would like to raise, and then I will simply mention in that, I'm going to come out in the list and talk a little bit more about people volunteering, and how we might be able to manage the comments and move them forward.

Anybody want to make any comment? [AUDIO BREAK] Seeing none, I would like to thank everybody for what I think was a productive call and everybody's participation, and look forward to chatting next week and seeing you all on the list. So that will be the end of this call. Thank you.

[END OF TRANSCRIPTION]

EXHIBIT 238

Suggestions for disparate Joinder comments

1. That all those who participated in the underlying proceeding as a “party” receive notice from a claimant (in IRPs under Bylaw section 4.3(b)(iii)(A)(3)) of the full Notice of IRP and Request for IRP (including copies of all related, filed documents) contemporaneously with the claimant serving those documents on ICANN.
2. That all such parties have a right to intervene in the IRP. How that right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. No interim relief or settlement of the IRP can be made without allowing those given amicus status a chance to file an amicus brief on the requested relief or terms of settlement.

Suggestions for disparate Joinder comments

3. In reviewing such applications, and without limitation to other obligations under the bylaws, the PROCEDURES OFFICER shall endeavor to adhere to the provisions of Bylaw section 4.3(s) to the extent possible while maintaining fundamental fairness.
4. Persons/entities participating in IRPs as amici shall each, for purposes on bylaw section 4.3(r) only, be considered “parties” to the IRP.

EXHIBIT 239

[IOT] Trying to coordinate Joinder comments

McAuley, David Contact Information Redacted

Wed May 3 20:21:18 UTC 2017

- Previous message: [\[IOT\] Another comment treatment \(Panel Conflict of Interest\)](#)
- Next message: [\[IOT\] Trying to coordinate Joinder comments](#)
- Messages sorted by: [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)

Dear members of the IRP IOT,

For our call tomorrow at 19:00 UTC.

Attached are two brief slides with my thoughts on trying to coordinate disparate joinder comments.

Slide two mentions bylaw section 4.3(s) - which states this: "(s) An IRP Panel should complete an IRP proceeding expeditiously, issuing an early scheduling order and its written decision no later than six months after the filing of the Claim, except as otherwise permitted under the Rules of Procedure. The preceding sentence does not provide the basis for a Covered Action."

And mentions bylaw 4.3(r) - which says this: "(r) ICANN shall bear all the administrative costs of maintaining the IRP mechanism, including compensation of Standing Panel members. Except as otherwise provided in Section 4.3(e)(ii), each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, including the costs of all legal counsel and technical experts. Nevertheless, except with respect to a Community IRP, the IRP Panel may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive."

Best regards

David

David McAuley

Sr International Policy & Business Development Manager

Verisign Inc.

Contact Information Redacted

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URL: <<http://mm.icann.org/pipermail/iot/attachments/20170503/5c99d640/attachment-0001.html>>

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[IOT] Trying to coordinate Joinder comments

Name: IRP disparate joinder comments .pptx

Type: application/vnd.openxmlformats-officedocument.presentationml.presentation

Size: 40816 bytes

Desc: IRP disparate joinder comments .pptx

URL:

<<http://mm.icann.org/pipermail/iot/attachments/20170503/5c99d640/IRPdisparatejoindercomments-0001.pptx>>

- Previous message: [\[IOT\] Another comment treatment \(Panel Conflict of Interest\)](#)
 - Next message: [\[IOT\] Trying to coordinate Joinder comments](#)
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-

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EXHIBIT 240

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(captioner standing by)

>> Let's wait until two minutes passed the hour or three minutes passed the hour. We'll get started soon, I hope. Thank you.

(captioner standing by).

>> DAVID McAULEY: Hello, everyone, it's David McAuley speaking, and thank you all for joining. I'm trying to determine if we have a quorum present, and so let me count for a minute and just take a look.

I see Sam has joined. Thank you very much.

Let me just take one more look here at some notes. So, let's begin. Can I ask that the recording get started, please?

>> This meeting is now being recorded.

>> DAVID McAULEY: Thanks, very much. Thank you to those who have joined. Very happy to see you. Let's just note that number one on the agenda is to discuss administrative matters, and let me ask if there is anybody who is participating on the phone who is not in the Adobe Room, if they would please identify themselves now.

Not hearing any, let me ask of those gathered --

(Chime)

(Chime)

Just one moment. There were just two phone entries that we heard. Could I ask if anybody is on the phone who is not in the Adobe if they would please identify themselves?

Okay. I just assumed those folks were in Adobe already.

If anyone has an update or a change to their statement of interest or anything to note about their statement of interest, could they please do so now?

Not seeing or hearing anything, let's move on to agenda item number two, and before we do that, Kavouss, you were expressing a concern about a quorum. I believe we are at quorum now and I think we can proceed. If you feel otherwise, Kavouss, could you comment now?

Kavouss, your hand is up. Take the floor, please.

>> KAVOUSS ARASTEH: I have no problems to start the meeting. If we pass the (?) we need the quorum. I don't think that eight people or nine people are sufficient for quorum. Unless it is that this is the result of this number, and ask them how they want to take it, it is up to them. But I think for the meeting, this is all issues, still there are some issues, I hope that people would not push a lot from their own view and we agree what we have agreed. Thank you.

>> DAVID MCAULEY: Okay, thanks, Kavouss. I think we have enough to go forward, and the way that we're handling this now, in my view, is both with a combination of the List and the calls, and so I'm hoping that we can move forward, and thank you for that.

So, the second item I put on the agenda was just a request for volunteers on issues, and then Greg had the good idea of creating a sign-up sheet. Bernie is taking some steps in that respect, so I'm going to ask if Bernie would comment on that right now.

>> BERNARD: Thank you. Brenda, could we bring up the sheet. All right. Thanks, everyone. You've seen the email of the Google Doc is up and we've got it in the window here. Let me try to make that just a bit bigger.

Nothing too fancy here. We've got the comment groupings on the left-hand side for person analyzing, and everyone has editing rights here. So, if you want to pick up a topic, you just need to write your name in there that you'll be having a look at that particular topic, and then the staff and David will be handling updating the status as we go along.

The only point that we may want to have a look at is if we got the comment grouping right, and I'll run through them very quickly just to be sure everyone understands them, and I do understand that on some screens this may look a little small, so let me try to get that a little bigger again.

So, the comment groupings we've got -- and I'll get to you in a second, Kavouss. 45 days, Consensus Policy, Discovery, Evidence, and Statement, Joinder, Notice, under the heading of other -- and these are alphabetically, sort of, and

not by importance -- On-going Monitoring. Under other, we have Payment of Fees. Under other, we have WTO Rules for Least Developed Countries. Under Panel we have Renewal. Under Panel we have Conflict of Interest. We have Repose. We have Retroactivity. We have Retroactivity Substantive Standards. We have Standing, bracket, Materially Affected, and we have Translation and Interpretation.

So, after going through everything we've got for comments and discussions on the list recently, this is what we thought would handle the various comments. Kavouss, over to you.

>> KAVOUSS ARASTEH: Thank you. Just understand, what I was volunteer, with all of these topics you need to volunteer for these topics or that these are the topics you have already discussed? And you just want to put them in the document (?), so I don't understand to volunteer to do what? To talk about it again (?). So, what is issue, and maybe I have missed something and I apologize if I missed something. If possible, remind us of the issue of volunteers. Thank you.

>> DAVID McAULEY: Thank you, Kavouss. It's good request for clarification from you, so thank you very much for that.

What we're looking for here is for people to volunteer and to take an issue and lead the discussion, and so Bernie has just done this. I've been tied up most of today. Usually I have a little bit more time to get ready before a call starts, and I would have filled in some of this information. But obviously, I've taken the lead on a number of these issues, but there are other issues -- so person analyzing. The Person Analyzing Column will be filled in, probably tomorrow morning by me with my name in certain places. Malcolm's name will appear beside 45 Days and beside Repose, if that's okay with Malcolm. But you'll see my name in some of them, but there will be some left.

What we're looking for with the some left, is if people would please volunteer to look up the issue and simply lead the discussion. As much as I've done with some of the memos I've sent on email on things like consensus policy, et cetera, and what I typically do is indicate who has made comments in this respect and put a link to their comments what the issue might be, what recommendations I make.

There is a template that I've used that's in the email, and I'd be happy to send something along those lines if needed. But where I don't think we have anyone analyzing yet, and I'll start at the bottom and go up just because it's a little bit easier. translation and interpretation. I don't believe that's being handled yet. Other, WTO Rules for Least Developed

Countries, I don't think anyone is handling that. Other, Payment of Fee, I don't think that's being handled. Other, On-going Monitoring, I don't think anyone is handling that. And Discovery, Evidence, and Statements, I don't think that's yet been taken.

Some of these will be a little bit more complex, like Discovery, Evidence, and Statements. Some of these, and I'll use the example of on-going monitoring -- I'm sorry, other -- on-going monitoring, will be fairly simple. If I'm not mistaken, that came in from the ALAC asking for on-going monitoring of IRP, and I believe the bylaws say it will be subject to a review similar to the ATRT review every five years or so, and so that's what we're looking for.

And then the Status Column would simply show, you know, Under Review, or Being Prepared for First Reading, et cetera. That's what we're looking for here, Kavouss. Does that answer your question?

If you're speaking Kavouss, we can't hear you.

>> KAVOUSS ARASTEH: Do we need somebody to lead the discussion because the reason, some of the issues you just mentioned and what do you need? What I heard was the WTO Rules for the Least Developed Countries, and I wonder what is that issue? And the other issue may be more of an accepting substantive standards, so which activities, the WTO (?) material I got and what the issue is, but I don't think we need to regroup or day to day, but it was from the day that you had the first -- where are you supposed to reopen the discussion? Thank you.

>> DAVID MCAULEY: Thank you, Kavouss. What I'm looking for, this is sort of a personal initiative of mine and I'm modeling on what Greg has done in the Jurisdiction Group. I'm looking for two things. You're right, I mean, I can raise the issues as the lead of the group and I've done that in a number of instances, but I worry sometimes that it's not fair to the group that I take the lead on everything, in case people get worried that we're getting one point of view sort of making recommendations and things of that nature.

And the other is, I could use the help, to be honest with you. Today is a good example. Normally, I would put a couple hours of preparation into a call, and today I put none into this call just because things have -- you know, I'm just tied up here in my office, a little bit unexpectedly, all day, so that's just the way that happens. So, it's in the nature of help, too. So that's where it's coming from.

I'd like to ask Bernie if he was finished with his comments on this sign-up sheet?

>> BERNIE: I am indeed.

>> DAVID MCAULEY: Thank you Bernie. What I'm going to ask him to do, is if after the call, if he could put out to the List the link to the document, and I'm just asking if people will take a look. And if they can, take an issue -- I'm sorry. Maybe not after this call. Bernie, wait until you and I coordinate tomorrow.

Malcolm, I hope you don't mind if we put your name in on 45 Days and Repose, but then once we fill in the blank -- once we fill in that column on the person analyzing, then I'll ask Bernie to put this out on the list with a link to the sign-up sheet so people might take a look and see if they had could help out taking the lead.

Malcolm, if that's not okay with you --

>> MALCOLM: That's fine with me.

>> DAVID MCAULEY: Okay. Thank you. And Bernie is that okay with you?

(silence).

>> BERNIE: Maybe not given I've already sent the link to this List --

>> DAVID MCAULEY: That's okay. I missed that then, that's fine. People, just be aware that we're going to fill in some of the things we're already discussing and I'll try to have that done by tomorrow. Thanks, Bernie, no problem.

I think we can move to agenda item number three, which is to come to a final discussion, is my hope, of the timing issue. This is not a request that people comment on every facet of the argument, but in the last couple of weeks, both Malcolm, as Lead and with a certain point of view, and Liz, with a different point of view, have made some entries on the email list. I'd like to sort of give each of them a chance to restate them briefly, and then if Malcolm as Lead to try to help us figure out where we are on the timing issue. It's possible we can close it now, or maybe we have to close it on the List. But in any event, I'll first you turn it to Malcolm, if that would be okay with Malcolm?

>> MALCOLM: Thank you. I think we've had a very full discussion of this subject. We've arrived at a consensus on 120 days after the person had become -- or was aware or ought to reasonably to have been aware of the harm that they've suffered, then ICANN Legal asked for time to present consideration of any specific problems that that might have and that was the time that was allocated for Liz to come up with an email on the subject. But from my reading of that, I don't see any -- that that discloses any concrete problems, just a difference in perspective.

From my perspective, the essential thing is that the IRP purpose which purposes that all material effects (?) are able to challenge ICANN's challenge system for compatibility with bylaws is fulfilled, and that cannot be achieved if a party is not able to file a challenge, even if they act immediately that they have been harmed.

So, I accept the advice from our Independent Legal Counsel, that is said that the knowledge of the claimants must be the starting date for the -- for the timing issue. And, I certainly do not believe that it can be moved before the person even became affected and therefore had the rights to bring a challenge, so that's my perspective.

>> DAVID McAULEY: Thank you, Malcolm. Liz, would you like to comment in addition to your mail?

>> LIZ: Yes, David. Thank you so much, and thank you Malcolm. I think from an ICANN standpoint, we are -- we believe that we've relayed our position and objections on this issue in our half meetings and also through email.

We, at this point, we think that it's, you know, we think that the removal of an outside bar creates a material change to what was put out for public comment. But at this point, we also think if the IOT wishes to proceed with putting this out there, ICANN will not stand in the way of the IOT putting it forward and putting the proposal to the community for input.

We definitely think that this is something that should be provided to the community for input, and it's beyond just a Malcolm, Sam, and Liz issue. So that -- having said that, what the next step would be and how this would get updated? I don't know if there is going to be any direction, or if you intend to have direction specifically about updating this rule, and I think, we'd like a little bit more information on that part.

>> DAVID McAULEY: Thanks, Liz. This is David speaking. And I will answer the latter part first, and I'll ask Bernie to come in and comment afterwards if I misstate anything here with respect to the rules or how we're supposed to proceed. But it's my understanding that what Malcolm would do as the Lead in this issue is come to the List and say, you know, this has been a discussion. Here is the request for first reading on the timing issue, and he would state what it is. You know, I think 120 days from the date a person is materially harmed or should have been recently aware of being materially harmed, and we would wrap up what we discussed from that perspective and put it out for first reading.

And then, we would as a group, come to consensus which List or in the call to your point, and we would go to (Sivoli) for a change. Once we come to what we believe is consensus, we would

go to (Sivoli) for a rewrite on the rules to take into account what we agree on this phase of the implementation oversight team and put that rewrite of the rules out with some commentary from us as to what we've done, you know, sort of a final report from our group. That's what I understand. Bernie, if I misstated any of that or gotten any of that wrong, please correct me or comment if you wish.

>> BERNARD: Thank you, David. I don't think it's a question of being wrong. It's a question of there is always an option for another public comment if the group so feels it necessary. Thank you.

>> DAVID MCAULEY: Thanks. So, I would assume then that we would decide that, not based on the timing thing, but once we've come to a closure on all of the issues that we have in front of us -- not all the issues, but all the issues with respect to rules, I don't think that would prevent us from going to Sivoli for the rewrite. We can even do that in steps if we wish, but prior to wrapping up our roles treatment, then I take it or we should discuss among ourselves need for another public comment. I take it, Liz, that's what you're looking for; is that correct?

>> SAM: This is Sam. I'm here with Liz, and I think that that is -- we'd want to evaluate the rules across to see where the substantial changes have been and if they're so substantial that another public comment is warranted and that's a typical process from ICANN. And from looking at it now, from an ICANN internal position, is that the removal of our Period of Repose that was previously put out for public comment would be something that would be so significant that would require a further public comment, and there might be other things that we see within the rules changes, too. And then hopefully, we as the IOT would go through and identify some of the areas that we wish to highlight in a communication to help focus the public comments that we would receive on those areas of changes.

>> DAVID MCAULEY: Thanks, Sam.

So, I appreciate your point of view. I think we're at a point where we can move forward. In the debate on timing, I had suggested some possible workarounds, but I think that I better not mention them now and just do it on List as we move forward maybe and when we get to the discussion or second round of comments.

So why don't we -- unless anyone else has a comment on this issue, I think we can move to the next agenda item.

And hearing or seeing none, why don't we move to item number four, which is an update of what's available, the what ICANN Legal and Policy Teams are doing with respect to the SO

and ACs, and also Sam made a good comment about charting up the process timeframe.

So, if there is anything else -- or anything new, rather, Sam, that you wanted to say, this would be your chance.

>> SAM: Thanks, David. So just to confirm, we're working on the charting right now. We've started coordinating with our policy colleagues, letting them know that we're working on the charting and trying to time out, and drafting some specific questions to ask in our outreach to the SOs and ACs. We're working with them on those items, so we'll hopeful of more updates, but it's all in process of based on what we were talking about last week.

>> DAVID McAULEY: Okay. Thank you, Sam. Is there any comment or question about that?

Hearing none and seeing none, we'll move to agenda item number five, which is titled on the agenda, first reading on a certain number of issues. The first of which is joinder. Let me just pull up my document here.

And, on the joinder issue, you've seen the slides that I sent before, and basically where we have come down on joinder is that anybody that participated in an underlying expert panel proceeding as a party would receive notice from an IRP claimant, and they would receive a copy of the notice and a request for an IRP, two separate things, but together they constitute the body of the request for IRP.

And, they would be to get the documents, that they would have such people that participated below would have a right to intervene in the IRP, but the procedure's officer of the panel would have the final say on how that is executed, whether as a party or as an amicus brief, and the procedure's officer would be exhorted to do their best to stick within the timeframes that the bylaws call for in handling IRPs.

And we have agreed to eliminate something I raised, and that is that people participating amici would be considered parties for the limited purpose of costs on frivolous claims or frivolous argument, so that would be -- that last bit is no longer part of it, and so we agreed to strike that. I think we've agreed on this joinder approach, and I think this could constitute a first reading, but I'm open to comments, questions right now, so the floor is open.

Okay. Seeing none and hearing none -- I'm sorry.

>> SAM: I'm sorry. This is Sam. Do you -- can you recall the date where the final joint approach was sent?

>> DAVID McAULEY: No, but I can do it after the call or tomorrow morning I could try and do it. I'll send something to the List about where this all came from.

>> SAM: Okay. Sounds good.

>> DAVID MCAULEY: I need to just take a moment to write a note. Okay. Just make a note. Almost done. Thank you.

So, moving on, Panel Conflict of Interest. Now, as Bernie's sign-up sheet indicated, this is probably turned into more than one issue, and the first point in the slides is one where I -- one where it appears that we're no longer of one mind, and it has to do with the panel's term.

And so, I think it's fair to say that this is still under discussion, so what I have sent forward as the suggested treatment on this is that there be a term limit of five years as is stated in the bylaw for panelists, but that my original suggestion, that an additional term be available, was no longer part of our recommendation.

There would be no renewal, but on the List, it's happened -- and I believe that Malcolm and Aubry -- Malcolm primarily and Aubry in support were supporting that position, and that position being that there be one term with no chance for renewal. And, I was of the view that there could be two terms, but I didn't feel that strongly about it and backed away and said that's fine, we'll take your approach. Because on that particular call, that's really the only points of view that were being expressed, and that's how we went.

But, then on the List, Greg came in and thought differently. Aubry has been reconsidering her position, and so I mentioned recently on the List, that I'm still of the view that another term would be good just because of the bylaw, interest in having people who are experienced with ICANN, knowledgeable, et cetera. And Sam, I think had pointed out in one of the chats, that it's not ICANN that makes the decisions anyway. The SOs and AC are the ones that nominate the panelist, while the board has to approve them, that approval can't be unreasonably withheld.

So, I invite people to comment on this now if they would like to, and I'm thinking of people that might be likely would be -- well I'll call you first in a minute, Kavouss -- would be Greg, Aubry and Malcolm. Kavouss, you have your hand up first, so why don't you take the floor.

>> KAVOUSS ARASTEH: Yes. You said that talked about one term of five years; is that right?

>> DAVID MCAULEY: My point is the bylaws say a term of five years. The bylaws did not pick up the language that there should be a renewal. I think it's silent in that respect. I can actually read it -- I'm sorry?

>> KAVOUSS ARASTEH: No. No. Sorry. I do not want to bother you to read it. Is it possibly instead of one term of

five years you have two terms each of two years and in order to have continuity of the situation and (?), half of the people that renew within in the second term will have already experienced in the panel. I think it's an issue we'll discuss many times, (?) and essentially where the problem has to have some sort of continuity with whatever you do (?) would be from the quorum and from some coming and the situation so you have all sorts of continuity of somebody that has sufficient experience of why it has been brought. Thank you.

>> DAVID McAULEY: Thanks. Excuse me. Thank you, Kavouss. David here. I think we are trying to get continuity in this. I appreciate your point. You're making a good point, that continuity is important. With respect to two terms of two years each, the bylaws do speak of five years.

We have in the background, a separate discussion going on about staggering terms and having some panelists begin with three years, but we think that maybe giving them an option for a full term after that may solve that particular bylaw's issue. I think you're right, Kavouss, but we have to have a five-year term as I read it.

So, I'm next going to turn to Greg -- oh, I thought Malcolm -- never mind. Greg's hand is up and he's next in the cue.

>> GREG: Thank you, David. I'm working from a tablet which doesn't put people's hands in order, but so in any case, I'll go next. I believe that there should be more than one term. I think we stick with the five-year term that's called for in the bylaws, you know, so we don't necessarily want to get into changing the bylaws. I would suggest, as I have before, that a single renewal would be allowed. We can even have more than one be allowed.

My view is the integrity and independence are kind of essential parts of the job description, and I'm perhaps somewhat less cynical than some, and I would not believe that the panelists would expressly or underhandedly try to shade their opinions and findings in order to, quote unquote, keep their jobs as panelists if a renewal came along.

It's true, perhaps, that a lame duck who has no chance of being renewed in their job is going to be more somehow free, but I think there is -- if the freedom was inherent in the job description and in the understanding, and if people who we are hiring have a sense of personal integrity, and frankly, if we were to be bringing in panelists for a single term, and we believe these panelists but for the ability to have a second term, there is -- if, in fact, they have the ability to have a second term, that these same panelists will go from being an

independent persons of integrity to pandering to keep their job, we probably shouldn't have those panelists in there even for an hour or a week because we're clearly so dubious about their moral and ethical compass. I frankly am just not that dubious, and frankly there are lots of ways in the world to turn a term like this as a panelist into other positions and that there is always a chance that after the term or that there is something that could be made of it. But I think, more than anything else, the way people advance their careers is by doing the best job they can and by being persons of integrity and by exhibiting independence when that is called for, and exhibiting proper -- proper judgment.

Furthermore, since everything here, I think, is going to be a three-person panel, the chance that any one panelist could, essentially, throw the game, to use a U.S. term, I believe, which I apologize for, but that really is another check and balance against a panelist wanting to see a particular outcome rather than letting the fact take them where they go.

So, long story short, or maybe long story long, I'm confident enough in our panelists and in human nature that I believe that a renewal term would be appropriate and would not result in judgments being made that were not high integrity and independence, but instead were of evidence of pandering and trying to impress those who would renew their position.

Lastly, I think it's important to have continuity and experience. I don't know how many IRPs any panelists were here in two years, three years, four years, but I think we'll be better off with panelists who have been around. They may decide they don't want to do it and they've had enough, but for those that want more and are getting in the groove, so to speak, those are the panelists that we want continue.

The (?) RP panelists go on essentially forever, so there is really no -- I just don't share the concerns that others do that somehow, we're going to, you know, prejudice the system by having the renewal system that we have. Thank you.

>> DAVID McAULEY: Greg, thank you. I'm going to go to Malcolm in a second, but before I do, I would like to just mention to Aubry that I would be interested if you would like to speak because you were on the fence, but before that, Malcolm, the floor is yours.

Malcolm, if you're speaking, we can't hear you.

>> MALCOLM: I'm sorry. Is that better?

>> DAVID McAULEY: Yeah. That's better.

>> MALCOLM: Thank you. Sorry. I was on mute.

Clearly, one of the most important features of the IRP is that

it be truly independent.

Now, I must say that I agree with Greg that I would hope that the selection process would weed out anybody who had the low moral fiber that they would deliberately defer a case that they had no faith in or judgment, but nonetheless in bad faith deliberately the decision such as to carry favor with ICANN, such a person really doesn't belong in the position for five minutes, just as Greg says, and I hope that we would manage to avoid that. You cannot be sure, but I would hope so.

But, I don't see anything like black and white terms as Greg does. Independent to say -- to be honest, in compliance fields, the independence area is a highly-studied area of corporal governance that has many long-standing good practice recommendations in it. And whether or not the person who is supposed to be independent is beholding to another important for a renewal of their position, is one of the key markers there of lack of independence. This is not just me saying this. This is a widely-recognized marker.

And there is no specific (?) thing. I know I was being maybe slightly rye when I was pointing out from the List to Mike, I think it was, that for the -- probably the best explanation of this could be found in paper number 78 which spoke about how the most important protector of the independence of the supreme judges of the newly to be created -- the newly to be created U.S. Supreme Court would be their permanence in office, so that's making the same point.

Nonetheless, I do recognize the arguments that are being made on the List about the importance of -- of having people in place for long enough that they build up a good understanding of the system and a good level of expertise.

And personally, I would have been happy if the -- if the five-year cap had been seven years, for example. Unfortunately, that's not allowed. So I wonder, and I don't know, David, if you saw my email on the list this afternoon, this afternoon in UK time, this morning your time, in which I looked -- I wondered if there was some alternative mechanism that could be got at for -- for preserving that sense of -- or that characteristics of there being the panelist not being beholding to anyone for renewal while ensuring that they're satisfying this concern about ensuring that they're in a post longer than five years. If five years is longest allowed by the bylaws, but thought by this group to be too short of a time to be adequate -- to build up an adequate level of expertise.

So, I wonder if, actually, rather than going for no renewal, we might say that renewal is automatic. If we can deny a discretion in renewal. If we stop both ICANN and the

SOs from arbitrarily removing someone at the time, saying oh, we think it's time for fresh blood, or anything that's not an overt retaliation for a decision, but nonetheless, a purely arbitrary exercise of discretion.

If instead we said the renewal would be automatic or renewal would be automatic unless there was there was removal for cause of the panelist, then that would satisfy the arguments that I've been making about the value of no renewal for independence.

By another route, I'm at a route that would also seem to satisfy the concerns about allowing people to be longer in office to build up a greater level of expertise, so I offer that as a possible alternative approach to it.

>> DAVID MCAULEY: Thank you, Malcolm. David here. To answer an immediate question though, I have been tied up all day and have not really seen the mail from this morning, so my apologies. But hearing you now, I think that has promise, and I'm going to ask you a question about it, but first, Kavouss had his hand up.

>> MALCOLM: I think in the chat as well.

>> DAVID MCAULEY: Right. But I'd like to go back to the cue.

>> KAVOUSS ARASTEH: Yes. Sorry. I apologize maybe not so clear. (?). During the absolute independence, I don't know anyone. I have been working with many people during (?), I don't think you could put absolute independence. Independence is a relative issue. It's that (?). So, we should not push too much for independence, but understand of continuity.

In my view, if it can work from the concept of not in (?) having all parties renew, then it would work out how it would without touching this issue of independence -- can we -- (?) that all members of the panel should be new person. How could we could work it out, how we could divide the terms or at least half of them or two-thirds or some of them have a fraction of them to be always different, and (?) in order people maintain this continuity. Is that an experience (?), the issues of the panel and the (?) of the panel, in my view, is almost a null issue. It's different from what we do today because there is a lot of important (?). Why not work it out this to have to avoid to have any panelist on (?) -- How we could work it out? Thank you.

>> DAVID MCAULEY: Thank you, Kavouss. Aubry is next in the queue.

>> AUBRY: Thanks. This is Aubry speaking. I wrote most of what I was going to say on the issue in the chat. I still sort of remain on the fence though. I still tend to the

single term.

I think there is a fine line. When Greg speaks of it, he draws a short boundary between pandering and remaining independent. There is a whole middle ground of having accepted the mindset and become sympathetic or antipathetic to it over the course of five years, and so why one might not be pandering in any conscious way, they have -- they have joined the tribe and have drunk the Kool-Aid, so I worry about that aspect of things.

I worry -- I don't really have a problem with that if it's all the SOs and ACs that are evaluating and deciding, but as long as there is a choke point that is in the board's hand that says, yae or nay to a choice and that can be for a stated reason that may be similar to or different than a reason that, gee, this one is always, you know, this one is always the primary author or always the one that questions us hard, is always the one, is something that can be used as a reason to not renew one, so I really still very much tend toward, with no intention or prophesy on anyone just human behavior, I tend to be very much still in the stable, long enough term. So, five years is great. Even ten years is fine in my mind, but not anything where they have to appeal to a power group that can say yes or no. Thanks.

>> DAVID MCAULEY: Thank you, Aubry. Greg is next in the queue, then after Greg I'll make some comments and we'll move on. We have 12 minutes left in this call.

>> GREG: Hi, this is Greg. I recognize there is a spectrum, but there is also a spectrum of harm, if you will, from losing talent, and I think that -- I'm not sure that they kind of will have drunk the Kool-Aid since as independent panelists, and I think we have the requirement that the panelists not be active in ICANN in a number of stated different ways.

So for instance, if I wanted to be a panelist, I would have to resign from all working groups and from leadership of the IPC and possibly from the IPC as well, so we're actually talking about people kind of undrinking the Kool-Aid in a sense, which is I think yet another check and balance on independence, is that we're looking for people that are kind of able to cope with ICANN based on, you know, prior knowledge or the like, but not part of the Kool-Aid drinking club or any of the several Kool-Aid drinking clubs that exist, each with their own antipathy or propathy, whatever the opposite of that is.

Again, I like Malcolm's approach. I think it kind of comes committal on the issues. You can have a -- and if we don't want to change the bylaws and recognizing it adds an

additional hurdle. Having the five-year renewal, essentially the mechanical -- basically, taking any kind of kind of broad discretion or ability to change for any reason or no reason, which ICANN, and possibly the SO and ACs may also have that issue if there is someone they want to get rid of because they're too favorable to ICANN.

I think if we have this for clause concept, but other than for something stated and for a fairly significant reason, they'll continue to their second five-year term without having to pander at anyone or with any pandering, probably would be counter-productive and certainly not productive. And I think that's a way to solve the issue of keeping people around long enough that is really useful and yet removing any incentives or any significant amount of incentive for them to shade their opinions or their behavior in order to curry favor.

So, long story long, I think Malcolm's is coming to a middle, and I think when Malcolm is in the middle, I think that's a good place to be.

>> DAVID McAULEY: Okay. Thank you, Greg. I see that both Kavouss -- Malcolm, I thought your hand was up, but Kavouss you want to make another comment, so I'm going to give you the floor, but please try to keep it brief. I realize this is not yet ready for a first reading, but go ahead, Kavouss. Kavouss, if you're speaking we can't hear you.

>> KAVOUSS ARASTEH: (?) where coming from, right by, I have not problems with renewals of terms, but why two times five? Why not two times three, and why not two times four? And maybe too long, two times five and I don't know, maybe you take (?) from some countries, but where does five come from? It's too long.

And also, I'm sorry to say that I don't agree with everything, there is no problem with one term for ten years, and ten years it is too long. Really, it is. (?) maybe there are some conditions, but ten years is too long so I suggest you could have renewable but not two time five, maybe two times three or two times four. Thank you.

>> DAVID McAULEY: Thank you, Kavouss. The original -- the term of five years for a panelist is in the bylaws and I think that's what we have to work with right now, but I also note to this group, even though this issue is not ready for first reading, Kavouss raised a good point about we have to take steps and we're considering steps, but not all of the panelists, except at the beginning, not all of the panelists renew and that's the ICANN -- Sam originally gave us the idea for staggered panels, and I think that's something we have to pursue somehow. It's a very good point.

So, let me just say this about the whole issue of panel conflict of interest. It actually is a couple of issues. I think I need to recast this and I'll do it on list and try to break out the term thing into one separate bucket and deal with the rest of that slide separately. And I'm going to try to get us to close fairly quickly.

But the idea that Malcolm suggested, automatic renewal, I think has some promise in it, except the fact that we're dealing with five-year terms, so with automatic renewal, I think we need to put some procedures in there such as the SOs or ACs, you know, have the right to bless it.

I think ICANN should have a chance to request SOs or ACs not to -- I mean, there should be some kind of a process that there is a -- that even if the renewal is, quote, automatic except for some circumstances, that it's clear that how that circumstance works and who has a say in it. Aubry had a good point too. So, it's a difficult issue. I need to rethink and rework for the list.

And it's taken up a good portion of this call, which I think is fair. Fair enough. In fact, I really appreciate the input from everybody, especially Greg and Malcolm on this. And in future when this issue comes up, I think I'll point people that are not on this call to this call, the transcript or the recording and say listen to this, this is a pretty crisp discussion of what is going on here, so thank you for that.

On agenda number five, we still have retroactivity and standing, which are fairly -- fairly straightforward, but we have five minutes left, and so before I go to those and challenges to consensus policy, I just wanted to ask that Bernie and I comment about -- I'm moving to Item number seven now, just have a brief discussion on List that we're moving to a point where -- where we're not going to be able to meet the deadline that we have, which is disappointing.

Our deadline, which includes, you know, staff putting their work on top of ours, I believe, is May 29th. So, we're going to have to figure out what we're going to do with this respect. I'm starting to think that we will be -- we would be fortunate to have this wrapped up in time for ICANN 59, but I'm interested in what people think about that. Greg, your hand is up, so why don't you take the floor.

>> GREG: I was actually going back on the last point that you made on the previous subject, just to say that --

>> DAVID McAULEY: That's okay that's okay.

>> I put 4.3J into the chat which says that removal can be for expected cause in the nature of corruption, misuse of position, fraud or criminal activity, and I would suggest that

those can also be the standards for non-renewal at the end of the first five-year term. And I think that could be just in the rules. That doesn't need to have evidence of change in the bylaws any more than having a single term would as opposed to renewing terms would need a change in the bylaws.

So, I think we have in the bylaws the answer to the question that you raised, which is how do we deal with having an all but automatic renewal, but yet somehow have some ability to deal with folks that have gone off the rails completely. And so, I think corruption, misuse of position, fraud, or criminal activity are all pretty heavy-weight problems, and I think would be a good -- good standard for nonrenewal, and then anything other than that would essentially lead to the second five-year term. Thanks.

>> DAVID MCAULEY: Thanks, Greg. David here. I also note that 4.3 -- you're right. That's a good quote from 4.3J. That provision also says goes on to say that it's up to this team to come up with rules on how to apply that standard which is something we'll do -- that's not part of the rules of procedure, at least not in my mind critical for getting the IRP up and standing, but it is something we need to do as a group, so thank you for that.

Back to the -- back to the -- our work and our deadline and how we're proceeding. I personal am encouraged. I think, that we're actually hitting good issues, we're having good discussions on List and in this group, and I want to continue that. That's why I'm looking for volunteers to pick up issues.

I'm going to try to recast this panel, conflict of interest in the coming week. I'm going to re-T-up retroactivity, standing, and materially affected and also the challenge to consensus policy. But in the meantime, I'll be talking with Bernie about our deadline and how we're going to handle this. And I'll come to the List with thoughts on it, but we need to handle it probably by the next call, just decide what are we going to do with this. It's not good to keep setting deadlines that we might miss.

And I'll also note, I think Malcolm asked me, I saw a glimpse of an email this morning where someone was asking about what other things we must do beyond the rules, and so it would be good for us to talk stalk of that. That's one reason I sent along a mail that I had sent to the CC and SO, but we have some possible role with cooperative engagement process. I know that group has asked us once in a while about some input.

We might want to consider whether we want to say anything about conciliation discussions or think more about rules for appeals, things of that nature. So, there is plenty to talk

about there, but we're at the end of this call.

So, these are the things in our future, our immediate future. Kavouss, your hand is up. I'm going to give you a chance to make a final comment.

>> KAVOUSS ARASTEH: Yes, kind of on the deadline, does it hurt if you extend that deadline by 10 to 15 days. Thank you.

>> DAVID MCAULEY: Thanks, Kavouss. I think we could, but I'm not sure that's sufficient. I think it will help us get to a good position to discuss this next week if that sign-up sheet is filled in, if we know that there is people handling issues, so thank you for that.

I think 10 to 15 days wouldn't -- wouldn't do it right now, but I think this is a discussion we have to have next week we should talk about it, and so I'm trying to create that -- create that idea.

So, I think we're done. Kavouss, I see your hand, is that a new hand? Nope. It's not.

So, unless anyone has a final comment, I actually think we've made a lot of progress. I'm very grateful for everybody that weighed in on the panel term. That's an important thing for us, and I think we had some very good discussions about it today. And so, I'm also grateful for Malcolm and Liz and Sam commenting on timing, so off we go. We'll see you next week. I'll be out there on the email List and I'll talk with Bernie in the meantime for ideas about deadline and things like that, but please do take a look at the sign-up sheet. I'll try to populate it as to where it currently stands by the end of the day tomorrow, so that's the end of this call and I'd like to thank everybody for attending. Thank you.

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EXHIBIT 241

[IOT] Second reading June 12 on 'Joinder' issues Ex. 241

McAuley, David Contact Information Redacted

Mon Jun 5 13:40:17 UTC 2017

- Previous message: [\[IOT\] Second reading June 12 on retroactivity issues](#)
- Next message: [\[IOT\] First reading complete on timing issue](#)
- Messages sorted by: [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)

Dear members of the IRP IOT,

The purpose of this mail is to inform you, particularly those who do not regularly attend the teleconference calls, that at a recent meeting we gave a first reading to an outcome on "Joinder" issues, and to notify you that we have a second reading scheduled for June 12th (conference call at 19:00 UTC).

Our agreed approach at first reading deals with joinder issues concerning entities that participated in an underlying proceeding (process-specific expert panel) as contemplated in Bylaw Section 4.3(b)(iii)(A)(3).

Our approach was agreed at first reading following consideration of various public comments received from the first draft public comment period.

Here is what we agreed at first reading:

1. That all those who participated in the underlying proceeding as a "party" receive notice from a claimant (in IRPs under Bylaw section 4.3(b)(iii)(A)(3)) of the full Notice of IRP and Request for IRP (including copies of all related, filed documents) contemporaneously with the claimant serving those documents on ICANN.
2. That all such parties have a right to intervene in the IRP. How that right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. No interim relief or settlement of the IRP can be made without allowing those given amicus status as a matter of right as described herein a chance to file an amicus brief on the requested relief or terms of settlement.
3. In reviewing such applications, and without limitation to other obligations under the bylaws, the PROCEDURES OFFICER shall endeavor to adhere to the provisions of Bylaw section 4.3 (s) to the extent possible while maintaining fundamental fairness.

If you wish to object to second reading being given please speak up now on list, and/or at the

next call on June 12th at 19:00 UTC.

Best Regards,

David

David McAuley

Sr International Policy & Business Development Manager

Verisign Inc.

Contact Information Redacted

----- next part -----

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URL: <<http://mm.icann.org/pipermail/iot/attachments/20170605/a770999f/attachment.html>>

-
- Previous message: [\[IOT\] Second reading June 12 on retroactivity issues](#)
 - Next message: [\[IOT\] First reading complete on timing issue](#)
 - Messages sorted by: [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)

[More information about the IOT mailing list](#)

EXHIBIT 242

IRP-IOT Meeting #28 (7 Sep. 2017), Audio Recording,
available at <http://audio.icann.org/mssi/irp-iot-07sep17-en.mp3>
(last accessed on 26 Jan. 2019)

This audio recording is provided electronically

EXHIBIT 243

[IOT] Joinder issues toward FIRST READING [renamed subject line]

Samantha Eisner [Samantha.Eisner at icann.org](mailto:Samantha.Eisner@icann.org)

Thu Sep 7 20:03:59 UTC 2017

- Previous message: [\[IOT\] IRP IOT call Thursday Sept. 7 - 19:00UTC - Agenda](#)
- Next message: [\[IOT\] Recordings, DAIRs, Raw Caption Notes for IRP-IOT Meeting #32 - 7 September 2017](#)
- Messages sorted by: [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)

Hi David -

As discussed during the call, here is some proposed language to address the concern raised about making sure that only those who satisfy the definition of "claimant" and would otherwise have standing under the IRP are given "party" status. Otherwise, allowing persons or entities to achieve "party" status could risk the expansion of the IRP to issues not tethered to violations of ICANN's articles or bylaws. This still allows the person or entity to come in and protect/assert their position, but would also further the efficiency of the process by limiting the focus of the IRP to whether ICANN violated its Articles or Bylaws, and not risk that the IRP would be used to reach issues that are between the non-ICANN participants in the IRP.

Insert language to the effect of: "A person or entity seeking to intervene in an IRP can only be granted party status if that person or entity demonstrates that it meets the standing requirement to be a Claimant under the IRP at Section 4.3(b) of the ICANN Bylaws and as Defined within these Supplemental Procedures."

Sam

—
Samantha Eisner
Deputy General Counsel, ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, California 90094
USA
Direct Dial: +1 310 578 8631

From: <[iot-bounces at icann.org](mailto:iot-bounces@icann.org)<mailto:iot-bounces at icann.org>> on behalf of "McAuley, David via IOT" <iot at icann.org<mailto:iot at icann.org>>
Reply-To: David McAuley Contact Information Redacted <mailto:Contact Information Redacted >>
Date: Friday, August 25, 2017 at 12:10 PM
To: "iot at icann.org<mailto:iot at icann.org>" <iot at icann.org<mailto:iot at icann.org>>, Contact Information Redacted <mailto:Contact Information Redacted >>
Subject: [IOT] Joinder issues toward FIRST READING [renamed subject line]

Dear members of the IRP IOT:

This email is intended to accomplish the First Reading of the Joinder issue - note also that whatever we agree on Joinder will also affect our work on the rule concerning challenges to Consensus Policy.

You can see a summary of some of the joinder discussion in the email of July 21st forwarded below.

This proposal is my attempt to draw the various joinder views together in an acceptable final proposal. Keep in mind that the final language we adopt will be our instructions to Sidley as to how to amend the applicable rule - our language will not be the actual rule itself.

The aim is to confirm first reading at our next meeting, Thursday, September 7, at 19:00 UTC. Second reading should then be a largely pro forma exercise at our subsequent meeting on September 21st at 19:00 UTC.

If you object or propose different treatment please say so on list as soon as possible prior to September 7th and be specific and suggest specific alternative language.

HERE IS THE SUGGESTED JOINDER LANGUAGE:

1. That only those persons/entities who participated in the underlying proceeding as a "party" receive notice from a claimant (in IRPs under Bylaw section 4.3(b)(iii)(A)(3)) of the full Notice of IRP and Request for IRP (including copies of all related, filed documents) contemporaneously with the claimant serving those documents on ICANN.
2. That all such parties have a right to intervene in the IRP. The timing and other aspects of intervention shall be managed pursuant to the applicable rules of arbitration of the ICDR except as otherwise indicated here. The manner in which this limited intervention right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. An intervening party shall be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as determined by the ICDR. An amicus may be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as deemed reasonable by the PROCEDURES OFFICER.
3. No interim relief that would materially affect an interest of any such amicus to an IRP can be made without allowing such amicus an opportunity to be heard on the requested relief in a manner as determined by the PROCEDURES OFFICER.
4. In handling all matters of intervention, and without limitation to other obligations under the bylaws, the PROCEDURES OFFICER shall endeavor to adhere to the provisions of Bylaw section 4.3(s) to the extent possible while maintaining fundamental fairness.

Best regards,
David

David McAuley
Sr International Policy & Business Development Manager
Verisign Inc.
Contact Information Redacted

From: [iot-bounces at icann.org](mailto:iot-bounces@icann.org)<mailto:[iot-bounces at icann.org](mailto:iot-bounces@icann.org)> [mailto:[iot-bounces at icann.org](mailto:iot-bounces@icann.org)] On Behalf Of McAuley, David via IOT
Sent: Friday, July 21, 2017 9:57 AM
To: [iot at icann.org](mailto:iot@icann.org)<mailto:[iot at icann.org](mailto:iot@icann.org)>
Subject: [EXTERNAL] [IOT] Issues Treatment - Joinder

Dear members of the IRP IOT:

Let's move some issues along on list -see our sign-up sheet[docs.google.com]
<https://urldefense.proofpoint.com/v2/url?u=https-3A_docs.google.com_spreadsheets_d_lHi-5FHgvrfsT33p5mfYWT4-2Dx-2DuhEoy9nCK8owX5uTKC0U_edit-3Fts-3D591dda09-23gid-3D0&d=DwMFag&c=FmYlu3PJP6wrcrwl13mSVzgfkbPSS6sJms7xcl4I5cM&r=w1jlgVWntmqTISdedIDLQ6uBxH Jh-uBee_4imohzko&m=Y3a94Xx3J74X-GypbLPZ3DdC3QpO8vCHQltfOuFE-zw&s=vlNiaGvHB8wfPtrmgkEiF8FT4UJC-CsLoJahltqVrwA&e=> for issues. This email deals with the joinder issue.

These following three numbered paragraphs constitute the previous proposal<<http://mm.icann.org/pipermail/iot/2017-June/000251.html>> on joinder:

1. That all those who participated in the underlying proceeding as a "party" receive notice from a claimant (in IRPs under Bylaw section 4.3(b)(iii)(A)(3)) of the full Notice of IRP and Request for IRP (including copies of all related, filed documents) contemporaneously with the claimant serving those documents on ICANN.
2. That all such parties have a right to intervene in the IRP. How that right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. No interim relief or settlement of the IRP can be made without allowing those given amicus status as a matter of right as described herein a chance to file an amicus brief on the requested relief or terms of settlement.
3. In reviewing such applications, and without limitation to other obligations under the bylaws, the PROCEDURES OFFICER shall endeavor to adhere to the provisions of Bylaw section 4.3 (s) to the extent possible while maintaining fundamental fairness.

On July 9th Liz Le of ICANN Legal listed concerns/questions with respect to this proposal in an email<<http://mm.icann.org/pipermail/iot/2017-July/000265.html>>.

My comments (as participant and issue lead):

I will note the gist of Liz's concern/question in italics and then my proposal/answer in red.

One overall note: This joinder proposal is strictly with respect to "parties" to expert panels as per #1 above - when we deal with challenges to consensus policies we can there deal with how SOs may intervene in those matters (remembering that we will ask Sidley to come up with actual "rules" language once we finish our work).

Liz's points (not necessarily her entire comments):

First, there needs to be rules and criteria established as to who can join/intervene by right as well who may be properly joined/allowed to intervene at the discretion of the IRP panels.

The intent is to allow all "parties" at the underlying proceeding to have a right of intervention, but that the IRP Panel (through the Procedures Officer) may limit such intervention to that of Amicus in certain cases. It is not envisioned to allow non-parties from below (or others) to join under these provisions - noting that these provisions just deal with parties below. We are not displacing rule #7 (Consolidation, Intervention, and Joinder) from the draft supplementary rules[icann.org]<[https://urldefense.proofpoint.com/v2/url?u=https-3A-www.icann.org-en-system-files-files-draft-2Dirp-2Dsupp-2Dprocedures-2D31oct16-2Den.pdf&d=DwMFAG&c=FmYlu3PJp6wrcrwl13mSVZgfkbpSS6sJms7xcl4I5cM&r=w1jlqVWntmqtI5dedIDLQ6uBxH Jh-uBee 4imohzko&m=Y3a94Xx3J74X-GypbLPZ3DdC3Qp08vCHQ1tfOuFE-zw&s=appP0Q0Wfl9rc7Jo5HLpXTdtC5Zj8ES NpBnf006dIE&e](https://urldefense.proofpoint.com/v2/url?u=https-3A-www.icann.org-en-system-files-files-draft-2Dirp-2Dsupp-2Dprocedures-2D31oct16-2Den.pdf&d=DwMFAG&c=FmYlu3PJp6wrcrwl13mSVZgfkbpSS6sJms7xcl4I5cM&r=w1jlqVWntmqtI5dedIDLQ6uBxH Jh-uBee 4imohzko&m=Y3a94Xx3J74X-GypbLPZ3DdC3Qp08vCHQ1tfOuFE-zw&s=appP0Q0Wfl9rc7Jo5HLpXTdtC5Zj8ES NpBnf006dIE&e=)> that went out for comment.

Second, clarification and development is needed on the standard of review that is to be applied by the Procedures Officer when determining the extent to which an intervenor may participate. What should the interested parties have to demonstrate (e.g., should the interested parties have to demonstrate harm based on an alleged violation by ICANN of the Bylaws or Articles? What are appropriate interests that will be supported?). What types of briefings and opportunity to be heard are needed in order to allow an interested party to petition the Procedures Officer to exercise his or her discretion and allow the party to join in the IRP?

I don't think the intervenor would have to allege or show harm - that is the job of the Claimant (presumably the "loser" below) - and that Claimant will have to allege/show that the decision by the panel below, if implemented by ICANN, would violate the Articles or Bylaws. The intervenor here would simply need to show party-status below. I would think that a request for joinder would have roughly the same information required of a Claim as per Bylaw 4.3(d) and would also require an equivalent filing fee.

Third, Also fundamental to this question is understanding if there are different levels of "joining" an IRP? Should a person/entity that can allege that they have been harmed by an alleged ICANN violation the Bylaws/Articles be treated differently than a person/entity that just has an interest in someone else's claim that the Bylaws were violated? Keeping the purpose of the IRP in mind, does it make sense to treat each of these as having "IRP-party status"?

I think that in these circumstances (dealing with an expert panel below decision) the "winner" below would most probably be accorded party status and would have an obvious interest. The more difficult case might be an intervenor who was also a "loser" below in cases where there may have been more than two parties. Maybe we should require that they allege and show a material likelihood of winning on rehearing if the IRP panel were to advise ICANN to call for a rehearing.

Fourth, It would also be helpful to clarify if IRP-party status includes the ability to be a prevailing party, is entitled to its own discovery, and if such discovery would be coordinated or consolidated with that of the claimant?

My suggestion would be that anyone with party status (rather than amicus status) have discovery rights as coordinated by the IRP panel.

Fifth, An amicus curiae, as generally understood, typically does not participate as a party to a proceeding. The concept of allowing for briefing at the interim relief stage from an amicus, or a third party that believes it has an interest in the outcome (with IRP-party status or not), could be appropriate, but more information is needed as to the timing and expectation of what intervention or briefing is expected to achieve.

Perhaps this right should be limited to instances where requested interim relief, if granted, could materially harm the amicus's ability to pursue/achieve their legitimate interest.

Sixth, What standard is the panel adhering to when considering an amicus? Are there timing requirements of when the process should be invoked? The timing for an amicus curiae to comment on interim relief should take into account the fact that the interim relief process is an

expedited process to provide emergency relief. For example, at what point in time can an amicus curiae comment on interim relief - during the briefing stage seeking interim relief or after the IRP Panel makes a determination an interim relief?

If the above responses don't address standard sufficiently then a specific proposal is invited. As for timing, I propose notice of intent to file within 10 days of receipt of the claim (not business days) with timing for briefs (whether as party or amicus) determined by PROCEDURES OFFICER.

Seventh, In regard to the settlement of issues presented in an IRP, the settlement of disputes is a private and often confidential process between two parties. It is unclear how and why an amicus curiae, who is not a party to the IRP, would be entitled to have input in the settlement amongst two (or more) parties to an IRP. What is the procedure for such a process? What types of briefings and opportunity to be heard are needed in order to allow an amicus curiae to comment on interim relief or settlement? Parties are not even required to notify or brief the panel during settlement discussion, and the panel does not have an opportunity to vet a settlement, so what else would need to be changed (and on what grounds) to make this intervention into a settlement feasible and justified as to cost and burden to the parties? Parties should not be required to prolong an IRP if they would prefer to end it. ... how is the right of an amicus curiae to approve settlement terms balanced with the interests of the parties to the settlement to keep the terms of the settlement confidential?

This seems a fair point and perhaps the right to intervene as to a settlement must be limited to parties.

Eighth, Additional development is needed to ensure that an amicus curiae's exercise of its rights to comment on interim relief or settlement does not delay the emergency relief and prejudice the rights of the parties to the IRP.

The reference (to Bylaw Section 4.3(s)) in paragraph 3 of the original proposal is intended to address this.

Ninth, further clarification and development is needed regarding timing of the joinder and intervention processes. The amount of time in which a party has to intervene or join in the IRP and the briefing schedule for such motion should take into consideration the intent under the Bylaws for IRP proceedings to be completed expeditiously with a written decision no later than six months after the filing of the Claim if feasible.

Suggest 10 days for notice etc., as noted under SIXTH above.

Tenth, another issue for consideration pertains to the extent to which confidential information can/should be shared with parties intervening/joining. For example, if a claimant wants to submit confidential information in support of its IRP, it should be able to protect that information from being accessible to intervenors, some of whom could be competitors or contracted parties. Do intervenors get access to information exchanged between ICANN and the claimant? How will discovery methods apply to intervenors? Do intervenors have all rights as any other party to the proceeding, up to and including the ability to be determined as the prevailing party?

I would think that the panel, operating under ICDR rules, can handle these matters - e.g. I believe the rule on confidentiality here would be Article 21, subsection 5, which provides:

The tribunal may condition any exchange of information subject to claims of commercial or technical confidentiality on appropriate measures to protect such confidentiality.

(I am referring here to these rules: [file:///C:/Users/dmcauley/Downloads/ICDR%20%20\(1\).pdf](file:///C:/Users/dmcauley/Downloads/ICDR%20%20(1).pdf))

Best regards,
David

David McAuley
Sr International Policy & Business Development Manager
Verisign Inc.
Contact Information Redacted

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URL: <<http://mm.icann.org/pipermail/iot/attachments/20170907/91444fdb/attachment-0001.html>>

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- Previous message: [\[IOT\] IRP IOT call Thursday Sept. 7 - 19:00UTC - Agenda](#)

[IOT] Joinder issues toward FIRST READING [renamed subject line]

- Next message: [\[IOT\] Recordings, DAIRs, Raw Caption Notes for IRP-IOT Meeting #32 - 7 September 2017](#)
- Messages sorted by: [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)

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EXHIBIT 244

[IOT] Joinder issue - revised proposal for First reading

McAuley, David Contact Information Redacted

Tue Oct 3 18:00:19 UTC 2017

- Previous message: [\[IOT\] IRP IOT teleconference Oct. 5 19:00 UTC - Agenda](#)
- Next message: [\[IOT\] Joinder issue - revised proposal for First reading](#)
- **Messages sorted by:** [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)

Dear members of the IRP IOT,

I am hoping we can move the issue of Joinder to successful first reading at our meeting Thursday, Oct. 5th, at 19:00 UTC. In order to allow those who cannot attend a chance to weigh in I will not move this to first reading (should we agree on this) until Monday, Oct. 9. Please comment by then if you have a concern.

The suggested language for Joinder is below, with underlined language (also in red) to reflect a change requested by Sam and written up by me. Only paragraph 2 has been changed.

My summary can be seen in my email<<http://mm.icann.org/pipermail/iot/2017-August/000298.html>> of Aug. 25 and Sam's requested addition can be seen in her email<<http://mm.icann.org/pipermail/iot/2017-September/000306.html>> of Sept. 7.

SUGGESTED JOINDER LANGUAGE:

1. That only those persons/entities who participated in the underlying proceeding as a "party" receive notice from a claimant (in IRPs under Bylaw section 4.3(b)(iii)(A)(3)) of the full Notice of IRP and Request for IRP (including copies of all related, filed documents) contemporaneously with the claimant serving those documents on ICANN.

2. That, subject to the following sentence, all such parties have a right to intervene in the IRP. Notwithstanding the foregoing, a person or entity seeking to intervene in an IRP can only be granted "party" status if that person or entity demonstrates that it meets the standing requirement to be a Claimant under the IRP at Section 4.3(b) of the ICANN Bylaws and as Defined within these Supplemental Procedures. The timing and other aspects of intervention shall be managed pursuant to the applicable rules of arbitration of the ICDR except as otherwise indicated here. Subject to the preceding provisions in this paragraph,

the manner in which this limited intervention right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. An intervening party shall be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as determined by the ICDR. An amicus may be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as deemed reasonable by the PROCEDURES OFFICER.

3. No interim relief that would materially affect an interest of any such amicus to an IRP can be made without allowing such amicus an opportunity to be heard on the requested relief in a manner as determined by the PROCEDURES OFFICER.

4. In handling all matters of intervention, and without limitation to other obligations under the bylaws, the PROCEDURES OFFICER shall endeavor to adhere to the provisions of Bylaw section 4.3(s) to the extent possible while maintaining fundamental fairness.

Thank you and best regards,

David

David McAuley

Sr International Policy & Business Development Manager

Verisign Inc.

Contact Information Redacted

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URL:

<http://mm.icann.org/pipermail/iot/attachments/20171003/59d3c93b/attachment.html>

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- Previous message: [\[IOT\] IRP IOT teleconference Oct. 5 19:00 UTC - Agenda](#)
 - Next message: [\[IOT\] Joinder issue - revised proposal for First reading](#)
 - Messages sorted by: [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)

[More information about the IOT mailing list](#)

EXHIBIT 245

[IOT] Joinder issue - revised proposal for First reading

Malcolm Hutty Contact Information Redacted

Wed Oct 4 01:40:17 UTC 2017

- Previous message: [\[IOT\] Joinder issue - revised proposal for First reading](#)
- Next message: [\[IOT\] Joinder issue - revised proposal for First reading](#)
- Messages sorted by: [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)

David,

In regard to the added sentence, requiring interveners to be persons that would qualify as a Claimant.

I think there may be a concern with this text. It assumes that the person wishing to intervene would be doing so on the side of the Claimant. However, a person may wish to intervene to oppose the Claimant's position. Such a person might not qualify as a Claimant, but would still have a material interest. Indeed, in the counterfactual where ICANN had done what the Claimant claims it ought to have done, the intervener might then qualify as a Claimant. I think such a person has a good reason to say they ought to be heard.

Beyond that, (and as an additional point on which the foregoing does not depend), the outcome from an IRP need not be binary. That is, if ICANN has done A, of which the Claimant complains, it is possible that it ought to have done B, C or D; even if the Claimant says B, the IRP could decide C. An intervener might be indifferent as between A or B but be strongly interested in it not being C. Again, such an intervener might be someone who does not qualify as a Claimant given A, but would have done if ICANN had done C. Such a person might well wish to intervene to argue against C as a possible resolution. I say this only to point out that it's not really about which side you're on, but whether you have a material interest in any of the reasonably foreseeable possible outcomes of the IRP case.

Malcolm

Sent from my iDevice; please excuse terseness and typos.

> On 3 Oct 2017, at 11:00, McAuley, David via IOT <iot@icann.org> wrote:
>
> Dear members of the IRP IOT,
>
> I am hoping we can move the issue of Joinder to successful first reading at our meeting Thursday, Oct. 5th, at 19:00 UTC. In order to allow those who cannot attend a chance to weigh in I will not move this to first reading (should we agree on this) until Monday, Oct. 9. Please comment by then if you have a concern.
>
> The suggested language for Joinder is below, with underlined language

(also in red) to reflect a change requested by Sam and written up by me. Only paragraph 2 has been changed.

>

> My summary can be seen in my email of Aug. 25 and Sam's requested addition can be seen in her email of Sept. 7.

>

> SUGGESTED JOINDER LANGUAGE:

>

> 1. That only those persons/entities who participated in the underlying proceeding as a "party" receive notice from a claimant (in IRPs under Bylaw section 4.3(b)(iii)(A)(3)) of the full Notice of IRP and Request for IRP (including copies of all related, filed documents) contemporaneously with the claimant serving those documents on ICANN.

>

> 2. That, subject to the following sentence, all such parties have a right to intervene in the IRP. Notwithstanding the foregoing, a person or entity seeking to intervene in an IRP can only be granted "party" status if that person or entity demonstrates that it meets the standing requirement to be a Claimant under the IRP at Section 4.3(b) of the ICANN Bylaws and as Defined within these Supplemental Procedures. The timing and other aspects of intervention shall be managed pursuant to the applicable rules of arbitration of the ICDR except as otherwise indicated here. Subject to the preceding provisions in this paragraph, the manner in which this limited intervention right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. An intervening party shall be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as determined by the ICDR. An amicus may be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as deemed reasonable by the PROCEDURES OFFICER.

>

> 3. No interim relief that would materially affect an interest of any such amicus to an IRP can be made without allowing such amicus an opportunity to be heard on the requested relief in a manner as determined by the PROCEDURES OFFICER.

>

> 4. In handling all matters of intervention, and without limitation to other obligations under the bylaws, the PROCEDURES OFFICER shall endeavor to adhere to the provisions of Bylaw section 4.3(s) to the extent possible while maintaining fundamental fairness.

>

> Thank you and best regards,

> David

>

> David McAuley

> Sr International Policy & Business Development Manager

> Verisign Inc.

> Contact Information Redacted

>

>

> _____
> IOT mailing list

> [IOT at icann.org](mailto:iot@icann.org)

> <https://mm.icann.org/mailman/listinfo/iot>

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URL:

<http://mm.icann.org/pipermail/iot/attachments/20171003/81c6ff4f/attachment-0001.html>

- Previous message: [\[IOT\] Joinder issue - revised proposal for First reading](#)
 - Next message: [\[IOT\] Joinder issue - revised proposal for First reading](#)
 - **Messages sorted by:** [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)
-

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EXHIBIT 246

[IOT] Joinder, again

McAuley, David Contact Information Redacted

Tue Oct 10 18:57:52 UTC 2017

- Previous message: [\[IOT\] Recordings, DAIRs, Raw Caption Notes for IRP-IOT Meeting #31 - 5 October 2017](#)
- Next message: [\[IOT\] IRP IOT Meeting Thursday, Oct. 19, 19:00 UTC](#)
- Messages sorted by: [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)

Dear members of the IRP IOT:

I propose this as final "Joinder" language - it takes a stab at addressing Malcolm's question/concern<<http://mm.icann.org/pipermail/iot/2017-October/000316.html>> of October 3rd. (Only this latest change is in red and underlined.)

Please consider - if there are no comments by October 17 then I will propose confirming First Reading at our next meeting (October 19, 19:00 UTC)..

If you have a concern please describe it and propose alternative language.

Thank you and best regards,
David

David McAuley

Sr International Policy & Business Development Manager

Verisign Inc.

Contact Information Redacted

SUGGESTED JOINDER LANGUAGE:

1. That only those persons/entities who participated in the underlying proceeding as a "party" receive notice from a claimant (in IRPs under Bylaw section 4.3(b) (iii) (A) (3)) of the full Notice of IRP and Request for IRP (including copies of all related, filed documents) contemporaneously with the

claimant serving those documents on ICANN.

2. That, subject to the following sentence, all such parties have a right to intervene in the IRP. Notwithstanding the foregoing, a person or entity seeking to intervene in an IRP can only be granted "party" status if (1) that person or entity demonstrates that it meets the standing requirement to be a Claimant under the IRP at Section 4.3(b) of the ICANN Bylaws and as Defined within these Supplemental Procedures, or (2) that person or entity demonstrates that it has a material interest at stake directly relating to the injury or harm that is claimed by the Claimant to have been directly and causally connected to the alleged violation at issue in the Dispute. The timing and other aspects of intervention shall be managed pursuant to the applicable rules of arbitration of the ICDR except as otherwise indicated here. Subject to the preceding provisions in this paragraph, the manner in which this limited intervention right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. An intervening party shall be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as determined by the ICDR. An amicus may be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as deemed reasonable by the PROCEDURES OFFICER.

3. No interim relief that would materially affect an interest of any such amicus to an IRP can be made without allowing such amicus an opportunity to be heard on the requested relief in a manner as determined by the PROCEDURES OFFICER.

4. In handling all matters of intervention, and without limitation to other obligations under the bylaws, the PROCEDURES OFFICER shall endeavor to adhere to the provisions of Bylaw section 4.3(s) to the extent possible while maintaining fundamental fairness.

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- Previous message: [\[IOT\] Recordings, DAIRs, Raw Caption Notes for IRP-IOT Meeting #31 - 5 October 2017](#)
 - Next message: [\[IOT\] IRP IOT Meeting Thursday, Oct. 19, 19:00 UTC](#)
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EXHIBIT 247

[IOT] IRP IOT – moving toward second reading of JOINDER issue

McAuley, David Contact Information Redacted

Mon Oct 23 12:58:56 UTC 2017

- Previous message: [\[IOT\] IRP IOT plans for coming weeks](#)
- Next message: [\[IOT\] IRP IOT – moving toward second reading of JOINDER issue](#)
- **Messages sorted by:** [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)

Dear members of the IRP IOT:

Here below is suggested language for second reading on the Joinder issue we have been discussing.

I have deleted the word "endeavor" in paragraph #4 as requested by Kavouss but have maintained all-caps for PROCEDURES OFFICER inasmuch as that is how it appears in the draft rules.

Please consider and agree on list or on next call (Nov. 14 at 19:00 UTC), or if you suggest a change please provide specific language and rationale.

SUGGESTED JOINDER LANGUAGE:

1. That only those persons/entities who participated in the underlying proceeding as a "party" receive notice from a claimant (in IRPs under Bylaw section 4.3(b)(iii)(A)(3)) of the full Notice of IRP and Request for IRP (including copies of all related, filed documents) contemporaneously with the claimant serving those documents on ICANN.

2. That, subject to the following sentence, all such parties have a right to intervene in the IRP. Notwithstanding the foregoing, a person or entity seeking to intervene in an IRP can only be granted "party" status if (1) that person or entity demonstrates that it meets the standing requirement to be a Claimant under the IRP at Section 4.3(b) of the ICANN Bylaws and as Defined within these Supplemental Procedures, or (2) that person or entity demonstrates that it has a material interest at stake directly relating to the injury or harm that is claimed by the Claimant to have been directly and causally connected to the alleged violation at issue in the Dispute. The timing and other aspects of intervention shall be managed pursuant to the applicable rules of arbitration of the ICDR except as otherwise indicated here. Subject to the preceding provisions in this paragraph, the manner in which this limited intervention right shall be

exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. An intervening party shall be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as determined by the ICDR. An amicus may be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as deemed reasonable by the PROCEDURES OFFICER.

3. No interim relief that would materially affect an interest of any such amicus to an IRP can be made without allowing such amicus an opportunity to be heard on the requested relief in a manner as determined by the PROCEDURES OFFICER.

4. In handling all matters of intervention, and without limitation to other obligations under the bylaws, the PROCEDURES OFFICER shall adhere to the provisions of Bylaw section 4.3(s) to the extent possible while maintaining fundamental fairness.

Best regards,

David

David McAuley

Sr International Policy & Business Development Manager

Verisign Inc.

Contact Information Redacted

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<<http://mm.icann.org/pipermail/iot/attachments/20171023/284ac720/attachment.html>>

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- Previous message: [\[IOT\] IRP IOT plans for coming weeks](#)
 - Next message: [\[IOT\] IRP IOT – moving toward second reading of JOINDER issue](#)
 - **Messages sorted by:** [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)

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EXHIBIT 248

[IOT] Proposed Set of INTERIM Supplementary Procedures

Samantha Eisner [Samantha.Eisner at icann.org](mailto:Samantha.Eisner@icann.org)

Tue May 8 22:30:27 UTC 2018

- Previous message: [\[IOT\] Recordings, DAIRs, Raw Caption Notes for IRP-IOT Meeting #37 - 3 May 2018](#)
- Next message: [\[IOT\] IOT meeting tomorrow \(Thursday, May 10\) at 19:00 UTC](#)
- **Messages sorted by:** [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)

Dear members of the IOT,

As discussed on last week's call, attached please find a draft proposed set of Interim Supplementary Procedures for your consideration. The purpose of this document is to see if we can quickly reach agreement on an interim set of supplementary procedures that could be put in place in the event that we have an IRP filed prior to the time that there is a completed set of Supplementary Procedures available. Currently, the Supplementary Procedures that are in force are those that correspond to the old Bylaws, and we think that it's important to have a set in place that moves closer to the intent of the new Bylaws, while we understand there is still time needed to get to a final set.

This document is presented in redline from what was posted for public comment in October 2016, and we have provided annotations to where modifications to that document come from, or comments to explain why things have been included/may not be appropriate to include. NOTHING that is included in this set of Interim Supplementary Procedures is intended to preclude a different procedure being included in the final version concluded through the IOT process. You will see that the beginning of the document sets out some principles that guided the development of this interim set.

>From this, I would recommend that in parallel to seeing if we can move this interim set forward, that we get Sidley working on the intervention and joinder section for a final set of rules, as attention is needed to that section in order to have enough detail to make it ready. In addition, I recommend that the IOT have some additional conversation about the bounds of the translation item that was discussed earlier in our process, as this appears to need more detail before it can be implemented.

Please let me know if you have any questions that might guide your review of this document.

Best,

Sam

-

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USA

Direct Dial: +1 310 578 8631

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Type: application/vnd.openxmlformats-officedocument.wordprocessingml.document

Size: 59123 bytes

Desc: 8-May-2018-Draft-INTERIM-Supplementary-Procedures-IOT IRP.docx

URL: <<http://mm.icann.org/pipermail/iot/attachments/20180508/d9f38bd6/8-May-2018-Draft-INTERIM-Supplementary-Procedures-IOTIRP-0001.docx>>

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- Previous message: [\[IOT\] Recordings, DAIRs, Raw Caption Notes for IRP-IOT Meeting #37 - 3 May 2018](#)
 - Next message: [\[IOT\] IOT meeting tomorrow \(Thursday, May 10\) at 19:00 UTC](#)
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EXHIBIT 249

 KeyCite to Yeow Fag Negate Treatment
Decided to Extend by (NG) v. U.S., Fed.C., August 20, 200

787 F.2d 1569

United States Court of Appeals,
Federal Circuit.

Kenneth L. WRONKE, Appellee,

v.

John A. MARSH, as Secretary
of the Army, et al., Appellants.

Appeal No. 85-2629.

|

April 4, 1986.

Synopsis

Discharged army reserve officer brought action challenging discharge. The United States District Court for the Central District of Illinois, Harold Albert Baker, Chief Judge, 603 F.Supp. 407, granted relief and Army appealed. Following transfer from the Seventh Circuit, 767 F.2d 354, the Court of Appeals, Markey, Chief Judge, held that: (1) army regulation precluding discharge on the basis of conduct which has been the subject of a judicial proceeding resulting in acquittal did not bind Army to determination of National Transportation Safety Board, which found that officer had not engaged in intentional misrepresentation in submitting false documents in connection with application for civilian pilot's license, and (2) NTSB proceeding did not estop the Army from discharging the reserve officer.

Reversed and remanded.

West Headnotes (5)

[1] Armed Services

Grounds in General

Army regulation providing that no officer will be considered for elimination from the reserve because of conduct that has been the subject of "judicial proceedings resulting in an acquittal based on the merits of the case or in an action having the same effect" refers to judicial proceedings resulting in an acquittal based on the merits of the case or judicial proceedings

resulting in an action having the same effect as an acquittal based on the merits of the case; it does not refer to judicial proceedings resulting in an acquittal based on the merits of the case or an action having the same effect as judicial proceedings resulting in an acquittal based on the merits of the case.

Cases that cite this headnote

[2] Armed Services

Proceedings in General

In determining whether to discharge army reserve officer because of his having submitted false documents to obtain a civilian pilot's license, Army was not bound by view of the National Transportation Safety Board that the submission had not been the result of a deliberate intent to mislead.

4 Cases that cite this headnote

[3] Armed Services

Judicial Intervention or Review

Army's interpretation of regulation dealing with dismissal of army reserve officer was entitled to judicial deference.

14 Cases that cite this headnote

[4] Armed Services

Correction of Records

Reserve officer challenging discharge from army reserve was bound by determination of the Army Board for Correction of Military Records that he was unsuitable, unless he established that the determination was arbitrary, capricious, contrary to law, or unsupported by substantial evidence.

147 Cases that cite this headnote

[5] Judgment

Special Tribunals, Boards, and Officers Exercising Judicial Functions

National Transportation Safety Board proceeding at which Army was not fully represented and which had nothing to do with

reserve officer's suitability as an army officer could not constitute an estoppel precluding the Army from discharging the officer on the basis of conduct which was the subject of the NTSB proceeding.

[6 Cases that cite this headnote](#)

Attorneys and Law Firms

*1570 J. Steven Beckett, of Reno, O'Byrne & Kepley, Champaign, Ill., argued, for appellee.

John S. Groat, of the Commercial Litigation Branch, Civ. Div., Dept. of Justice, Washington, D.C., argued, for appellants. With him on brief were Richard K. Willard, Acting Asst. Atty. Gen., David M. Cohen, Director, Thomas W. Petersen, Asst. Director. Of counsel were Major Charles W. Beardall and Lt. Col. Joyce E. Peters, of the Office of the Judge Advocate Gen., Dept. of the Army.

Before MARKEY, Chief Judge, and SMITH and NEWMAN, Circuit Judges.

Opinion

MARKEY, Chief Judge.

Appeal from a judgment of the District Court for the Central District of Illinois, vacating the discharge from the United States Army Reserve (USAR) of Kenneth L. Wronke (Wronke), ordering him reinstated with all rank and privileges to which he would have been entitled had he not been discharged, and awarding him back pay not to exceed \$9,999.99. 603 F.Supp. 407 (C.D.Ill.1985). We reverse.

Background

In October 1977, Wronke, then a non-rated commissioned officer (Major) in the USAR, applied to the Federal Aviation Administration (FAA) for a civilian pilot's Certificate. Applying under a regulation that waived a flight test for rated military pilots, he presented an Army Flight Record indicating that he had been a rated Army Aviator since November 1967 and had flown 10 hours with his Reserve unit during the preceding month. He also furnished an order showing that he had been placed

on flight status by his Reserve unit. Based on those documents, he was given merely a written test by the FAA and was issued a temporary Airman Certificate.

In May 1978, the FAA requested Wronke's USAR Commander to verify his flying status. After checking Wronke's records, the Commander advised the FAA officials that Wronke had never been a rated Army Aviator.

*1571 The FAA issued an emergency revocation of Wronke's Certificate, and Wronke obtained an FAA hearing in September 1978. Wronke testified that he was placed on flight status in 1967 while he was in Vietnam, but never saw the order; that his military records were incomplete; that the 10 hours flown with his Reserve unit were flown partly in his own aircraft. The FAA's Administrative Law Judge concluded that he was not a military rated pilot, and did not qualify for a Certificate based on such qualification. The ALJ permanently revoked his Certificate and placed a one-year ban on his making further application.

Wronke appealed the FAA revocation of his certificate to the National Transportation Safety Board (NTSB), which affirmed the revocation on November 13, 1978. In its opinion, NTSB pointed out:

- (a) Wronke had obtained the Certificate on the basis of military piloting record data and therefore without a flight test under § 61.73 of the Federal Aviation Regulations, the regulation governing applications by *rated military pilots*.
- (b) Neither of the two military aircraft he claimed to have flown were in service during the period involved.
- (c) Safety in the air and the public interest required affirmation of the revocation.
- (d) Though Wronke submitted documents showing his rating in fixed wing aircraft on November 28, 1967 and in rotary wing aircraft on April 16, 1976, and an invalid Special Order confirming his "aviator profile", Wronke is not a military rated pilot.

NTSB modified the one-year ban on re-applying, however, saying:

In the absence of any probative evidence that respondent's application was based on a deliberate

intent to mislead the FAA, ⁴ we are not persuaded that barring a new application for a full year would serve any meaningful safety purpose. Furthermore, respondent's extensive use of the privileges of an airman certificate would aggravate the effect of a full year's grounding. ⁵ We also note that the Administrator's counsel, both during interrogation at the hearing and in his reply brief, has indicated a willingness to shorten the 1 year period of ineligibility. In view of the above circumstances, we believe respondent should be allowed to re-apply for appropriate airman certification, in the standard manner rather than under section 61.73, and we urge the Administrator to consider any such application submitted by respondent following issuance of this order.

14 Rather, it appears the application was more the result of a lack of understanding of pertinent FAA and military standards.

15 Respondent is a fixed base operator, and also flies frequently in his occupation as a veterinarian and in his continuing affiliation with the military reserve.

On November 5, 1979, Wronke was recommended for discharge from the USAR under Army Regulation (AR) 135-175 for conduct unbecoming an officer, falsification of official military records, and fraudulent preparation of the two documents he had submitted to the FAA.

On January 10, 1981, Wronke, with counsel, appeared before a Board of Officers (Elimination Board) to show cause why he should not be discharged. Wronke testified that he had served in Korea with the Navy as an underwater demolition technician; that after he was commissioned, he served in Vietnam, and was attached to the 184th Recon Airplane Company; that his duty was Veterinarian; that he did fly while attached to the 184th; that he flew during the Tet offensive when they were caught unaware and they needed him; that he flew 230 missions in the OH 13 aircraft; that he never saw orders designating him a pilot; that he did not receive flight pay. Other military personnel testified that a Flight Record (DA Form 759, one of Wronke's fraudulently prepared documents) had not been prepared on Wronke; that he was not a rated military pilot; that it would have been improper to prepare a Flight Record for him; and that Wronke's records do not show that he was ever attached *1572 to the 184th Recon Airplane Company.

The Board of Officers unanimously found that Wronke had engaged in conduct unbecoming an officer when he: (1) intentionally submitted a false official statement for the purpose of misrepresentation to the FAA; (2) supplied inaccurate information to persons in his organization for use in preparation of orders; (3) failed in his obligation as an officer to recognize and correct official records of his qualifications; (4) adopted records containing misleading and inaccurate information and presented them to a government body for purposes of obtaining a pilot's license on the basis of a non-existent military pilot rating. The board recommended Wronke's general discharge under honorable conditions. Wronke received that discharge, to be effective June 14, 1982.

On July 2, 1982, Wronke sued in the District Court. That suit was dismissed for failure to exhaust military remedies. Wronke appealed to the Court of Appeals for the Seventh Circuit, which affirmed the dismissal.

While the appeal was pending in the Seventh Circuit, Wronke applied to the Army Board for Correction of Military Records (ABCMR), seeking to vacate his discharge and relying primarily on the NTSB's statement that his "application was more the result of a lack of understanding of pertinent FAA and military standards." In April 1983, the ABCMR found Wronke's conduct unbecoming that of an officer, held that the NTSB's statement was not binding on the Army, and, after reviewing the entire record, refused to vacate Wronke's discharge.

On August 11, 1983, Wronke sued again in the district court, where the parties lodged cross motions for summary judgment.

The District Court's Decision

The district court rested its decision on two foundations. The first was this part of NTSB's statement about the one-year re-application restriction:

In the absence of any probative evidence that respondent's application was based on a deliberate intent to mislead the FAA, ⁴ we are not persuaded that barring a new application for a full year would serve any meaningful safety purpose.

14 Rather, it appears the application was more the result of a lack of understanding of pertinent FAA and military standards.^[1]

1 The district court may not have had called to its attention that NTSB was dealing only with the one year restriction, that Wronke needed a Certificate as a fixed base operator, and that FAA's counsel had recommended lifting the restriction, and that the restriction was deemed unnecessary as a *safety* measure. The gratuitous statement that Wronke did not intend to mislead when he submitted falsified records to get a Certificate without a flight test (when no reason other than intent to mislead, such as accident, was presented) was uncritically accepted, as was the notion that a field grade officer of many years service did not understand military standards.

The second foundation was the district court's interpretation of paragraph 2-5(a) of AR 135-175:

2-5(a) No officer will be considered for elimination for the reasons in paragraph 2-11 or 2-12 because of conduct that has been the subject of judicial proceedings resulting in an acquittal based on the merits of the case or in an action having the same effect.^[2]

2 Wronke was eliminated for violations of paragraphs 2 12(d) and 2 12(o) of Section II of AR 135 175, "REASONS WHICH REQUIRE ELIMINATION :

2 12. *Moral or professional dereliction.* While not all inclusive, existence of one of the following or similar conditions, unless successfully rebutted, authorizes elimination of an officer due to moral or professional dereliction. Officers discharged for any of the following reasons may be furnished an Honorable, General, or Other Than Honorable Discharge Certificate:

(d) Intentional omission or misstatement of facts in official statements or records, for the purpose of misrepresentation.

(o) Conduct unbecoming an officer.

(p) When one or more of the reasons in *a* through *n* above is alleged and the circumstances on which they were based indicated that the reason in *o* above also is involved, it will constitute additional reason for requiring elimination.

*1573 The district court recognized the Army's interpretation of paragraph 2-5(a):

The defendant alleges that the NTSB proceedings were not judicial proceedings, and they were also not "an action having the same effect" under the provisions of AR 135-175, Para. 2-5(a). Defendants opine that the thrust of the provision is to prevent an elimination action against an officer who has been successful in judicial proceedings whether as the result of an acquittal or of some other action, such as a dismissal at trial on certain motions that have the same effect.

603 F.Supp. at 412. The court also recognized the established rules governing judicial review of the Army's interpretation of its own regulations:

Where the meaning of a regulation is in question, the Army's own interpretation of its regulations must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation. (Citations omitted.) If the applicable regulations are interpreted by the Army in a reasonable manner, any charge of procedural irregularity must fail even though the petitioner may present another reasonable interpretation of the regulations. (Citation omitted.) Thus where a military regulation is susceptible to equally reasonable constructions, a court may not substitute an alternative interpretation for the interpretation of the military service. (Citation omitted.)

Nonetheless, the court went on to say that the Army's interpretation was unreasonable, plainly erroneous, inconsistent with the regulation and untenable.

Substituting its own interpretation, the court held that NTSB's statement was binding on the Army:

The court, however, does not find the Army's interpretation of AR 135-175 Para. 2-5(a) to be a reasonable interpretation and the court instead finds that the Army's interpretation is plainly erroneous and inconsistent with the wording of the regulation. The court has examined the opinion and order of the NTSB and finds it to be "an action having the same effect" as a "judicial proceeding resulting in an acquittal based on the merits". The court finds the defendants' reading of AR 135-175 Para. 2-5(a) to be untenable. It is apparent to the court that the "action having the same effect" phrase in the paragraph refers to proceedings with results that are similar to judicial proceedings resulting in an acquittal based on the merits. The opinion and order of the NTSB is such an action and therefore any finding by that body would be binding upon the Elimination Board and the ABCMR under Para. 2-5(a).

In the NTSB proceedings it was found that there was an absence of any probative evidence that Wronke's application to the FAA for a commercial pilot license was based on any deliberate intent to mislead the FAA and was more the result of the lack of an understanding of pertinent FAA and military standards. The charges against plaintiff Wronke in the Board's elimination hearing, whose decision to eliminate the plaintiff was subsequently approved by the ABCMR, were based on AR 135-175 Paras. 2-12(d) and 2-12(o). Paragraph 2-12(d) states that an officer may be eliminated from the Army Reserves where he has committed an "intentional omission or misstatement of facts in official statements or records, for the purpose of misrepresentation." The finding by the NTSB, that there was no probative evidence that Wronke's application was based on a deliberate intent to mislead, bars under AR 135-175 Para. 2-5(a) a finding that Wronke "intentionally omitted or misstated facts and official statements or records for the purpose of misrepresentation." AR 135-175 Para. 2-5(a) operates to estop a finding by the Elimination Board and the ABCMR that Wronke intentionally *1574 omitted or misstated facts in his application for a commercial pilot's license for the purpose of misrepresentation of his past military flying record.

Id. at 412-13. The district court concluded the opinion accompanying its order with:

As the substance of the Elimination Board's finding of conduct unbecoming an officer relied on the determination that plaintiff Wronke had deliberately intended to mislead the FAA, the findings of the NTSB also operate, pursuant to AR 135-175 Para. 2-5(a), to estop the Elimination Board's determination that Wronke had committed conduct unbecoming an officer.

The court rejected the Army's argument that the paragraph 2-12(o) charge of conduct unbecoming an officer was based on more than the paragraph 2-12(d) charge, saying the 2-12(o) charge was also based on Wronke's submission of a fraudulent flight record for the purpose of misrepresenting himself to the FAA.³ *Id.* at 413.

³ The court did not discuss paragraph 2-12(p), *supra*, note 1. Nor did it refer to findings (2) and (3) of the Board of Officers, *supra*.

The district court then granted Wronke's motion for summary judgment.

The Appeal

The Army appealed to the Court of Appeals for the Seventh Circuit. Realizing that Wronke had limited damages to bring his case within the Tucker Act, 28 U.S.C. § 1346(a)(2), the Army moved for transfer of the appeal to this court. Over Wronke's objection, the Court of Appeals granted the motion and transferred the appeal to this court under 28 U.S.C. § 1631. *Wronke v. Marsh*, 767 F.2d 354 (7th Cir.1985).

ISSUE

Whether the district court erred in granting Wronke's motion for summary judgment.

(1) Introduction

A military officer's commission states that the President reposes "special trust and confidence" in the qualities of the person commissioned. Military commanders must make numerous decisions in reliance on information and records supplied by subordinate officers. Decisions made on false information lose not just battles, but lives.

In the present case, a military reserve officer indisputably falsified official military records. He was discharged. The district court ordered the Army to restore his commission in the belief that the Army had violated its own regulation, as the court interpreted that regulation. The case thus turns on the correctness of the court's interpretation of the regulation.

OPINION

(1) Paragraph 2-5(a)

(a) English Grammar

As in the interpretation of statutes, *Board of Governors v. Dimension Financial Corp.*, 474 U.S. 361, ---, 106 S.Ct. 681, 686, 88 L.Ed.2d 691 (1986), we begin, as we must, with the plain language of the regulation. *General Electric Co. v. United States*, 610 F.2d 730, 734, 221 Ct.Cl. 771 (1979). Neither the district court nor Wronke has anywhere stated that that language is unclear or ambiguous, and it is neither. Nor has either the district court or Wronke suggested any basis or need for looking outside the regulation for clarification. Neither has asserted that the regulation was contrary to statute, or was issued without authority, or that the Army's interpretation is contrary to congressional intent.

The district court simply misread paragraph 2-5(a), the key phrase of which it saw as "judicial proceedings resulting in an acquittal based on the merits of the case or in an action having the same effect." Under the standard rules of grammar, see Leggett, Mead & Charvat, *Prentice-Hall Handbook for Writers* (6th ed. 1974); S. Baker, *The Complete Stylist and Hand *1575 book* (3rd ed. 1984), the noun "proceedings" is restricted by the adjective "judicial", and the entire phrase must be read as limited to

judicial proceedings. See C.D. Sands, *Sutherland Statutory Construction*, § 47.17 (4th ed. 1973).

The present participle "resulting" relates to "judicial proceedings" and is followed by two modifying paralleled prepositional phrases "in an acquittal" and "in an action", separated by the disjunctive "or". Those elements must therefore be read as "resulting in an acquittal or resulting in an action".

The phrase "based on the merits of the case" modifies "acquittal", and "having the same effect" modifies "action". Because "acquittal" and "action" are interchangeable objects of the preposition "in", the wording, though it would be more cumbersome, could just as well have been "resulting in an action having the same effect as an acquittal or in an acquittal." The rules of English grammar require that "the same effect" be read as "the same effect as an acquittal".

[1] With otherwise unnecessary words inserted for understanding, therefore, the entire phrase must under the rules of English grammar be read as "judicial proceedings resulting in an acquittal based on the merits of the case or *judicial proceedings resulting in an action having the same effect as an acquittal based on the merits of the case*".

Only one type of "proceedings" is present in paragraph 2-5(a), and those are "judicial" proceedings. Even then, only those judicial proceedings that have one of two specified results are applicable: those judicial proceedings that result in an acquittal on the merits; and those judicial proceedings that result in an action having the same effect as an acquittal on the merits.

In constructing its interpretation, the district court said it *found* that the "opinion and order of the NTSB" is "an action having the same effect", and that "an action having the same effect" refers to "proceedings with results that are similar to judicial proceedings resulting in an acquittal based on the merits". As findings, interpretive or otherwise, those findings are clearly erroneous. As an interpretation, they amount to error as a matter of law. First, those findings/interpretation totally disregard the order of the paragraph's wording. Second, they totally disregard the preposition "in" before "an action". Third, they create without warrant a second "proceedings" noun and inject it into a single sentence dealing only with *judicial proceedings*.

The formulation envisaged by district court would have the key phrase of paragraph 2-5(a) read: “judicial proceedings resulting in an acquittal based on the merits of the case or an action having the same effect as judicial proceedings resulting in an acquittal based on the merits of the case”. The difficulty is two-fold. First, neither English usage, nor fairness to the drafter of the regulation, can countenance disregard of the second preposition “in” and its tie to “judicial proceedings resulting”. Second, the court’s formulation will not fit the rest of the paragraph, in which “judicial proceedings” is preceded by “conduct that has been the subject of”. It is simply impermissible to re-write the single sentence constituting paragraph 2-5(a) by replacing the second “in” with “the subject of”.

It would, of course, have been possible for the Army to have written paragraph 2-5(a) as:

No officer will be considered for elimination for the reasons in paragraph 2-11 or 2-12 because of conduct that has been the subject of judicial proceedings resulting in an acquittal based on the merits of the case, or that has been the subject of other proceedings with results that are similar to judicial proceedings resulting in an acquittal based on the merits.

But the Army did not write its regulation that way. On the contrary, it wrote a single sentence, easily understood as standard English usage.

***1576** No warrant, no reason, no rule of grammatical construction, and no legislative or regulatory history supports the reading of that sentence adopted by the district court, and the court gave none in its opinion. Nor did the court supply any textual or legal analysis supporting its reading of the regulation.

[2] On the basis of English grammar, the district court erred in its reading of paragraph 2-5(a) of AR 135-175. It based its holding that the Army was bound by NTSB’s view on that erroneous reading and that holding must therefore be reversed.

(b) *The Army’s Interpretation*

[3] The Army interpreted paragraph 2-5(a) of its own regulation as limited to judicial proceedings. That interpretation was entitled to judicial deference. *United States v. Clark*, 454 U.S. 555, 565, 102 S.Ct. 805, 811, 70 L.Ed.2d 768 (1982). That deference was especially appropriate here, where the Army was determining the suitability of a commissioned officer. *Maier v. Orr*, 754 F.2d 973, 984 (Fed.Cir.1984) (fitness for duty); see *Orloff v. Willoughby*, 345 U.S. 83, 93, 73 S.Ct. 534, 539, 97 L.Ed. 842 (1953) (judges not given the task of running the Army). In *Wallace v. Chappell*, 462 U.S. 296, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1982), the Supreme Court observed that “the special relationships that define military life have ‘supported the military establishment’s broad power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.’ ” *Id.* at 305, 103 S.Ct. at 2367 (citation omitted); see *Williams v. Secretary of the Navy*, 787 F.2d 552, --- - ---, (Fed.Cir.1986). In light of that “broad power,” the district court should have afforded the Army’s interpretation of AR 135-175 great deference in a matter as sensitive as the continued suitability of Wronke to serve as a commissioned officer. On this record, the district court erred as a matter of law in refusing to grant the deference normally due the Army’s interpretation of its own regulation.

(c) *The ABCMR Determination*

[4] Under the precedent in this court, Wronke was bound by the ABCMR’s determination that he was unsuitable, unless he established that that determination was arbitrary, capricious, contrary to law, or unsupported by substantial evidence, *Heisig v. United States*, 719 F.2d 1153, 1156 (Fed.Cir.1983); *Sanders v. United States*, 594 F.2d 804, 811, 219 Ct.Cl. 285 (1979), and unless he did so by “cogent and clearly convincing evidence.” *Dorl v. United States*, 200 Ct.Cl. 626, 633, cert. denied, 414 U.S. 1032, 94 S.Ct. 461, 38 L.Ed.2d 323 (1973). Wronke made no effort to meet that burden and the district court did not discuss it.

(d) *Wronke's Presentation on Appeal*

[5] Ignoring the district court's total focus on paragraph 2-5(a), Wronke attempts to buttress the judgment appealed from with general assertions of collateral estoppel. In arguing that the Army was estopped from considering his suitability, Wronke presumes a non-existent relationship between the NTSB's parenthetical remarks about his intent before the FAA and the charges brought against him by the Army, which included falsification of Army records. The NTSB never addressed Wronke's intent in falsifying those Army records, nor, of course, did it address his conduct as an officer or his fitness to continue serving as one. The NTSB proceeding, at which the Army was not fully represented, and which had nothing to do with Wronke's suitability as an Army officer could not possibly constitute an estoppel requiring the Army to retain Wronke.

Wronke offers no textual or legal arguments in support of the district court's interpretation of paragraph 2-5(a), but is content to attack the Army's interpretation as "highly technical and purportedly grammatical" and as merely

"trying to move the words and phrases." That attack is totally lacking in merit.

*1577 Wronke's arguments for district court jurisdiction on a basis other than 28 U.S.C. § 1346(a)(2) are simply wrong. See *Lee v. Thornton*, 420 U.S. 139, 140, 95 S.Ct. 853, 854, 43 L.Ed.2d 85 (1975); *Sherwood v. United States*, 312 U.S. 584, 591, 61 S.Ct. 767, 772, 85 L.Ed. 1058 (1941).

CONCLUSION

The district court erred as a matter of law in interpreting paragraph 2-5(a) of AR 135-175 as not limited to judicial proceedings. Its judgment must therefore be reversed. Because the appeal is from a summary judgment, the case must be remanded for such further proceedings not inconsistent with this opinion as the district court may deem necessary.

REVERSED and REMANDED.

All Citations

787 F.2d 1569

EXHIBIT 250

 KeyCite by [How Far Negative Treatment](#)
 Distinguished by [Hornbeck Offshore Services, L.L.C. v. Saazar](#),
 E.D.La., September 1, 2010

612 F.3d 822

United States Court of Appeals,
 Fifth Circuit.

CONOCOPHILLIPS CO.; Anadarko Petroleum
 Corp.; Surfrider Foundation; Massachusetts
 Public Interest Protection Research Group;
 Soundkeeper, Inc.; Delaware Riverkeeper Network;
 American Littoral Society; [Raritan Baykeeper,
 Inc.](#), dba NY/NJ Baykeeper; Save the Bay—
 People for Narragansett Bay; [Friends of Casco
 Bay](#); Santa Monica Baykeeper, Petitioners,

v.

[UNITED STATES ENVIRONMENTAL
 PROTECTION AGENCY](#); Stephen L.
 Johnson, Administrator, [United States
 Environmental Protection Agency](#), in
 His Official Capacity as Administrator
 of the United States EPA, Respondent,
 American Petroleum Institute,
 Respondent—Intervenor.

No. 06–60662.

July 23, 2010.

As Revised Aug. 6, 2010.

Synopsis

Background: Oil companies and environmental organizations filed petitions challenges to an Environmental Protection Agency (EPA) rule regulating the use of cooling water intake structures (CWIS) for both existing and new offshore oil and gas extraction facilities. After consolidation by a multi-district litigation (MDL) panel, environmental organization and the EPA jointly moved voluntarily to remand the existing-facilities portion of the rule for reconsideration.

Holdings: The Court of Appeals, [Wiener](#), Circuit Judge, held that:

[1] voluntary remand of portion of rule applicable to existing offshore oil and gas extraction facilities for reconsideration was warranted;

[2] “economic achievability” test, asserted during proceeding, was not sufficiently different from the “cost-benefit” test announced during rule making that it required notice under Administrative Procedure Act (APA); and

[3] portion of rule applicable to new offshore oil and gas extraction facilities was valid.

Motion granted; affirmed in part, and remanded in part.

E. Grady Jolly, Circuit Judge, concurred in the result.

West Headnotes (8)

[1] Environmental Law

 Water pollution

Court has jurisdiction over challenges to an agency's action that result in “other limitations” under the Clean Water Act (CWA). Federal Water Pollution Control Act, § 509(b)(1)(E), 33 U.S.C.A. § 1369(b)(1)(E).

[Cases that cite this headnote](#)

[2] Environmental Law

 Particular limitations and guidelines

Coolant water intake regulations are “other limitations” under the Clean Water Act (CWA). Federal Water Pollution Control Act, § 509(b)(1)(E), 33 U.S.C.A. § 1369(b)(1)(E).

[Cases that cite this headnote](#)

[3] Administrative Law and Procedure

 Power and discretion to order rehearing

Administrative Law and Procedure

 Time for application or order for rehearing

Embedded in an agency's power to make a decision is its power to reconsider that

decision; however, agency may not reconsider its own decision if to do so would be arbitrary, capricious, or an abuse of discretion, and reconsideration also must occur within a reasonable time after the decision being reconsidered was made, and notice of the agency's intent to reconsider must be given to the parties.

[9 Cases that cite this headnote](#)

[4] Environmental Law

 [Remand to administrative agency](#)

Voluntary remand of Environmental Protection Agency (EPA) Phase III rule regulating the use of cooling water intake structures (CWIS) for existing offshore oil and gas extraction facilities for reconsideration was warranted where Supreme Court had remanded the Phase II rule for existing facilities to the EPA; it was imminently reasonable to address together the substantial similarities of fact between aspect of the Phase II rule and the Phase III rule, and remand would work no prejudice to any affected entity because it merely maintained the status quo for existing facility regulation. Federal Water Pollution Control Act, § 316(b), [33 U.S.C.A. § 1326\(b\)](#).

[2 Cases that cite this headnote](#)

[5] Environmental Law

 [Notice and comment](#)

Environmental Protection Agency's (EPA) "economic achievability" test, asserted during appeal as justification for its statutory authority for final rule regulating the use of cooling water intake structures (CWIS) for new offshore oil and gas extraction facilities, was not sufficiently different from the "cost-benefit" test articulated during the rulemaking process as justification to have deprived interested parties of the notice required by the Administrative Procedure Act (APA); agency interpreted its statutory authority for the rule as authorizing a cost-benefit approach to CWIS regulation, but did not consider

itself bound to do so. [5 U.S.C.A. § 553\(b, c\)](#); Federal Water Pollution Control Act, § 316, [33 U.S.C.A. § 1326\(b\)](#).

[2 Cases that cite this headnote](#)

[6] Administrative Law and Procedure

 [Notice and comment, sufficiency](#)

An agency's final rule and the proposed rule need not be identical; final rule must be a logical outgrowth of the rule making process, and courts must proceed with caution before deeming a final rule too attenuated from the proposed rule, lest court supplant the agency's role in the nation's regulatory scheme. [5 U.S.C.A. § 553\(b, c\)](#).

[Cases that cite this headnote](#)

[7] Environmental Law

 [Particular limitations and guidelines](#)

Environmental Protection Agency (EPA) rule regulating the use of cooling water intake structures (CWIS) for new offshore oil and gas extraction facilities was substantially supported by the record and was rationally related to the statutory purpose of Clean Water Act (CWA); EPA's failure to estimate benefits for specific new facility locations did not render the process arbitrary or capricious and EPA's reliance on the SEAMAP (Southeast Area Monitoring and Assessment Program) data was not arbitrary and capricious. Federal Water Pollution Control Act, § 316(b), [33 U.S.C.A. § 1326\(b\)](#).

[1 Cases that cite this headnote](#)

[8] Statutes

 [Conjunctive and disjunctive words](#)

For statutory construction purposes of, nouns joined by coordinating conjunctions are usually treated as a single, compounded unit, and a postmodifying prepositional phrase is most naturally read to modify that single unit.

[2 Cases that cite this headnote](#)

Attorneys and Law Firms

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Frederic P. Andes, Barnes & Thornburg, L.L.P., Chicago, IL, for American Petroleum Institute.

Charles Craig Caldart, Nat. Environmental Law Ctr., Seattle, WA, Joshua R. Kratka, Nat. Environmental Law Ctr., Boston, MA, for Environment Massachusetts.

Appeal from the Environmental Protection Agency.

Before JOLLY, *WIENER, BARKSDALE, Circuit Judges.

* Judge Jolly concurs in the result.

Opinion

WIENER, Circuit Judge:

Before us are various consolidated challenges to a Final Rule (the “Rule”) promulgated by the Environmental Protection Agency (the “EPA”) pursuant to § 316(b) of the Clean Water Act (the “Act” or the “CWA”). The Rule regulates the use of cooling water intake structures

(“CWIS”) for both existing and new offshore oil and gas extraction facilities. Originally, the environmental Petitioners (collectively “Riverkeeper”) challenged the Rule as it applies to existing facilities, and the industry Petitioners (collectively “ConocoPhillips”) challenged the Rule as it applies to new facilities. In light of the Supreme Court's decision in *Entergy Co. v. Riverkeeper*, however, Riverkeeper and the EPA have now jointly moved voluntarily to remand the existing-facilities portion of the Rule for reconsideration; Intervenor American Petroleum Institute (“Intervenor API”) opposes remand.

¹ 556 U.S. 208, 129 S.Ct. 1498, 173 L.Ed.2d 369 (2009).

We grant the joint motion to remand and affirm the portion of the Rule that regulates new offshore facilities.

I. Facts and Proceedings

A. Prior Rule Making under Rule 316(b) of the Clean Water Act

Through the use of CWIS, industrial facilities, such as offshore oil and gas extraction vessels (or “rigs”),² withdraw and re-circulate, in the aggregate, billions of gallons of water per day from this country's seas, lakes, and rivers. This enormous intake of water often results in the impingement and entrainment of aquatic biomass. (Impingement is the trapping of an organism against the intake structure, and entrainment is the uptake of an organism into the cooling system itself.)³ Impingement and entrainment can seriously *825 affect not only the population and viability of an aquatic species, but the health of aquatic ecosystems as well.

² For simplicity's sake, we adopt ConocoPhillips's convention of referring to all offshore oil and gas drilling and extraction facilities as “facilities or “rigs, even though only offshore mobile drilling units are called “rigs, as both and fixed and mobile units employ CWIS.

³ *Establishing Requirements for Cooling Water Intake Structures at Phase III Facilities*, 71 Fed.Reg. 35,013 (June 16, 2006) (codified at 40 C.F.R. pts. 9, 122, 123, 124, and 125).

The purpose of the CWA is to restore and maintain the chemical, physical, and biological integrity of the nation's waters.⁴ Recognizing the impact of CWIS on the nation's

marine environments, Congress empowered the EPA to regulate CWIS under the Act. Section 316(b) of the Act regulates CWIS by requiring that:

4 33 U.S.C. § 1251(a).

Any standard established pursuant to section 1311 of this title or section 1316 of this title and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.⁵

5 Codified at 33 U.S.C. § 1326(b).

Despite the seemingly straightforward mandate of § 316(b), successful and effective rule making under this section has been elusive. The first Rule was issued in 1976,⁶ but, before being implemented, it was successfully challenged and remanded by the Fourth Circuit for procedural defects that violated the Administrative Procedures Act (the “APA”).⁷ The EPA withdrew the remanded portions of the Rule, but left intact those unremanded portions that required each National Pollutant Discharge Elimination System (“NPDES”) permitting authority to use its “best professional judgment” to determine the “best technology available” for CWIS regulation.⁸ This regulatory regime remained in effect until 1995, when Riverkeeper and other petitioners obtained a consent decree from the EPA in which it agreed to issue permanent regulations under § 316(b).⁹

6 41 Fed.Reg. 17,387 (Apr. 26, 1976).

7 *Appalachian Power Co. v. Train*, 566 F.2d 451 (4th Cir.1977).

8 71 Fed.Reg. at 35,011.

9 71 Fed.Reg. at 35,011.

Under the consent decree, the EPA agreed to establish three phases of rule making:⁰ Phase I applies to all new CWIS facilities above a particular intake threshold size, except new offshore oil rigs (the regulation of which was postponed until Phase III); Phase II applies to existing large power plants that take in more than 50 million gallons of water a day;² and Phase III (at issue here) regulates (1) existing facilities, including paper, chemical,

petroleum, aluminum, and steel manufacturers, small power plants, and other facilities (collectively “existing facilities”), (2) new offshore oil and gas extraction facilities (“new oil rigs”), (3) new offshore liquefied natural gas facilities, and (4) new seafood processing vessels.³

10 The EPA entered into a Second Amended Consent Decree on November 25, 2002, modifying each phase's deadlines as established in the first Consent Decree. *Id.* at 35,011.

11 [Regulations Addressing Cooling Water Intake Structures for New Facilities](#), 66 Fed.Reg. 65,256 (December 18, 2001) (codified at 40 C.F.R. pts. 9, 122, 123, 124, and 125). The EPA made minor changes to this Final Rule in 67 Fed.Reg. 78,948 (December 26, 2002).

12 [Final Regulations to Establish Requirements for Cooling Water Intake Structures at Phase II Existing Facilities](#), 69 Fed.Reg. 41,576 (July 8, 2004) (codified at 40 C.F.R. pts. 122, 123, 124, and 125).

13 71 Fed.Reg. 35,030.

1. Final Phase I Rule

After the Final Phase I Rule was published, it was challenged by both environmental and industry petitioners. The Second Circuit reviewed the Rule and generally upheld it in *Riverkeeper, Inc. v. *826 EPA (Riverkeeper I)*.⁴ The Phase I Rule established two tracks for regulating CWIS for new facilities. Track I created a uniform, national system for intake and velocity based on closed-cycle cooling technology.⁵ The EPA stated that the closed-cycle system is the “best technology available” for minimizing environmental impact.⁶ Track II allowed the use of any technological approach that “can show, in demonstration study, ‘that the technologies employed will reduce the level of adverse environmental impact ... to a comparable level to that which’ would be achieved applying Track I’s capacity and velocity requirements.”⁷ Track II also allowed facilities to employ “restoration measures” such as restocking, reclamation, and migration barrier removal as part of its “comparable” standard, so as to maintain wildlife levels in affected bodies of water.⁸

14 358 F.3d 174 (2d Cir.2004).

15 *Id.* at 182 83.

16 *Id.* at 183.

17 *Id.* (quoting 40 C.F.R. § 125.84(d)(1)).

18 *Id.*

Although the Second Circuit upheld most of the Phase I Rule, it did rule that the “restoration measures” provision was inconsistent with § 316(b)'s requirement that the EPA minimize adverse environmental impacts by regulating the location, design, construction, and capacity of CWIS. This was because the “restoration measures” had nothing to do with location, design, construction, or capacity.⁹ Holding that the EPA exceeded its authority by including the “restoration measures” in the Rule, the Second Circuit remanded that portion of the Rule to the EPA.²⁰

19 *Id.* at 189.

20 *Id.*

2. Final Phase II Rule

The Final Phase II Rule regulates CWIS at large, existing power plants that are “point sources” and that primarily generate electric power and either transmit it or sell it to another entity for transmission, and whose CWIS use are proposed to use 50 million gallons or more of water a day.² That rule set forth five compliance alternatives from which a facility could select and implement “‘for establishing [the] best technology available for minimizing adverse environmental impact.’”²² One of the compliance alternatives available to existing power plants was to employ a closed-cycle CWIS, but selection of such a system was not required.²³ The remaining compliance alternatives referenced national performance standards that “‘are based on consideration of a range of technologies that [the] EPA has determined to be commercially available.’”²⁴ The Phase II Rule also created two site-specific compliance variances from the national performance standards. The first compliance variance the “cost-compliance alternative” provides that if a facility demonstrates that the cost of compliance would be significantly greater than the projected costs by the EPA, the local permitting authority had to make a site-specific determination of the “best technology available” as close to the applicable national performance standards as practicable, but without producing costs “significantly greater” than those considered by the EPA

during rule making.²⁵ The second compliance variance the “cost-benefit alternative” provides that, if a facility demonstrates that the costs of compliance with the national standards is significantly greater than the benefits of compliance, the local permitting authority could make a site-specific determination of the “best technology available” that is as close as practicable to the national performance standards.²⁶

21 *Riverkeeper, Inc. v. EPA (Riverkeeper II)*, 475 F.3d 83, 92 (2d Cir.2007) (citing 40 C.F.R. § 125.91) *rev'd and remanded by Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 129 S.Ct. 1498, 173 L.Ed.2d 369 (2009).

22 *Id.* (quoting 40 C.F.R. § 125.94(a)).

23 *Id.* at 93.

24 *Id.* (quoting 69 Fed.Reg. at 41,598 99).

25 *Id.* at 94 (citing 40 C.F.R. § 125.94(a)(5)(I)).

26 *Id.* (citing 40 C.F.R. § 124.94(a)(5)(ii)).

After various states and environmental groups challenged the Final Phase II Rule, the Second Circuit held that the EPA could consider costs under § 316(b) in either of two ways, *viz.*, it could determine (1) whether the costs of remediation can be reasonably borne by the industry; or (2) which remedial technologies are the most cost-effective.²⁷ The Second Circuit also held, however, that it is impermissible under § 316(b) to consider a cost-benefit analysis that compares the costs and benefits of various regulatory options and choose the option with the best net benefits.²⁸ The court remanded the Rule to the EPA for clarification whether the national performance standards set out in the Phase II Rule incorporated a cost-benefit analysis.²⁹ On remand, the EPA suspended operation of the Rule pending further rule making, and the Supreme Court granted certiorari³⁰ limited to the question whether § 316(b) “authorizes the [EPA] to compare costs with benefits in determining the best technology available for minimizing adverse environmental impact at cooling water intake structures.”³

27 *Id.* at 98.

28 *Id.*

29 *Id.* at 104 05.

30 552 U.S. 1309, 128 S.Ct. 1867, 170 L.Ed.2d 743 (2008).

31 *Id.* at 1867 (internal quotation marks omitted).

3. *Entergy Corp. v. Riverkeeper*

In *Entergy Corp.* the Supreme Court considered both the plain language of the Act and the structure of the Act as a whole to address whether the Act precludes a cost-benefit analysis.³² The Court first considered the Second Circuit's interpretation of § 316(b) that the phrase "best technology available for minimizing adverse environmental impact" means "technology that achieves the greatest reduction in adverse environmental impacts."³³ The Court described this interpretation as "plausible," but reasoned that "best technology available" could also mean "technology that *most efficiently* produces some good."³⁴ The Court read the statute's phrase "minimizing adverse environmental impact" as allowing the EPA to consider the degree of adverse-impact reduction rather than mandating that the "greatest possible reduction in environmental harm" be achieved.³⁵ The Court determined that the statute afforded the EPA "some discretion to determine the extent of reduction that is warranted under the circumstances"³⁶ and that the phrase "best technology available" does not preclude cost-benefit analysis.³⁷

32 129 S.Ct. at 1505 07.

33 *Id.* at 1506 (citing *Riverkeeper II*, 475 F.3d at 88 100).

34 *Id.* (emphasis original).

35 *Id.*

36 *Id.*

37 *Id.*

*828 The Court also considered whether § 316(b)'s silence as to cost-benefit affirmatively prohibited the agency from employing a cost-benefit analysis. The Court rejected such a reading, holding that the statute's silence "is meant to convey nothing more than a refusal to tie an agency's hands as to whether cost-benefit analysis should be used, and if so to what degree."³⁸ The Court reversed the Second Circuit's remand of the Phase II Rule that rested on that court's reading of cost-benefit preclusion.

38 *Id.* at 1507.

Entergy Corp. lucidly establishes that the EPA *may* employ cost-benefit analysis when effecting regulations that reflect the "best technology available for minimizing adverse environmental impact." The *Entergy Corp.* Court also endorsed the idea, however, that, although it *may* employ cost-benefits analysis in rule making, the EPA is not *required* to do so, and is afforded discretion to consider to what degree, if any, costs and benefits should be weighed in determining the "best technology available to minimizing adverse environmental impact."³⁹

39 *Id.* at 1506.

4. *The Phase III Rule*

The final phase of CWIS rule making commenced in November, 2004 when the EPA published and sought comment on its Phase III Rule.⁴⁰ For existing facilities, the EPA proposed three classifications based on daily volume of water intake use: 50 million gallons; between 100 and 200 million gallons; and more than 200 million gallons.⁴¹ Additionally, the EPA gave notice that it might continue its current case-by-case regulation instead of implementing a national categorical approach.⁴² For new facilities, however, the EPA proposed national categorical standards for CWIS regulation.⁴³ On November 25, 2005, the EPA published a Notice of Data Availability that summarized the data that the EPA had received and collected since publishing the Proposed Rule;⁴⁴ on June 16, 2006, the EPA published the Final Phase III Rule.⁴⁵ The EPA noted that it considered input from environmental, industry, engineering, and governmental entities, held symposia to discuss research and costs of proposed technologies, and considered the materials from the Phase I and II rule makings.⁴⁶ Additionally, the EPA conducted entrainment studies for existing Phase III CWIS and collected industry-wide data regarding new facilities.⁴⁷

40 69 Fed.Reg. 68,444.

41 *Id.*

42 *Id.* at 68,467.

43 *Id.* at 68,444.

44 70 Fed.Reg. 71,057.

45 71 Fed.Reg. 35,006 (codified in 40 C.F.R. pts. 9, 122, 123, 124, and 125).

46 *Id.* at 35,012/2 3.

47 *Id.*

For existing Phase III facilities, the EPA performed cost-benefit analyses for evaluating the national social and economic costs and benefits of the three gallons-per-day categories of structures.⁴⁸ It calculated social costs by evaluating compliance and administrative costs to the state and federal governments.⁴⁹ The economic costs were evaluated based on the financial impact that the national categorical standards would have on the existing facilities' firms.⁵⁰ The national benefits assessment included considering use (economic resource *829 exploitation) and non-use (resource use for other than economic reason) benefits.⁵¹ The EPA also compared the annual monetized social costs of compliance with the annual monetized environmental benefits of compliance.⁵² For the 50 million gallons per day category, the EPA concluded that the annual costs of compliance would be between \$38.3 million and \$39 million and that the annual monetized benefits would be between \$1.8 and \$2.3 million, which led the EPA to conclude that the costs of compliance were "wholly disproportionate" to the benefits.⁵³ The EPA also concluded that the non-monetized benefits were unlikely to alter the monetized cost-benefit ratio.⁵⁴

48 *Id.* at 35,030 32.

49 *Id.* at 35,031.

50 *Id.* at 35,032.

51 *Id.* at 35,032 33.

52 *Id.* at 35,017.

53 *Id.*

54 *Id.*

For new Phase III facilities,⁵⁵ the EPA concluded that it was impossible to compare the costs incurred by individual facilities to the benefits of those facilities because those facilities have not yet been built.⁵⁶ Instead, the EPA calculated the expected costs of compliance under

the national uniform standards and determined whether those costs would result in a barrier to entry for new operations and whether those costs could be reasonably borne by the industry.⁵⁷

55 40 C.F.R. § 125.130 *et seq.*

56 71 Fed.Reg. 35,034.

57 *Id.* at 35,025 29.

The EPA also conducted a qualitative environmental impact study to determine the adverse effects of impingement and entrainment by new CWIS.⁵⁸ The EPA stated that it was relying in part on information that had been gathered since its Phase I rule making, including industry-wide surveys of technical and economic data.⁵⁹ The EPA calculated the total annualized social cost of compliance to be between \$3.2 million and \$3.8 million,⁶⁰ that the economic impact would pose no barrier to entry, and that the industry could reasonably bear the costs of compliance because no new facilities would be prevented from operating and no new operations would be forced to cease operations because of the costs of compliance.⁶¹

58 *Id.* at 35,013 14/1, 35,016/1.

59 *Id.* at 35,012.

60 *Id.* at 35,025.

61 *Id.* at 35,027 29.

The EPA's environmental impact analysis focused on the Gulf of Mexico, where the majority of new rig construction would occur over the next 20 years.⁶² The EPA could find no studies that specifically addressed entrainment or impingement for new rigs, so it relied on the Southeast Area Monitoring and Assessment Program ("SEAMAP") to provide information about ichthyoplankton densities in the Gulf,⁶³ which, it observed, were the same range of densities observed in the inland and coastal waters addressed in the Phase I rule making.⁶⁴ The EPA also took into account that offshore rigs serve as marine habitats, *830 attracting and concentrating marine life in their vicinities.⁶⁵

62 *Id.* at 35,013.

⁶³ The Southeast Area Monitoring and Assessment Program (SEAMAP) is a two decades long study (1982-2003) of ichthyoplankton and fish egg density in the Gulf of Mexico. *See id.* at 35,013-35,016. The EPA referenced this study in evaluating the potential environmental harm associated with CWIS. The EPA used this Gulf study as a proxy for all the country's waters, as comparisons to other pinpoint studies of specific waters demonstrated similar to nearly uniform levels of biomass densities at corresponding depths. *Id.* at 35,013.

⁶⁴ *Id.* at 35,013, 35,019.

⁶⁵ *Id.* at 35,013 (citing studies of marine life densities surrounding California and Alaska offshore rigs and in the Gulf).

The Phase III Rule for existing facilities specifies that CWIS requirements are to be established on a case-by-case basis under the NPDES program, in accordance with 40 C.F.R. § 125.90(b).⁶⁶ Accordingly, individual permit writers are to use their “best professional judgment” to determine, on a case-by-case basis, the requirements that each facility must meet to achieve the best technology available for minimizing adverse environmental impact at that facility.⁶⁷

⁶⁶ *Id.* at 35,009.

⁶⁷ *Id.* at 35,015.

For new offshore fixed and mobile facilities, the Rule applies national performance standards for any rig that is a “point source” and is thus required to have a NPDES permit, has a CWIS that uses at least 25% of water intake for cooling only, and withdraws at least 2 million gallons of water per day.⁶⁸ This national standard applies to all “coastal” or “offshore” oil and gas extraction facilities (there is an exception to the national standards for rigs located in tidal rivers or estuaries).⁶⁹

⁶⁸ 40 C.F.R. § 125.131(a).

⁶⁹ 71 Fed.Reg. at 35,021.

The Phase III Rule for new facilities creates two compliance options. First, the Rule distinguishes facilities as either fixed or non-fixed, and fixed facilities are further distinguished as those possessing a sea chest (openings in the hull of a vessel for withdrawing cooling water) and those that do not. Fixed facilities may choose to

employ either Track I or Track II. Mobile units may only employ Track I, which requires the facility to minimize entrainment by reducing through-screen velocity to 0.5 f/s or less. Facilities that use sea chests need not employ fish-protection technologies, but facilities without sea chests must employ entrainment protection. Mobile units need only comply with the through-screen velocity limit and are not required to employ entrainment controls.⁷⁰ Track II allows a fixed facility to employ “alternative technologies” to demonstrate impingement minimization comparable to that afforded by the 0.5 f/s through-screen velocity limit. Like Track I, Track II fixed facilities must either employ a sea chest or entrainment control.

⁷⁰ The Agency determined that such controls would compromise the seaworthiness of the mobile units. ⁷¹ Fed.Reg. 35,014.

Finally, all facilities are subject to impingement-minimization controls if the permitting authority determines that endangered, sport, commercial, or migratory species are threatened. Furthermore, any offshore facility may seek a “variance” from the impingement and entrainment requirements by demonstrating that the requirements would result in “compliance costs wholly out of proportion to the costs the EPA considered in establishing the requirement ... or would result in significant adverse impacts on local water resources other than impingement and entrainment, or significant adverse impacts on energy markets.”⁷

⁷¹ 40 C.F.R. § 125.135.

B. Petitioners' Challenges

After the EPA published notice of the Final Rule on June 16, 2006, challenges to it were filed in several courts of appeals. As these challenges to agency action were brought under the “other limitations” portion of 33 U.S.C. § 1369(b)(1)(E), the courts of appeal have exclusive jurisdiction to hear them. These challenges were consolidated *831 by a multi-district litigation (“MDL”) panel and randomly assigned to this court. Riverkeeper moved for change of venue to the Second Circuit, which we denied. Riverkeeper then filed a parallel action in the Southern District of New York challenging the “inaction” (as they now term it) of the EPA in the Rule for existing facilities. That suit has been stayed pending our determination of jurisdiction. And then, after the instant case was fully briefed, it was stayed pending the

Supreme Court's decision in *Entergy Corp.*, which was handed down on April 1, 2009. It was in light of this decision that Riverkeeper and the EPA filed a motion for voluntary remand of the existing-facilities Rule, which motion Intervenor API opposes. We ordered that motion to be carried with this case.

ConocoPhillips argues that the EPA acted arbitrarily and capriciously in promulgating national categorical standards for new facilities because these standards do not take into account facility location. ConocoPhillips also asserts that the EPA acted arbitrarily and capriciously by failing to perform the requisite cost-benefit analyses, and by relying on so-called "qualitative" rather than quantitative data. In the alternative, ConocoPhillips also contends that the qualitative data demonstrate that the EPA acted arbitrarily and capriciously in promulgating a uniform national standard. Finally, ConocoPhillips now asserts in its reply brief that the EPA has violated § 553(b)'s required notice and comment procedure by advancing in its Response a "litigating position" that differs from its original statutory interpretation of § 316(b) as articulated in the Proposed and Final Rules.

II. Standard of Review

[1] [2] We have jurisdiction over challenges to an agency's action that result in "other limitations" under the CWA,⁷² and coolant water intake regulations are deemed "other limitations."⁷³ Reviews of agency interpretations of statutes are informed by the Supreme Court's decision in *Chevron, U.S.A. v. Natural Resources Defense Council*.⁷⁴ Under *Chevron*, a reviewing court must first look to whether Congress has directly spoken to the precise question at issue.⁷⁵ If the court finds that congressional intent is clear, then that interpretation controls.⁷⁶ If not, however, the question for the reviewing court is whether the agency's interpretation is based on a permissible construction of the statute.⁷⁷ An agency's interpretation is permissible if it is reasonable. The question of reasonableness is not whether the agency's interpretation is the only possible interpretation or whether it is the most reasonable, merely whether it is reasonable *vel non*.⁷⁸

⁷² 33 U.S.C. § 1369(b)(1)(E).

⁷³ *E.g., Riverkeeper II*, 358 F.3d at 183 84.

⁷⁴ 467 U.S. 837, 842 43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

⁷⁵ *Id.* at 842, 104 S.Ct. 2778.

⁷⁶ *Id.*

⁷⁷ *Id.* at 843, 104 S.Ct. 2778.

⁷⁸ *Riverkeeper III*, 129 S.Ct. at 1505.

In the absence of a specified mechanism of judicial review of the agency action under judicial review, the APA governs.⁷⁹ 5 U.S.C. § 706(2)(A) directs that when reviewing agency "action, findings, and conclusions" the court shall hold the action of the agency unlawful only if it is found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁸⁰ "Under this highly deferential *832 standard of review, a reviewing court has the least latitude in finding grounds for reversal. Courts may not use review of an agency's environmental analysis as a guise for second-guessing substantive decisions committed to the discretion of the agency."⁸ "An agency rule is arbitrary and capricious 'if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'"⁸² The scope of the reviewing court's inquiry is to determine if the agency's judgment conforms to minimum standards of rationality, i.e., whether the agency act bears a rational relationship to the statutory purposes, and whether there is substantial evidence in the record to support it.⁸³

⁷⁹ 5 U.S.C. § 703.

⁸⁰ *Id.* at 706(2)(A).

⁸¹ *City of Dallas v. Hall*, 562 F.3d 712, 717 (5th Cir.2009) (internal citations omitted).

⁸² *Texas Oil & Gas Assn v. EPA*, 161 F.3d 923, 933 (5th Cir.1998) (citing *Motor Vehicle Mfrs. Assn. v. State Farm Mut.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983)).

83 *Louisiana Environmental Action Network v. E.P.A.*, 382 F.3d 575, 582 (5th Cir.2004) (citing *Texas Oil & Gas Assn.*, 161 F.3d at 934).

III. Analysis

A. The EPA and Riverkeeper's Joint Motion to Remand

The EPA and Riverkeeper jointly filed a motion to remand the Rule as it applies to existing CWIS in light of the Supreme Court's decision in *Entergy Corp.* Specifically, the EPA seeks to “reevaluate the Phase III Rule's existing facilities decision in conjunction with the Agency's proceedings on remand of the ‘Phase II Rule’ at issue in [*Riverkeeper II*] ... in light of the Supreme Court's recent decision in [*Entergy Corp.*].”

[3] Embedded in an agency's power to make a decision is its power to reconsider that decision.⁸⁴ An agency's inherent authority to reconsider its decisions is not without limits, however.⁸⁵ “An agency may not reconsider its own decision if to do so would be arbitrary, capricious, or an abuse of discretion.”⁸⁶ Furthermore, reconsideration also must occur within a reasonable time after the decision being reconsidered was made, and notice of the agency's intent to reconsider must be given to the parties.⁸⁷

84 *Trujillo v. General Elec. Co.*, 621 F.2d 1084, 1086 (10th Cir.1980).

85 *Macktal v. Chao*, 286 F.3d 822, 825 (5th Cir.2002).

86 *Id.* (citing 5 U.S.C. § 706(2)(A)).

87 *Id.* (citing *Dun & Bradstreet Corp.*, 946 F.2d at 193; *Bookman v. United States*, 197 Ct.Cl. 108, 453 F.2d 1263, 1265 (1972)).

[4] We conclude that the EPA's joint motion is not arbitrary, capricious, or an abuse of discretion; neither do we find that it was filed untimely or without valid notice to all parties. The Supreme Court in *Entergy Corp.* has remanded the Phase II Rule for existing facilities to the EPA, and it is imminently reasonable to address together the substantial similarities of fact between that aspect of the Phase II Rule and the instant Phase III Rule in light of *Entergy Corp.* Furthermore, remand will work no prejudice to any affected entity because it merely maintains the status quo for existing facility regulation. Pending a new Rule, the EPA's § 316(b) case-

by-case permitting procedure, which was in place before the Phase III Rule was promulgated, will remain in effect. Accordingly, we grant the EPA's joint motion for remand of just the Phase III Rule for existing CWIS.

*833 B. ConocoPhillips's Challenges to the Phase III Final Rule for New Facilities

1. EPA's “Economic Feasibility” Interpretation of § 316(b)

Before considering ConocoPhillips's substantive arguments, we first address whether the EPA's interpretation of § 316(b), as reviewed in this appeal, is sufficiently different from the interpretation it proffered in the Proposed Rule to constitute a violation of the notice provision for informal rule making set forth in § 4 of the APA.⁸⁸ ConocoPhillips asserts that (1) the EPA gave notice, in both the Proposed and Final Phase III Rule, that it was employing a cost-benefit analysis in its rule making for new CWIS, but (2) the EPA has abandoned its cost-benefit rationale and instead adopted during this appeal an “economic achievability” rationale for its rule making. ConocoPhillips argues that this *post hoc* rationalization should be afforded no deference under *Chevron* and that the agency should be held to its original basis of statutory interpretation.

88 5 U.S.C. § 553.

For almost seventy years, the rule has been that “ ‘the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based.’ ”⁸⁹ This is necessary because:

89 See *Global Van Lines v. ICC*, 714 F.2d 1290, 1297 (5th Cir.1983) (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 87, 63 S.Ct. 454, 87 L.Ed. 626 (1943)) and *id.* (“General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include ... reference to the legal authority under which the rule is proposed”) (citing 5 U.S.C. § 553(b)(2)).

If an [administrative] order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made,

a judicial judgment cannot be made to do service for administrative judgment.⁹⁰

⁹⁰ *Chenery*, 318 U.S. at 88, 63 S.Ct. 454.

Furthermore, an agency must comply with the notice and comment procedures in informal rule making that are set out in § 4 of the Administrative Procedures Act, namely:

General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include ... *reference to the legal authority under which the rule is proposed*⁹

⁹¹ 5 U.S.C. § 553(b)(2) (emphasis added).

and

After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules *adopted a concise general statement of their basis and purpose.*⁹²

⁹² *Id.* at § 553(c) (emphasis added).

Sections 553(b)(2) and (c) require that (1) an agency identify the source of its legal authority during the notice and comment period, and (2) “the reference to legal authority must be sufficiently precise to apprise interested persons of the agency’s legal authority to issue the proposed rule.”⁹³

⁹³ *Global Van Lines*, 714 F.2d at 1298 (internal citation and punctuation omitted).

*834 [5] ConocoPhillips does not dispute that the EPA has maintained, and continues to maintain, that § 316(b) is the statutory authority under which it has promulgated the Phase III Rule. Its argument is that the EPA’s “economic achievability” test, asserted during this appeal, is sufficiently different from the “cost-benefit” test announced during rule making that it amounts to a mere “litigation position” and the agency’s justifications for its Phase III Rule that rest on the “economic achievability” argument should be ignored.

[6] ConocoPhillips makes much of the EPA’s use on appeal of the phrase “economic achievability” a term that appears nowhere in the Proposed or Final Rule. An agency’s alteration of its *terminology*, however, does not mean that it has altered its *methodology*. Certainly, it may be possible for an agency to alter, *post hoc*, its previously announced interpretation of its legal authority to such a degree that the rule in *Chenery* and the notice requirements of the APA are violated. Even so, when an agency, in its discretion, has flexibility to execute its statutory authority in different ways, it may not always be clear whether a shift in an agency’s approach to rule making runs afoul of the APA or is merely a valid exercise of its statutory authority to regulate in different ways. We have long held that the Final Rule and the Proposed Rule need not be identical. The Final Rule must be a “ ‘logical outgrowth’ ”⁹⁴ of the rule making process, and courts must proceed with caution before deeming a Final Rule too attenuated from the Proposed Rule, lest we supplant the agency’s role in the nation’s regulatory scheme.⁹⁵ In the instant case, however, ConocoPhillips does not complain that the Proposed Rule and the Final Rule are different; rather, it insists that both the Proposed Rule’s and the Final Rule’s stated interpretations of § 316(b) differ from the agency’s interpretation argument on appeal.

⁹⁴ *Texas Office of Public Utility Counsel v. Federal Communications Commission*, 265 F.3d 313, 326 (5th Cir.2001) (quoting *United Steelworkers of Amer., AFL CIO CLC v. Schuylkill Metals Corp.*, 828 F.2d 314, 317 18 (5th Cir.1987)).

⁹⁵ See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 525, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978) (stating that

reviewing courts must not “engraft] their own notions of proper procedures upon agencies entrusted with substantive functions by Congress).

This question does not turn on the mere invocation by the EPA of the phrase “economic achievability” for the first time on appeal. The crux of the question is whether the EPA’s justificatory argument on appeal so differs from the justification articulated during the rule making process to have deprived interested parties of the notice required by the APA.

The EPA’s discussion in the preamble of its legal authority to promulgate the Phase III Rule in the Proposed Rule reads:

Section 316(b) requires that cooling water intake structures reflect the best technology available for minimizing adverse environmental impact. In contrast to the effluent limitations provisions, the object of the “best technology available” is explicitly articulated by reference to the receiving water: To minimize adverse environmental impact in the waters from which cooling water is withdrawn. This difference is reflected in EPA’s past practices in implementing sections 301, 304, and 316(b). While EPA has established effluent limitations guidelines based on the efficacy of one or more technologies to reduce pollutants in wastewater, considering costs, but without necessarily considering the impact on the receiving waters, EPA has *835 previously considered the costs of technologies in relation to the benefits of minimizing adverse environmental impact in establishing section 316(b) limits. *In Re Public Service Co. of New Hampshire*, 10 ERC 1257 (June 17, 1977); *In Re Public Service Co. of New Hampshire*, 1 EAD 455 (Aug. 4, 1978); *Seacoast Anti Pollution League v. Costle*, 597 F.2d 306 (1st Cir.1979).

For this Phase III rule making, EPA therefore interprets Clean Water Act section 316(b) as authorizing EPA to consider not only technologies but also their effects on and benefits to the water from which the cooling water is withdrawn. Based on these two considerations, today’s proposed rule establishes national requirements for facilities to install technology, as appropriate, that is technically available, economically practicable, cost-effective, and justified by the benefits to the source waterbody.⁹⁶

96 69 Fed.Reg. 68,449.

The preamble to the Final Rule reads:

Because section 316(b) is silent as to the factors EPA should consider in deciding whether a candidate technology minimizes adverse environmental impact, EPA has broad discretion to identify the appropriate criteria. *See Riverkeeper*, 358 F.3d at 187 n. 12 (brevity of section 316(b) reflects an intention to delegate significant rule making authority to EPA); *see id.* at 195 (appellate courts give EPA “considerable discretion to weigh and balance the various factors” where the statute does not state what weight should be accorded) (citation omitted).

For this Phase III rule making, EPA therefore interprets the phrase “best available technology for minimizing adverse environmental impacts” as authorizing EPA to consider the relationship of the costs of the technologies to the benefits associated with them. EPA has previously considered the costs of technologies in relation to the benefits of minimizing adverse environmental impact in establishing section 316(b) limits, which historically have been done on a case-by-case basis. *In Re Public Service Co. of New Hampshire*, 10 ERC 1257 (June 17, 1977); *In Re Public Service Co. of New Hampshire*, 1 EAD 455 (Aug. 4, 1978); *Seacoast Anti Pollution League v. Costle*, 597 F.2d 306 (1st Cir.1979).

In addition to helping EPA determine the effects of candidate technologies on the receiving water, considering the relationship of costs and benefits also helps EPA determine whether the technologies are economically practicable. EPA has long recognized, with the support of legislative history, that section 316(b) does not require adverse environmental impact to be minimized beyond that which can be achieved at an economically practicable cost. See 118 Cong. Rec. 33762 (1972) *reprinted in* 1 *Legislative History of the Water Pollution Control Act Amendments of 1972*, at 264 (1973) (Statement of Representative Don H. Clausen). EPA therefore may consider costs and benefits in deciding whether any of the technology options for Phase III existing facilities actually do minimize adverse environmental impact or whether the choice of technologies should be left to BPJ decision-making. When the costs of establishing a national categorical rule substantially outweigh the benefits of

such a rule, a national categorical section 316(b) rule may not be economically practicable, and therefore not the “best technology available for minimizing adverse environmental impact.”

Nothing in section 316(b) requires EPA to promulgate a regulation to implement *836 the requirements for cooling water intake structures. Section 316(b) of the CWA grants EPA broad authority to establish performance standards for cooling water intake structures based on the “best technology available to minimize adverse environmental impact.”⁹⁷

⁹⁷ 71 Fed.Reg. at 35,010.

Both the Proposed and Final Rules reflect that the EPA considered the Act to afford the agency the power to consider cost-benefits when regulating existing and new CWIS. Furthermore, the Proposed Rule expressed that the agency intended to consider CWIS regulation from *both* a technological standpoint and a cost-benefit standpoint: “EPA therefore interprets Clean Water Act section 316(b) as authorizing EPA to consider not only technologies but also their effects on and benefits to the water from which the cooling water is withdrawn.” This flexibility in regulatory approach is echoed in the Final Rule’s statement that the EPA “has broad discretion to identify the appropriate criteria” for evaluating whether candidate technology minimized adverse environmental impact and that considering the costs and benefits aids the agency in determining whether a regulatory scheme is “economically practicable.”

Both preambles demonstrate that the agency interpreted § 316(b) as *authorizing* a cost-benefit approach to CWIS regulation, but also that the agency does not consider itself *bound* to do so. What the preambles to the Proposed and Final Rules do indicate is that the agency purported to employ cost-benefit analysis in promulgating CWIS regulation for existing and new facilities as part of its “discretion to weigh and balance various factors” when determining the “best technology available for minimizing adverse environmental impact.”

The Phase III Final Rule is bifurcated in its application, regulating existing offshore facilities differently from new ones. It is therefore necessary to look beyond the Rule’s general statements in the preamble to the Rule’s specific application to new CWIS facilities. The Final Rule provides a detailed summary of the EPA’s cost-estimation

for the national categorical regulatory options for new CWIS.⁹⁸ The agency (1) identified the different types of CWIS being employed by different offshore facilities, (2) identified available impingement and entrainment control measures, and (3) estimated both capital and annual operating costs “for each technology option for the different configurations of offshore ... facilities and [CWIS].”⁹⁹ The agency also estimated the predicted economic impact of the new Rule by evaluating the costs associated with available impingement and entrainment technology with “superior reliability and performance and ease of operation.”¹⁰⁰ After collecting this data, the EPA evaluated the likely economic impact (1) on offshore facility revenue and operating costs, and (2) as a barrier-to-entry.¹⁰¹

⁹⁸ *Id.* at 35,025 29.

⁹⁹ *Id.* at 35,025.

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 35,025 29.

In the “Comparison and Benefits and Costs” section of the Final Rule,¹⁰² the EPA states that it could not compare estimated benefits yielded from the Rule as it applies to new facilities because “such estimates would rely on speculating where these facilities would be built and/or operate Hence, it is not possible to compare quantified costs and benefits associated with this final rule.”¹⁰³ The agency did, *837 however, perform “comparisons of the national benefits and costs of the national categorical regulatory options” by comparing the “total annualized use benefits to total annualized pre-tax costs at existing facilities that remain open in the baseline.”¹⁰⁴

¹⁰² 71 Fed.Reg. 35,034.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 35,034.

In short, the Final Rule indicates that the EPA estimated the compliance costs of the national categorical standards for new CWIS and compared those costs to the likely economic impact on the industry. Additionally, the EPA compared the compliance costs to the “baseline” benefits afforded by existing facilities. The agency was unable to

perform a specific cost-benefit analysis for new facilities, however, as those facilities have not yet been built.

On appeal, the EPA insists that it is not *required* to conduct a cost-benefit analysis when promulgating rules under § 316(b), and that, given the available information (or lack thereof), “economic achievability ... specifically, barriers to entry, are the appropriate cost measures for new facilities because they analyze whether a regulation will place new facilities at a competitive disadvantage as compared to existing facilities.” The agency asserts further that, even though it could estimate the *costs* of compliance for new CWIS despite not knowing their locations, it could not estimate the *benefits* of the Rule because of the wide variety of ecosystems in which new offshore facilities will be located. In contrast to benefits, compliance costs can be estimated because they will remain constant irrespective of the specific location of the facility: The depths of all CWIS are approximately the same regardless of the depth of the water at the facilities' location.

After comparing the EPA's statements in the Final Rule to those argued before us, we are convinced that the EPA's “economic achievability” argument is not a mere litigating position, but is instead the very basis under which the Final Phase III Rule for new offshore facilities was promulgated. The EPA considered barrier to entry and economic impact, as distinguished from making specific, facility-by-facility cost-benefit analyses, as the basis for the Final Rule, and that position has not changed during this appeal. We see no material difference between the EPA's statutory interpretation of its rule making authority and the interpretation previously articulated. ConocoPhillips's argument that the EPA did not provide adequate notice of the economic-achievability test during rule making is unavailing.

2. Whether the EPA's Rule Making was Arbitrary and Capricious

ConocoPhillips makes two primary arguments that the EPA's Final Phase III Rule for new offshore facilities is arbitrary and capricious. Each of these contentions rests at least in part on the assertion that the statutory language of § 316(b) *mandates* that the EPA engage in a cost-benefit analysis to effect CWIS regulations. In *Entergy Corp. v. Riverkeeper*, the Supreme Court has now made pellucid that the EPA *may* but is not *required* to engage in cost-benefit analyses for CWIS rule making. And, as discussed

above, the EPA has never interpreted the statute to *require* cost-benefit analyses in its rule making.¹⁰⁵ Neither did the EPA give notice in this rule making that it was *bound* to do so or that it *would* do so to the exclusion of other metrics. Thus, ConocoPhillips's ***838** objection to the Final Phase III Rule on this ground has been neutralized. We thus proceed to consider the specific grounds on which ConocoPhillips urges us to hold that the EPA was arbitrary and capricious in its rule making.

¹⁰⁵ See, e.g., the EPA's first regulation of CWIS, 41 Fed.Reg. 17,387, 17388 (Apr. 26, 1976) (“No comparison of monetary costs with the social benefits of minimizing adverse environmental impacts, much less a formal, quantified ‘cost/benefit assessment is required by the terms of § 316] the Clean Water] Act.).

The central theme for ConocoPhillips's remaining objections is that the agency was arbitrary and capricious in failing to consider facility location when it promulgated the Final Phase III Rule. This objection rests on two primary arguments: (1) It is arbitrary and capricious for the EPA to fail to conduct a benefits analysis for specific facility locations, and (2) it is arbitrary and capricious for the EPA to rely on the general, “qualitative” SEAMAP study, rather than on site-specific quantitative studies, to estimate the environmental impact of new CWIS.

a. Costs and Benefits of Facility Location

[7] ConocoPhillips asserts that the EPA failed properly to consider facility location as required by statute in promulgating the national categorical standards for new offshore facilities. ConocoPhillips argues that, contrary to the EPA's contention, the administrative record provided both the likely type and number of new facilities to be deployed over the next 20 years, and the overwhelming majority of new oil and gas rigs will be situated in very deep water (greater than 1,000 feet in depth) in the Gulf of Mexico. ConocoPhillips acknowledges that this information did not include the precise latitude and longitude of each new facility, but nevertheless “did tell the agency all it needed to know to perform a meaningful cost/benefit study: what kinds of rigs ..., operating in what seas, and at what depths.” ConocoPhillips insists that, given this information and the fact that the EPA stated that it possessed enough information to calculate compliance costs for new facilities, the agency's claim that it did

not have enough information to perform a meaningful cost-benefit analysis is arbitrary and capricious or, in the alternative, that it was arbitrary and capricious for the agency not to develop this information if it did not have it during rule making.

i. Statutory Argument

Section 316(b) reads: “Any standard established pursuant to section 1311 of this title or section 1316 of this title and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.”¹⁰⁶ ConocoPhillips claims that the emphasized language mandates that the EPA consider the facility’s physical location in its rule making; the EPA responds that this language only pertains to CWIS’s physical location and that a decision not to regulate on the basis of location does not mean that the agency did not consider it.

¹⁰⁶ 33 U.S.C. § 1326(b) (emphasis added).

To evaluate the agency’s interpretation of § 316(b), we employ *Chevron*’s above-described two-step framework: We first decide whether Congress spoke directly to the precise question at issue, and, if it did, give effect to the unambiguously expressed intent of Congress; under such a situation, we will reverse an agency’s interpretation if it does not conform to plain meaning of statute.¹⁰⁷ If the statute is silent or ambiguous, however, we ask whether the agency’s interpretation is based on a permissible construction of the statute. We may reverse the agency’s construction of an ambiguous or silent provision only if we *839 find it arbitrary, capricious, or manifestly contrary to the statute. That is to say, we will sustain an agency’s interpretation of an ambiguous statute if that interpretation is based on a permissible construction of the statute. This is *Chevron*’s second step.¹⁰⁸

¹⁰⁷ *Texas Office of Public Utility Counsel v. F.C.C.*, 183 F.3d 393, 410 (5th Cir.1999) (internal punctuation and citation omitted).

¹⁰⁸ *Id.* (internal punctuation and citation omitted).

[8] To determine whether a statute is ambiguous, we first look to its plain meaning.¹⁰⁹ It is absurd

and arbitrary to decide that “of cooling water intake structures” modifies some of the serial nouns but not “location.” There is certainly no evidence in the plain language or in the rules of English grammar to support such an interpretation. Nouns joined by coordinating conjunctions are usually treated as a single, compounded unit,¹¹⁰ and a postmodifying prepositional phrase is most naturally read to modify that single unit.

It is also absurd to assume that Congress intended “capacity” to refer to CWIS, but for “location, design, and construction” to refer to the “facility.” In short, to read this language as would ConocoPhillips that “location” refers to “point sources” finds no support in the plain language or the structure of the statute. Furthermore, construing “location” to mean the “facility’s location” is wholly unsupported by the plain meaning of the statute. Many facilities, such as power plants, employ CWIS but are themselves located on land. Under ConocoPhillips’s interpretation, the standards the EPA establishes *must* consider the location of a terrestrial facility but *may not* consider the location of that facility’s remote maritime or riparian CWIS.

¹⁰⁹ *Goswami v. American Collections Enterprise, Inc.*, 377 F.3d 488, 492 (5th Cir.2004)

(“ We do not look beyond the plain meaning of the statute unless the statute is absurd or ambiguous. Without ambiguity we are not permitted to look to the legislative history or agency interpretation.).

¹¹⁰ SIDNEY GREENBAUM, OXFORD ENGLISH GRAMMAR 233 (1996).

¹¹¹ Consider, e.g., “The doctor decided that keeping a boat, trailer, and car in storage was too expensive.

Such a reading makes no sense. We hold that the plain language of the statute requires the EPA to consider the location of the CWIS when establishing rules under § 316(b), irrespective of whether the location of the CWIS is the same as that of the facility served or is located in or contiguous to the water but distant from the facility. Having concluded that the statute is unambiguous, we do not proceed to the second prong of *Chevron*.

As for ConocoPhillips’s substantive criticism of the agency’s treatment of CWIS location, the EPA readily acknowledges that it did not attempt to estimate the likely benefits achieved by specific facilities at specific locations. Rather, the agency points to the portion of the record which reflects that it collected information to

inform its decision in promulgating national categorical standards. The EPA expressly found, by considering three economic impact assessments,² that uniform regulation was achievable, that it would not create barriers to entry, and that it would not force operations to close.³ In addition, the EPA considered a wide range of industry, environmental, and economic data which related to the types of facilities that will be used⁴ and the technologies available and their efficacy.⁵ The agency also considered this information in the context of the likely locations in the Gulf of Mexico (where almost all new offshore facilities will be situated),⁶ and made an exception to the uniform standard for facilities to be located in tidal rivers or estuaries.⁷ Moreover, the data in the record support the conclusion that environmental harm may result at *all* likely facility locations: both estuarial and ocean biomass suffer the highest rate of destruction from CWIS; eggs and plankton disperse over wide areas; and aquatic organisms are attracted to and concentrate around offshore facilities.⁸ The EPA further notes that, regardless of any shortcomings that ConocoPhillips finds in the data the agency relied on, ConocoPhillips provided no more detailed data during rule making than that which the EPA considered; indeed, site-specific impingement and entrainment data for offshore facilities have apparently never been collected.⁹

112 71 Fed.Reg. 35,025 29.

113 *Id.*

114 71 Fed.Reg. 35,024 25.

115 *Id.*

116 *Id.* at 35,013.

117 *Id.* at 35,020.

118 *Id.* at 35,013.

119 *Id.*

Considering the record as a whole, as well as the EPA's interpretation and application of § 316(b), we conclude that the EPA's decision to forgo a benefits analysis and promulgate the Phase III Rule on economic achievability grounds is at least "minimally related to rationality." Of the *Texas Oil & Gas* factors (1) agency reliance on factors which Congress has not intended it to consider, (2)

failure to consider an important aspect of the problem, (3) offering an explanation for its decision that runs counter to the evidence before the agency, or (4) offering an explanation that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise²⁰ only the second is possibly applicable. The record makes clear, however, that the EPA did consider location an "important aspect of the problem" specific benefits estimates for specific facilities and, with that precise data unavailable, that the agency evaluated the application of national categorical standards by looking at (1) the economic feasibility of the approach to the industry as whole and (2) the expected benefits that will be achieved generally. "Given the admitted information shortage, the EPA must make use of the information it has, recognizing the limits of the information; EPA cannot refuse to carry out its mandate, waiting for the day when it might possess perfect information."² Accordingly, under the "highly deferential" standard of review mandated here, we are unpersuaded that the EPA's failure to estimate benefits for specific new facility locations renders the process arbitrary or capricious.

120 161 F.3d at 934.

121 *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 652 (1st Cir.1979).

ii. Reliance on SEAMAP Data

ConocoPhillips also faults the EPA's reliance on so-called "qualitative data," as opposed to "quantitative data," to justify its promulgation of national categorical standards for new facilities. Specifically, ConocoPhillips takes issue with EPA's conclusion that, although the "EPA has limited information on specific environmental impacts associated with oil and gas extraction facilities," the agency nevertheless was confident in the "potential for such impacts to warrant including [national categorical requirements] for new offshore oil and gas extraction facilities in this rule."²² ConocoPhillips insists that the "limited information" that the EPA does possess the SEAMAP data²³ is inadequate to *841 support the Final Rule and that it was arbitrary and capricious for the agency not to develop a "quantitative benefit study" for new facility location. ConocoPhillips also contends that the SEAMAP data itself demonstrates that it was arbitrary and capricious for the EPA either

not to employ a case-by-case permitting regime or not to distinguish between deep water and shallow water facilities in promulgating the Rule.

122 71 Fed.Reg. 35,016.

123 The agency also points out that it relied on more than just the SEAMAP and similar studies to evaluate environmental impact. Other sources of corroborating information include evidence that the offshore facilities attract and concentrate a significant amount of aquatic life as a habitat and that the offshore areas where rigs will be located contain large a number of aquatic life forms with little or no motility (rendering such life especially vulnerable to entrainment).

Just as we have concluded that the agency's treatment of facility location is not arbitrary and capricious, we also conclude that the EPA's reliance on the SEAMAP data is not arbitrary and capricious. Conducting precise "quantitative benefits studies" for facilities that have yet to be built is impossible, and there are no existing quantitative studies of impingement and entrainment for new facilities. Again, when an agency is faced with such informational lacunae, the agency is well within its discretion to regulate on the basis of available information rather than to await the development of information in the future. And, as the EPA reiterates, almost all new offshore facilities will be located in the Gulf of Mexico, precisely the area surveyed by the SEAMAP study. That study demonstrates the presence of larval and planktonic life at increasing levels of depth in the Gulf, and, as ConocoPhillips acknowledges, the study shows that the vast majority of sensitive aquatic life lives in the first 100 meters of the water column. ²⁴

124 71 Fed.Reg. 35,013.

The EPA also relied on three additional studies of specific waterbodies as comparators (Penobscot Bay, Caloosahatchee Estuary, and the St. Lawrence River). ConocoPhillips asserts that those studies are so different from the SEAMAP data as to discredit the EPA's contention that the SEAMAP data represents an accurate estimate of all offshore larval densities. The agency counters that the "EPA's biology experts concluded that, for purposes of determining the potential for adverse environmental impact, they [the three studies] are comparable." Although ConocoPhillips insists that the EPA's conclusion that the SEAMAP data and the

three specific studies are comparable is "highly arbitrary," reading that conclusion would present questions of scientific evaluation and meta-analysis, tasks that we are ill-equipped to assume. "When reviewing an agency's scientific determinations in an area within the agency's technical expertise, a reviewing court must be at its most deferential." ²⁵ We defer to the agency's evaluation of the specific offshore and SEAMAP studies.

125 *Chemical Mfrs. Assn v. EPA*, 870 F.2d 177, 231 (5th Cir.1989).

Relying in large part on the SEAMAP study, the EPA concluded that there is "real potential for adverse environmental impact" for new offshore facilities, regardless of location. This conclusion is greatly bolstered by the fact that the statute commands that CWIS location and not facility location be considered in regulating CWIS. This is important to our review of the EPA's Final Rule because there is potentially a great difference between the depth of the water in which a facility is located and the depth of water in which its CWIS is located. ConocoPhillips's location argument rests largely on the assumption that because facilities will be located in ***842** different water depths, and these disparate depths contain a wide range of biomass density, new CWIS should be regulated on a case-by-case basis. The record reflects, however, that, even though some of the *facilities* will be located in deep waters and other in shallow waters (and, in the case of mobile rigs, may in fact be located from time to time in a wide range of water depths), the CWIS *intakes* will always be located at approximately the same water depth. ²⁶ In other words, even though a particular facility might extract oil and gas from a great depth, the CWIS will draw water at or near the surface, specifically, within the first 100 feet of the water column. Thus, the most relevant water depth of water for evaluating the adverse environmental impact for offshore facilities is 100 feet or less. It is this depth that the SEAMAP and other data demonstrate is most populated by vulnerable species. We cannot say that the record does not "substantially support" the agency's reliance on the SEAMAP data and its concern with only CWIS location and not facility location.

126 71 Fed Reg. 35, 016.

When we consider all of the forgoing analyses and reasoning, we conclude that the EPA's reliance on the SEAMAP data is not arbitrary and capricious. First, the

agency must make do with the available information. Second, the EPA has run afoul of none of the *Texas Oil & Gas* factors here, and the agency's estimation of adverse environmental impact was justified by the SEAMAP and other data, considering that (1) it is impossible for the agency to know precisely where a new fixed or mobile facility will be located, and (2) the CWIS structures themselves will be located almost uniformly in 100 meters of water or less. Consequently, the agency's decision to consider but not regulate on the basis of facility location is rationally related to the statute's purpose and substantially supported by the record.

IV. Conclusion

Under the highly deferential standard of review here applicable, we hold that the Final Phase III Rule for new facilities is substantially supported by the record and is rationally related to the statutory purpose of § 316(b). The Supreme Court has ratified the agency's longstanding

interpretation that it may, but is not required to, employ cost-benefit analysis when making rules under § 316(b). The record reflects that the EPA gave sufficient notice that it could but was not bound to engage in cost-benefit analyses when promulgating the Final Rule for new facilities. The agency's decision to regulate on the basis of economic achievability was borne out by the existence of cost information but not benefit information. The scientific data available to the agency demonstrated the likely adverse environmental impact of CWIS regardless of facility location.

We GRANT the joint motion to remand that portion of the Final Phase III Rule regulating existing cooling water intake structures, and we AFFIRM that portion of the Final Phase III Rule regulating new cooling water intake structures.

All Citations

612 F.3d 822, 71 ERC 1225

EXHIBIT 251

 KeyCite to Red Flag Severe Negative Treatment
Abrogated or Recognized by [United States v. Noga es](#), 4th Cir.(S.C.),
January 9, 2019

369 F.3d 363
United States Court of Appeals,
Fourth Circuit.

Juanita Pope REID, Petitioner–Appellant,
v.
Ronald J. ANGELONE,
Director, Respondent–Appellee.

No. 03–6146.
|
Argued: Jan. 22, 2004.
|
Decided: May 19, 2004.

Synopsis

Background: Petitioner who pled guilty to larceny in state court filed for federal writ of habeas corpus. The District Court dismissed the petition without prejudice for failure to exhaust state remedies. Petitioner filed second habeas petition, and subsequently moved to withdraw it. The United States District Court for the Eastern District of Virginia, [Robert E. Payne, J.](#), denied motion to withdraw, dismissed petition with prejudice, and subsequently denied petitioner's motion for relief from judgment. Petitioner appealed.

Holdings: The Court of Appeals, [Wilkins](#), Chief Judge, held that:

[1] petitioner was required to obtain a certificate of appealability (COA) as a prerequisite to appeal the denial of a motion for relief from judgment;

[2] petitioner was entitled to COA; and

[3] motion for relief from judgment from order denying motion to withdraw habeas petition was required to be treated as successive habeas petition, over which District Court had no jurisdiction.

Vacated and remanded.

West Headnotes (18)


[1] Statutes

 Plain Language; Plain, Ordinary, or Common Meaning


In interpreting a statute, the Court of Appeals must give the relevant terms their common and ordinary meaning.

2 Cases that cite this headnote

[2] Statutes

 Purpose and intent; determination thereof


Statutes

 Plain, literal, or clear meaning; ambiguity

In interpreting a statute, to the extent that there is any ambiguity in the terms of a statute, the Court of Appeals must consider other indicia of congressional intent, such as the legislative history.

2 Cases that cite this headnote


[3] Statutes

 Purpose and intent; determination thereof

In cases of statutory ambiguity, a court interpreting the statute may consider which interpretation of the statute would best give effect to the underlying legislative purpose.

Cases that cite this headnote

[4] Federal Courts

 Amending, modifying, or vacating judgment or order; proceedings after judgment

An order denying a motion for relief from judgment is a “final order” for purposes of appellate review. [Fed. Rules Civ. Proc. Rule 60\(b\)](#), 28 U.S.C.A.

6 Cases that cite this headnote

[5] Habeas Corpus

🔑 Certificate of probable cause

In every habeas proceeding, there is only one final order, for purpose of statute requiring issuance of certificate of appealability as a prerequisite to appeal from the final order in the habeas proceeding. 28 U.S.C.A. § 2253(c).

6 Cases that cite this headnote

[6] Habeas Corpus

🔑 Certificate of probable cause

The district court order denying habeas petitioner's motion for relief from judgment denying her motion to withdraw her petition and dismissing the petition with prejudice was not issued within the same habeas corpus proceeding as the order dismissing the petition, so that each order was a separate final order, for purpose of statute requiring issuance of certificate of appealability (COA) as a prerequisite to appeal from the final order in the habeas proceeding; each proceeding terminated with a judgment, and motion for relief from judgment was used to challenge final judgment, so that they were necessarily separate proceedings. 28 U.S.C.A. §§ 2253(c), 2254; Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

17 Cases that cite this headnote

[7] Habeas Corpus

🔑 Certificate of probable cause

The denial of habeas petitioner's motion for relief from judgment denying her motion to withdraw her petition and dismissing the petition with prejudice, was a "habeas corpus proceeding," for purpose of statute requiring issuance of certificate of appealability (COA) as a prerequisite to appeal from the final order in the habeas proceeding; if not for the underlying habeas proceeding, there would be no judgment from which to obtain relief. 28 U.S.C.A. §§ 2253(c), 2254; Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

21 Cases that cite this headnote

[8] Habeas Corpus

🔑 Certificate of probable cause

Habeas petitioner was required to obtain a certificate of appealability (COA) as a prerequisite to appeal the order denying her motion for relief from judgment dismissing habeas petition and denying her motion to withdraw petition; order was "the final order" in habeas corpus proceeding, and allowing appeal of order without COA would circumvent purpose of COA requirement to winnow out frivolous appeals in habeas cases, despite limits imposed by rule governing motion for relief from judgment. 28 U.S.C.A. §§ 2253(c), 2254; Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

39 Cases that cite this headnote

[9] Habeas Corpus

🔑 Certificate of probable cause

The purpose of the statutory requirement of a certificate of appealability (COA) as prerequisite to appeal in habeas proceeding is to enable the courts of appeals to winnow out frivolous appeals in habeas cases. 28 U.S.C.A. § 2253(c).

1 Cases that cite this headnote

[10] Federal Civil Procedure

🔑 Catch-all provisions

A motion for relief from judgment based upon "any other reason justifying relief from the operation of the judgment" in addition to the reasons enumerated in the rule governing the motion may not be granted absent extraordinary circumstances. Fed.Rules Civ.Proc.Rule 60(b)(6), 28 U.S.C.A.

45 Cases that cite this headnote

[11] Habeas Corpus

🔑 Certificate of probable cause

In habeas claim alleging procedural error, a Court of Appeals may not grant a certificate of appealability (COA) unless petitioner establishes (1) that jurists of reason would find it debatable whether the claim states a valid claim of the denial of a constitutional right, and (2) that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. 28 U.S.C.A. § 2253(c).

205 Cases that cite this headnote

[12] Habeas Corpus

🔑 Certificate of probable cause

In determining whether habeas petitioner was entitled to certificate of appealability (COA) from district court order denying motion for relief from judgment from denial of motion to withdraw habeas petition, the Court of Appeals could consider the underlying habeas petition. 28 U.S.C.A. §§ 2253(c), 2254; Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

127 Cases that cite this headnote

[13] Habeas Corpus

🔑 Certificate of probable cause

Habeas petitioner was entitled to certificate of appealability (COA) in order to appeal district court's denial of motion for relief from judgment from order denying motion to withdraw petition asserting ineffective assistance of counsel claim, based on determination that defendant's statements during her plea hearing, that she was entering guilty plea voluntarily, that she understood the maximum penalty for the offense, and that she was satisfied with her attorney's performance, were inconsistent with her allegation that her attorney ineffectively advised her that she faced a maximum imprisonment term of much less than she received; it was debatable among reasonable jurists whether petitioner received ineffective assistance of counsel, and if district court had allowed petitioner to withdraw petition to exhaust her state remedies, she could

have had a hearing in state court on the ineffective assistance claim, and petitioner based motion on mental health issues, which could have qualified as special circumstances to warrant relief from judgment. 28 U.S.C.A. §§ 2253(c), 2254; Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

37 Cases that cite this headnote

[14] Federal Civil Procedure

🔑 Catch-all provisions

Federal rule of civil procedure allowing motion for relief from judgment for any reason justifying relief from operation of judgment provides a court with a grand reservoir of equitable power to do justice in a particular case. Fed.Rules Civ.Proc.Rule 60(b)(6), 28 U.S.C.A.

17 Cases that cite this headnote

[15] Federal Courts

🔑 Determination of question of jurisdiction

The Court of Appeals is bound in all cases to ascertain its own appellate jurisdiction before reviewing a district court judgment.

1 Cases that cite this headnote

[16] Habeas Corpus

🔑 Refusal to Discharge;Subsequent Applications;Prejudice

A motion for relief from judgment directly attacking the prisoner's conviction or sentence will usually amount to a successive habeas petition, for purpose of statutory rule requiring authorization as a prerequisite to filing successive petition. 28 U.S.C.A. § 2254; Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

4 Cases that cite this headnote

[17] Habeas Corpus

🔑 Relief from judgment;revocation or modification

Habeas Corpus

🔑 [Refusal to Discharge;Subsequent Applications;Prejudice](#)

A motion for relief from judgment seeking a remedy for some defect in the habeas review process will generally be deemed a proper motion to reconsider, rather than a successive habeas petition, for purpose of statutory rule requiring authorization as a prerequisite to filing successive petition. [28 U.S.C.A. § 2254](#); [Fed.Rules Civ.Proc.Rule 60\(b\)](#), [28 U.S.C.A.](#)

[6 Cases that cite this headnote](#)

[18] **Habeas Corpus**

🔑 [Refusal to Discharge;Subsequent Applications;Prejudice](#)

Motion for relief from judgment from order denying motion to withdraw habeas petition, challenging validity of petitioner's guilty plea to larceny offense, was required to be treated as successive habeas petition, over which District Court had no jurisdiction, absent issuance by Court of Appeals of pre-filing authorization for a successive petition. [28 U.S.C.A. §§ 2244\(b\), 2254](#); [Fed.Rules Civ.Proc.Rule 60\(b\)](#), [28 U.S.C.A.](#)

[6 Cases that cite this headnote](#)

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Before [WILKINS](#), Chief Judge, and [WIDENER](#) and [MICHAEL](#), Circuit Judges.

Vacated and remanded by published opinion. Chief Judge [WILKINS](#) wrote the opinion, in which Judge [WIDENER](#) and Judge [MICHAEL](#) joined.

OPINION

[WILKINS](#), Chief Judge.

Juanita Pope Reid seeks review of a district court order denying her motion for reconsideration of an order denying her application for habeas corpus relief. We hold that Reid must obtain a certificate of appealability as a prerequisite to our consideration of her claims. *See* [28 U.S.C.A. § 2253\(c\)](#) ([West Supp.2003](#)). In addition, we grant a certificate of appealability as to the only claim that Reid seeks to appeal, vacate the decision of the district court, and remand with instructions.

I.

In November 2000, Reid appeared in a Virginia state court and pled guilty to larceny. The court accepted her plea, revoked the probation she was serving for a prior offense, and sentenced her to a total of six years imprisonment four years for the probation violation and two years for the new offense (with an additional three years suspended). Reid's ensuing appeals were unsuccessful, and she did not seek collateral review in state court.

In July 2001, Reid filed an application for habeas corpus relief pursuant to [28 U.S.C.A. § 2254](#) ([West 1994 & Supp.2003](#)). The district court dismissed this application without prejudice for failure to exhaust state remedies.

Reid subsequently filed a second habeas application. After the Commonwealth filed its answer, however, Reid moved to withdraw her application without prejudice so that she could pursue a state habeas action. The district court denied this motion and dismissed Reid's application with prejudice.

The district court construed Reid's application to present three claims:

1. Petitioner did not understand the nature of the charges and the consequences of pleading guilty; her attorney led her to believe she would only receive a ten month sentence.

2. Petitioner's conviction was obtained by the unconstitutional failure of the prosecution to disclose evidence to petitioner, specifically that no presentence report was prepared despite the judge's request for one.

3. Petitioner's conviction was obtained by a violation of her privilege against self-incrimination when the judge heard evidence from the probation officer concerning her participation in treatment for substance abuse and kleptomania.

J.A. 77. The court determined that Claims 2 and 3 were procedurally defaulted and that Claim 1, the ineffective assistance claim, was meritless in light of Reid's representations at the plea hearing "that she was entering the plea voluntarily, that nobody forced her into entering the plea, that she understood the maximum penalty for the crime and that she was satisfied with her attorney's performance." *Id.* at 81.

Reid then moved for reconsideration, asking the district court "to vacate dismissal with prejudice prayerfully asking to be without prejudice, [and] to also vacate judgement of denial of withdraw[a]l of petition based on Petitioner mental health issues." *Id.* at 84. Reid further asked the *367 court "to grant also the remand for resentencing." *Id.* The court construed this as a motion for relief from the judgment under [Federal Rule of Civil Procedure 60\(b\)](#) and denied the motion. Reid now appeals this order.

II.

The initial question before us is whether Reid needs a certificate of appealability (COA) to appeal the denial of her [Rule 60\(b\)](#) motion. Under [28 U.S.C.A. § 2253\(c\)\(1\)\(A\)](#), a COA is required in order for a habeas applicant to obtain appellate review of "the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court." Thus, we must decide whether the order denying Reid's [Rule 60\(b\)](#) motion was "the final order in a habeas corpus proceeding."

1 [Section 2253\(c\)](#) provides in full:

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

[1] [2] [3] To interpret this statute, we begin by examining its plain language. *See Ramey v. Director*, 326 F.3d 474, 476 (4th Cir.2003). We must give the relevant terms their "common and ordinary meaning." *Mapoy v. Carroll*, 185 F.3d 224, 229 (4th Cir.1999) (internal quotation marks omitted). And, to the extent that there is any ambiguity in these terms, we must consider other indicia of congressional intent, such as the legislative history, *see Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 627, 113 S.Ct. 2264, 124 L.Ed.2d 539 (1993). It is also appropriate in cases of ambiguity to consider which interpretation of the statute would best give effect to the underlying legislative purpose. *See United States v. Goines*, 357 F.3d 469, 475 (4th Cir.2004).

A. "The Final Order"

[4] We begin with the phrase "the final order." It is undisputed that an order denying relief under [Rule 60\(b\)](#) is a "final order" for purposes of appellate review. *See United States v. Holland*, 214 F.3d 523, 525 n. 4 (4th Cir.2000). Reid maintains, however, that the order denying her [Rule 60\(b\)](#) motion was not "the final order" in this case. She asserts that because Congress used the definite article "the," rather than a broader term like "a" or "any," [§ 2253\(c\)](#) applies only to the order denying relief on her habeas application.

[5] Reid is correct about the meaning of the word "the." *See Webster's Third New Int'l Dictionary* 2368 (1981)

(stating that the word “the” is “used ... to indicate that a following noun ... refers to someone or something that is unique”). Thus, because Congress used the definite article “the,” we conclude that, in every habeas proceeding, there is only one order subject to the requirements of § 2253(c).

B. “Proceeding”

[6] The conclusion we have just stated does not end our inquiry. Instead, we must determine whether the order denying Reid's Rule 60(b) motion was issued within the same “habeas corpus proceeding” as *368 the order denying her § 2254 application. We conclude that it was not; on the contrary, a single habeas action may embrace multiple habeas “proceedings,” and more than one of these proceedings may give rise to a “final order” subject to the COA requirement.

The term “proceeding” is indeterminate:

The word [“proceeding”] may be used synonymously with ‘action’ or ‘suit’ to describe the entire course of an action at law or suit in equity from the issuance of the writ or filing of the complaint until the entry of a final judgment, or may be used to describe any act done by authority of a court of law and every step required to be taken in any cause by either party.

Black's Law Dictionary 1204 (6th ed.1990); see also *Black's Law Dictionary* 1221 (7th ed.1999) (defining “proceeding” alternatively as “[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment” and as “[a]n act or step that is part of a larger action”). But even under the more expansive definitions quoted above, a proceeding terminates with a judgment. Since Rule 60(b) motions are used to challenge final judgments, a proceeding involving a Rule 60(b) motion is necessarily separate from the proceeding giving rise to the underlying judgment. Cf. *Holland*, 214 F.3d at 525 n. 4 (noting that “the denial of a Rule 60(b) motion is appealable as a separate final order”).

The language of Rule 60(b) confirms this understanding of the word “proceeding.” The rule allows a party to seek relief from “a final judgment, order, or proceeding.” Fed.R.Civ.P. 60(b) (emphasis added). This indicates that filing a Rule 60(b) motion initiates a new proceeding that is separate from the proceeding from which the movant seeks relief (or, as in this case, the proceeding giving rise to the judgment from which the movant seeks relief).

To the extent that any ambiguity remains, it may be resolved through examination of pre-AEDPA procedures. Congress enacted § 2253(c) in its current form as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). Before the AEDPA, § 2253 provided in pertinent part:

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

28 U.S.C.A. § 2253 ¶ 3 (West 1994). Although the AEDPA substantially revised this provision, it retained the phrase relevant to our analysis “the final order in a habeas corpus proceeding.” Because Congress did not change this phrase, we presume that Congress intended to ratify any settled judicial interpretation regarding the scope of the certification requirement. See *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 527, 114 S.Ct. 1023, 127 L.Ed.2d 455 (1994). It is therefore of great significance that pre-AEDPA courts consistently required a certificate of probable cause (CPC) when reviewing orders denying Rule 60(b) motions in habeas actions. See *Lynch v. Blodgett*, 999 F.2d 401, 402-03 (9th Cir.1993) (per curiam order); see also *Waye v. Townley*, 884 F.2d 762, 762 (4th Cir.1989) (per curiam) (noting that habeas applicant was granted CPC for appeal from Rule 60(b) order).

C. “Habeas Corpus Proceeding”

[7] There is one question remaining under § 2253(c): If an order denying Rule 60(b) constitutes “the final order” in a discrete “proceeding,” is that Rule 60(b) *369 proceeding a “habeas corpus proceeding” for purposes of § 2253(c)? We hold that it is.

A Rule 60(b) proceeding, however distinct from the underlying § 2254 proceeding, can never be entirely independent of the underlying proceeding; after all, if not for that underlying proceeding, there would be no judgment to give rise to a Rule 60(b) motion. Thus, it is appropriate to treat a Rule 60(b) proceeding as a “habeas corpus proceeding” one of multiple proceedings within the larger habeas action.

This conclusion is supported by Supreme Court precedent applying the rules governing habeas proceedings to Rule 60(b) motions challenging habeas judgments. *See, e.g., Pitchess v. Davis*, 421 U.S. 482, 489 90, 95 S.Ct. 1748, 44 L.Ed.2d 317 (1975) (per curiam) (applying the exhaustion requirement to a claim presented in a Rule 60(b) motion seeking additional relief beyond the judgment in the original habeas proceeding). We therefore hold that litigation relating to a Rule 60(b) motion in a habeas action constitutes a “habeas corpus proceeding” and that the order denying Rule 60(b) relief is “the final order” in such a proceeding.

D. Policy Considerations

[8] For the reasons stated above, we are persuaded that § 2253(c) requires that a habeas petitioner obtain a COA in order to appeal the denial of a Rule 60(b) motion. Nevertheless, in the interest of thoroughness, we will address Reid's policy arguments against requiring a COA in this circumstance.

[9] We note initially that the purpose of the COA requirement is to enable the courts of appeals to winnow out frivolous appeals in habeas cases. *See Barefoot v. Estelle*, 463 U.S. 880, 892 93, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983) (explaining the purpose of the pre-AEDPA CPC requirement); *see also Slack v. McDaniel*, 529 U.S. 473, 483 84, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000) (noting that the AEDPA largely codified the standards set forth in *Barefoot*). As the Second Circuit has noted, “it would be rather anomalous for Congress to have intended to screen out unmeritorious appeals from denials

of habeas corpus petitions and yet not have wished to apply this same screen to 60(b) motions seeking to revisit those denials.” *Kellogg v. Strack*, 269 F.3d 100, 103 (2d Cir.2001) (per curiam).²

² Five courts of appeals other than the Second Circuit have applied the COA requirement to appeals from Rule 60(b) orders in habeas cases. *See Gonzalez v. Secy*, 366 F.3d 1253, 1262 66 (11th Cir. Apr.26, 2004) (en banc) (holding that COA is required for appeal from denial of Rule 60(b) motion); *Rutledge v. United States*, 230 F.3d 1041, 1052 53 (7th Cir.2000) (denying COA as to issue raised in Rule 60(b) motion); *Morris v. Horn*, 187 F.3d 333, 336 (3d Cir.1999) (same); *Langford v. Day*, 134 F.3d 1381, 1383 (9th Cir.1998) (per curiam order) (same); *Zeitvogel v. Bowersox*, 103 F.3d 56, 57 (8th Cir.1996) (per curiam order) (same). The only court to depart from this consensus is the Fifth Circuit, which has held that no COA is required if the underlying motion was a true Rule 60(b) motion rather than a successive habeas application. *See Dunn v. Cockrell*, 302 F.3d 491, 492 & n. 1 (5th Cir.2002) (per curiam), *cert. denied*, 537 U.S. 1181, 123 S.Ct. 1208, 154 L.Ed.2d 1013 (2003); *cf. United States v. Winestock*, 340 F.3d 200, 207 (4th Cir.) (explaining how to distinguish between true Rule 60(b) motions and disguised successive applications), *cert. denied*, 540 U.S. 995, 124 S.Ct. 496, 157 L.Ed.2d 395 (2003).

Of the cases cited above, only *Kellogg* and *Gonzalez* offered reasons to support their holdings regarding the applicability of § 2253(c). We find the reasons articulated in *Kellogg* persuasive, but we do not rely extensively on that decision because it did not address the arguments presented here. *Gonzalez*, on the other hand, did address the question of whether the phrase “the final order” encompasses more than one order and concluded that the phrase may be construed as plural under the Dictionary Act. *See Gonzalez*, 366 F.3d at 1262. The Dictionary Act provides, in pertinent part, that “[i]n determining the meaning of any Act of Congress, unless the context indicates otherwise,] words importing the singular include and apply to several persons, parties, or things 1 U.S.C.A. § 1 (West 1997). Although the Dictionary Act essentially confirms our understanding of § 2253(c), we have not relied on this statute because it is “not ... to be applied except where it is necessary to carry out the evident intent of the statute.” *First Nat'l Bank in St. Louis v. Missouri*, 263 U.S. 640, 657, 44 S.Ct. 213, 68 L.Ed. 486 (1924); *see Toy Mfrs. of Am., Inc. v.*

Consumer Prod. Safety Comm'n, 630 F.2d 70, 74 (2d Cir.1980) (declining to rely on Dictionary Act when other evidence was available to establish intent of Congress). We agree with *Gonzalez*, however, about the value of the COA requirement as a “filter for plainly meritless appeals. *Gonzalez*, 366 F.3d at 1263.

*370 Reid argues that there is no anomaly in declining to apply § 2253(c) to appeals from Rule 60(b) orders because Rule 60(b) motions are already subject to threshold requirements designed to screen out frivolous claims. We disagree.

[10] Rule 60(b) provides in pertinent part:

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

Motions within each category are subject to various limitations. For example, motions under Rule 60(b)(1), (2), or (3) must be made within a year after entry of the order being challenged. See Fed.R.Civ.P. 60(b). Also, a motion under Rule 60(b)(6) may not be granted absent “extraordinary circumstances.” *Valero Terrestrial Corp.*

v. Paige, 211 F.3d 112, 118 n. 2 (4th Cir.2000) (internal quotation marks omitted).

We decline to treat these limitations on Rule 60(b) review as equivalent to the restrictions imposed by § 2253(c). Neither the Rule itself nor the cases interpreting it require a 60(b) movant to satisfy the primary prerequisite for issuance of a COA—namely, making “a substantial showing of the denial of a constitutional right.” 28 U.S.C.A. § 2253(c)(2). Moreover, as noted above, the purpose of the COA requirement is to screen out frivolous appeals. In contrast, the limits on Rule 60(b) review are designed to protect the finality of judgments. See, e.g., *Schultz v. Butcher*, 24 F.3d 626, 630 (4th Cir.1994) (noting that district court must consider interests of finality in resolving motion pursuant to Rule 60(b)(3)). That these interests are not interchangeable is demonstrated by the fact that Congress requires a COA in habeas cases even though finality concerns figure prominently in habeas litigation, see *Calderon v. Thompson*, 523 U.S. 538, 554–55, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998). We therefore conclude that, notwithstanding the limits on Rule 60(b) review, requiring a COA for an appeal from a Rule 60(b) motion is necessary to achieve the congressional purposes underlying § 2253.

*371 III.

[11] Having concluded that Reid needs a COA to obtain review of the order denying her Rule 60(b) motion, we now consider whether a COA should issue. Reid's Rule 60(b) motion apparently raised two claims: (1) that the district court erred in refusing to allow her to withdraw her habeas application (“the Withdrawal Claim”), and (2) that the state court abused its discretion in imposing a six-year sentence (“the Sentencing Claim”).³ On appeal, however, Reid seeks review only of the Withdrawal Claim. Because this claim is procedural in nature, we may not grant a COA unless Reid establishes (a) “that jurists of reason would find it debatable whether the [Rule 60(b) motion] states a valid claim of the denial of a constitutional right” and (b) “that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack*, 529 U.S. at 484, 120 S.Ct. 1595.

³ We view Reid's request that the dismissal with prejudice be converted to a dismissal without

prejudice as merely an alternate phrasing of the Withdrawal Claim.

A.

In order to apply the first of the *Slack* requirements, we must determine where to look to assess whether Reid has made a substantial showing of the denial of a constitutional right. The Withdrawal Claim itself is not constitutional in nature. Moreover, this claim is entirely distinct from the Sentencing Claim, because, even if we ultimately grant relief as to the Withdrawal Claim and remand this case to the district court, our remand would not open the door to reconsideration of the Sentencing Claim. It therefore would not make sense to consider the Sentencing Claim in determining whether Reid's Withdrawal Claim makes the showing required by § 2253(c)(2). Cf. 28 U.S.C.A. § 2253(c)(3) (requiring that COA specify issues for review). Thus, if we were to look only at Reid's Rule 60(b) motion, we would find no constitutional claim to support issuance of a COA.

[12] We hold, however, that we should not look exclusively at the motion. Instead, we may also examine the underlying habeas application. See *Morris v. Horn*, 187 F.3d 333, 336 (3d Cir.1999) (holding, pre-*Slack*, that a court may grant a COA for review of a Rule 60(b) order based on “a credible showing that the District Court's denial of Rule 60(b) relief was in error combined with a showing that the underlying habeas petition alleges a denial of a constitutional right”).

In reviewing Reid's habeas application to determine whether she has made a substantial showing of the denial of a constitutional right, we look only at those claims that are not “distinct” from her procedural claim, as we have used that term above. In other words, we look at the claims that the district court may reexamine if we conclude that its procedural ruling was erroneous; if a particular substantive claim could not form the basis for relief on remand following vacatur of a challenged procedural ruling, then we must disregard that claim in determining whether to grant a COA with respect to the procedural ruling.⁴

⁴ In prior cases, we have not expressly defined which substantive claims we may consider in conducting the first prong of the *Slack* inquiry, but our holding today is consistent with existing practice. Compare

Hernandez v. Caldwell, 225 F.3d 435, 437 (4th Cir.2000) (examining a limitations ruling that resulted in dismissal of an entire application and holding that a COA was proper as to all claims because the limitations ruling was incorrect and all of the claims “state d] a valid claim of the denial of a constitutional right (internal quotation marks omitted)), with *Rose v. Lee*, 252 F.3d 676, 684–88 (4th Cir.2001) (reviewing claims that were individually deemed procedurally defaulted and examining each claim individually to determine whether the appellant had made a substantial showing of the denial of a constitutional right).

*372 Applying this principle here is straightforward, because the procedural ruling at issue—the denial of Rule 60(b) relief on the Withdrawal Claim—affected all of the claims in the underlying application. If that procedural decision was erroneous, then Reid may be entitled to have the judgment as to all of her substantive claims changed from a dismissal *with* prejudice to a dismissal *without* prejudice. We may therefore consider any of the claims in Reid's application in answering the first question of the *Slack* inquiry.

Furthermore, it is sufficient for Reid to make the requisite showing with respect to *any one* of the claims in her application. In other words, if any one of Reid's claims presents a substantial showing of the denial of a constitutional right, then we must conclude that the first *Slack* requirement is satisfied, and we need not examine the other claims in the application. See *Jefferson v. Welborn*, 222 F.3d 286, 289 (7th Cir.2000) (holding that the first *Slack* prong was satisfied because “[a]t least some of [the applicant's] claims” alleged the denial of a constitutional right).

[13] Following this approach, we hold that the first requirement of *Slack* is satisfied because Reid's ineffective assistance of counsel claim makes a substantial showing of the denial of a constitutional right. The district court denied relief on this claim based on Reid's statements at her plea colloquy. However, nothing in those statements is inconsistent with Reid's allegation that her attorney advised her that she faced a maximum penalty of ten months imprisonment. It is therefore debatable among reasonable jurists whether the denial of relief on Reid's ineffective assistance claim was correct. This showing as to one of the claims in the underlying application suffices to satisfy the first of the requirements set forth in *Slack*.

B.

With respect to the second showing required under *Slack*, we must again consider where our focus should be. We could look exclusively at the actual analysis employed by the district court. Or, we could assess both the rationale relied on by the district court and any alternative grounds suggested by the record. It is not clear either from § 2253(c) itself or from applicable precedent which of these approaches is proper.⁵

⁵ In theory, there are many situations in which a procedural consideration not addressed by the district court might render an appeal futile. For example, after the district court dismisses a claim on its merits, the court of appeals might conclude that the claim is procedurally defaulted. In situations like this, the court of appeals could deny a COA on the ground that any appeal would be futile. See *Krantz v. United States*, 224 F.3d 125, 127 (2d Cir.2000) (per curiam) (denying COA on mootness grounds because habeas applicant died while request for COA was pending); cf. *Rodriguez v. Scillia*, 193 F.3d 913, 917-18 (7th Cir.1999) (vacating COA upon determining that prosecutorial misconduct claim which district court denied on merits was procedurally defaulted). Alternatively, the court could grant a COA (if the applicant shows that the analysis employed by the district court would be debatable among reasonable jurists) and then affirm the denial of habeas relief on procedural grounds. See, e.g., *Garcia v. Lewis*, 188 F.3d 71, 75 n. 2 (2d Cir.1999).

We need not resolve that question here, however. As discussed below in Part III.B.1, the validity of the rationale actually applied by the district court is debatable among jurists of reason. And, as we will *373 subsequently explain, the record does not present any non-debatable basis for denying Reid's motion arising either from the general limitations that apply in Rule 60(b) proceedings (Part III.B.2) or from the jurisdictional constraints that govern Rule 60(b) motions in habeas cases (Part IV). Accordingly, no matter how we approach the inquiry before us, Reid has demonstrated that the procedural ruling of the district court is debatable among reasonable jurists.

1.

We initially consider the analysis employed by the district court. In its order denying Rule 60(b) relief, the court recited the standards for such relief and then stated: “For the reasons previously articulated by the Court, Reid has failed to allege a meritorious claim entitling her to relief under Fed.R.Civ.P. 60(b). Accordingly, Reid's motion for relief from judgment will be denied.” J.A. 89. We construe this order to indicate that the court denied Reid's Rule 60(b) motion as to the Withdrawal Claim for the same reasons the court had already denied Reid's pre-judgment motion to withdraw. We therefore begin our COA inquiry by considering whether reasonable jurists could debate the correctness of the justification articulated by the district court when it denied Reid's motion to withdraw.

The district court did not expressly set forth its basis for denying this motion, but we can reconstruct its reasoning from the materials in the record. Reid moved to withdraw her petition “[s]o I can proceed with writ of habeas corpus in state court.” *Id.* at 73. The district court denied this motion simultaneously with its determination that all of Reid's claims were procedurally defaulted or meritless and that her habeas application therefore should not be dismissed for failure to exhaust state remedies. Thus, we infer that the court decided that dismissal without prejudice was inappropriate because Reid plainly was not entitled to relief on any of her claims.

Although “[a]n application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State,” 28 U.S.C.A. § 2254(b)(2), reasonable jurists could debate whether such a disposition was appropriate here. As noted above, the district court resolved Reid's ineffective assistance claim based on representations that did not, in fact, undermine her claim. Moreover, if the district court had allowed Reid to withdraw her application and exhaust state remedies, she might have had a hearing in state court at which she could have proven that she was misinformed by her attorney.⁶ Thus, Reid has made a substantial showing that the district court abused its discretion in denying her application on the merits instead of granting her motion to withdraw her application without prejudice. Cf. *Ellett Bros. v. United States Fid. & Guar. Co.*, 275 F.3d 384, 388 (4th Cir.2001) (applying abuse of discretion standard in reviewing order granting motion to voluntarily dismiss claim without prejudice). And, because the district court relied on the same grounds in denying Reid's Rule 60(b)

motion, reasonable jurists could debate whether this order was an abuse of discretion as well.

6 We do not mean to imply that we accept Reid's allegation that she received incorrect information from her attorney. Our point is rather that, until there is an evidentiary hearing on this question, it is impossible to determine whether this allegation is true. The appropriate venue for such a hearing would be state court rather than federal court. See 28 U.S.C.A. § 2254(e)(2).

*374 2.

Even if the denial of Reid's motion to withdraw was erroneous (which we do *not* hold; we hold only that this ruling is debatable among reasonable jurists), it would not necessarily follow that Reid is entitled to Rule 60(b) relief, as Rule 60(b) prescribes multiple limitations on post-judgment relief. Although it appears that the district court did not rely on these limitations in ruling on Reid's Withdrawal Claim, we will nevertheless consider whether the record suggests any non-debatable basis for denying Reid's Rule 60(b) motion based on the limits of Rule 60(b) review. We find none.

[14] The only provision of Rule 60(b) that is potentially applicable here is Rule 60(b)(6), which permits a district court to modify a previous decision based on "any ... reason justifying relief from the operation of the judgment." Rule 60(b)(6) "provides the court with a grand reservoir of equitable power to do justice in a particular case." *Eberhardt v. Integrated Design & Constr., Inc.*, 167 F.3d 861, 872 (4th Cir.1999) (internal quotation marks omitted). Nevertheless, as noted above, a court may not grant relief pursuant to Rule 60(b)(6) absent extraordinary circumstances.

The possibility that Reid qualifies for Rule 60(b)(6) relief is not so remote that this appeal is necessarily futile. Reid diligently sought leave to withdraw her habeas application, filing her motion to withdraw before her application was dismissed and then promptly reiterating this request (by way of her Rule 60(b) motion) after the dismissal. There are strong equitable considerations favoring such motions in habeas cases, given the stringent requirements a prisoner must satisfy to file a successive habeas application, see 28 U.S.C.A. § 2244(b) (West Supp.2003). Cf. *Castro v. United States*, 540 U.S. 375,

, 124 S.Ct. 786, 792, 157 L.Ed.2d 778 (2003) (noting that courts have exercised special care in habeas cases because of the obstacles to filing successive applications). And Reid has indicated that special considerations may be present here specifically, her "mental health issues" and her apparently limited ability to understand court procedures. J.A. 84; see *Klapprott v. United States*, 335 U.S. 601, 613 15, 69 S.Ct. 384, 93 L.Ed. 266 (1949) (opinion of Black, J.) (holding that relief from default judgment of denaturalization was proper under Rule 60(b)(6) because petitioner was incarcerated and ill when judgment was entered). We do not know whether Reid's allegations concerning her mental health and limited capacity are accurate, but the allegations alone, when combined with the other reasons we have set forth above, convince us that it is appropriate to grant a COA and delve further into the issues presented in this appeal. For these reasons, and in light of the jurisdictional concerns discussed below, we grant a COA on the question of whether the district court properly denied Reid's post-judgment request to withdraw her habeas application.

IV.

[15] Having issued a COA, we are now empowered to consider whether the district court erred in denying Reid's Rule 60(b) motion. We conclude that the district court lacked jurisdiction to consider the motion, and we therefore vacate the district court order and remand for appropriate proceedings.⁷

7 It may appear incongruous for us to grant a COA but then hold that the district court had no jurisdiction. As this case illustrates, however, a habeas applicant may have a strong interest in having an appellate court declare that the judgment of the district court is void for lack of jurisdiction. Thus, if we adopted a blanket policy of denying a COA upon determining that the district court lacked jurisdiction, this would leave an entire class of aggrieved habeas applicants with no remedy. Moreover, we may not forgo the COA inquiry altogether, as there is no exemption in § 2253(c) for questions of subject matter jurisdiction, see *United States v. Sosa*, 364 F.3d 507, 2004 WL 758382, at *3 (4th Cir. Apr.9, 2004) (declining to adopt proposed exception to § 2253(c) that was not supported by statutory language), and we are bound in all cases to ascertain our own appellate jurisdiction before reviewing a district court judgment, see *Steel*

Co. v. Citizens for a Better Env't, 523 U.S. 83, 94, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (holding that court of appeals may not assume jurisdiction and resolve appeal on merits). Consequently, we must accept some incongruity in order to be faithful to the statutory scheme while still affording appellate review to all applicants who are entitled to such review.

*375 In *United States v. Winestock*, 340 F.3d 200 (4th Cir.), cert. denied, 540 U.S. 995, 124 S.Ct. 496, 157 L.Ed.2d 395 (2003), we held that some Rule 60(b) motions in habeas cases should be treated as successive habeas applications. See *id.* at 206-07. Reid's motion was filed and denied before *Winestock* was decided, and the parties have not urged that the district court erred in addressing the merits of Reid's motion instead of treating it as an unauthorized successive application. Nevertheless, because this issue is jurisdictional, we must address it. See *id.* at 205 (stating that district court lacks jurisdiction to consider successive application filed without authorization).

[16] [17] [18] *Winestock* explained that “a motion directly attacking the prisoner's conviction or sentence will usually amount to a successive application, while a motion seeking a remedy for some defect in the collateral review process will generally be deemed a proper motion to reconsider.” *Id.* at 207. Reid's Rule 60(b) motion did both; her Withdrawal Claim sought to remedy a purported defect in the review process, while her Sentencing Claim directly challenged the validity of the criminal judgment under which she is imprisoned. Under *Winestock*, we must treat this motion as a successive habeas application, over which the district court had no jurisdiction. See *id.* at 205. The proper remedy, however, is not dismissal;

instead, Reid must be given “an opportunity to elect between deleting the improper claims or having the entire motion treated as a successive application.” *Id.* at 207. We therefore vacate the order denying Reid's Rule 60(b) motion and remand to allow her to make the required election.

If Reid chooses to withdraw her Sentencing Claim, then the district court may consider anew her request to withdraw her habeas application. Although we have held that this issue is sufficiently debatable to justify the issuance of a COA, we take no position on whether Reid is in fact entitled to Rule 60(b) relief.

V.

For the foregoing reasons, we hold that a COA is required for appeals from Rule 60(b) motions in habeas cases, and we grant a COA as to Reid's claim that the district court erred in denying her request to withdraw her habeas application. We further hold that the district court erred in failing to treat Reid's motion as a successive habeas application; we therefore vacate the district court order and remand to allow Reid to choose between withdrawing her improper claim or suffering dismissal or transfer of her motion.

VACATED AND REMANDED

All Citations

369 F.3d 363

EXHIBIT 252

 KeyC to Ye ow F ag Negat ve Treatment
 D sagement Recogn zed by [TorPharm, Inc. v. Thompson](#), D.D.C.,
 Apr 25, 2003

316 F.3d 1348

United States Court of Appeals,
 Federal Circuit.

WARNER-LAMBERT
 COMPANY, Plaintiff-Appellant,
 v.
 APOTEX CORP., Apotex, Inc., and
 Torpharm, Inc., Defendants-Appellees.

No. 02-1073.

|
 Jan. 16, 2003.

Synopsis

Assignee brought action against competitor alleging infringement of patent that disclosed and claimed use of certain cyclic amino acid compounds, as well as salts and esters derived from them, for treatment of neurodegenerative diseases. The United States District Court for the Northern District of Illinois, [Paul E. Plunkett](#), Senior Judge, granted summary judgment of noninfringement, 2001 WL 1104618. Assignee appealed. The Court of Appeals, [Lourie](#), Circuit Judge, held that it was not an act of infringement for competitor to submit an Abbreviated New Drug Application (ANDA) for approval to market a drug for a use when neither the drug nor that use was covered by an existing patent, and the patent at issue was for a use not approved under the New Drug Application (NDA).

Affirmed.

West Headnotes (17)

[1] Patents


Filing of applications for drug approval

It is not an act of infringement to submit an Abbreviated New Drug Application (ANDA) for approval to market a drug for a use when neither the drug nor that use is covered by an existing patent, and the patent at issue is for a use not approved under the New Drug

Application (NDA). 35 U.S.C.A. § 271(e)(2) (A).

41 Cases that cite this headnote

[2] Statutes

 Language and intent, will, purpose, or policy

Statutes

 Statute as a Whole;Relation of Parts to Whole and to One Another

When expounding a statute, a court is not to be guided by a single sentence or member of a sentence, but looks to the provisions of the whole law, and to its object and policy.

8 Cases that cite this headnote

[3] Statutes

 Will of legislature

Statutes

 Statute as a Whole;Relation of Parts to Whole and to One Another

Statutes

 Subject or purpose

When interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute, or statutes on the same subject, and the objects and policy of the law, as indicated by its various provisions, and give it such a construction as will carry into execution the will of the legislature.

5 Cases that cite this headnote

[4] Health

 Effect of approval or non-approval;off-label use

While a physician may prescribe an approved drug for any use consistent with acceptable medical practice, a New Drug Application (NDA), and hence an Abbreviated New Drug Application (ANDA), only approves a use for which safety and efficacy have been proven. Federal Food, Drug, and Cosmetic Act, §

505(j)(2)(A)(i), 21 U.S.C.A. § 355(j)(2)(A)(i);
35 U.S.C.A. § 271.

[4 Cases that cite this headnote](#)

[5] Health

🔑 [New drugs](#)

A certification need not be provided for a patent claiming a use for which the applicant for an Abbreviated New Drug Application (ANDA) is not seeking approval, i.e., a use not covered by the New Drug Application (NDA). Federal Food, Drug, and Cosmetic Act, § 505(j)(2)(A)(vii), (viii), 21 U.S.C.A. § 355(j)(2)(A)(vii), (viii).

[10 Cases that cite this headnote](#)

[6] Health

🔑 [Effect of approval or non-approval; off-label use](#)

Patents

🔑 [Filing of applications for drug approval](#)

Actions for infringement of method-of-use patents are limited to “controlling use patents,” or patents that claim an approved use of a drug; an applicant for an Abbreviated New Drug Application (ANDA), who necessarily “piggybacks” on the approved New Drug Application (NDA) of the innovator, can only apply to sell the approved drug and to market it for the use for which the Food and Drug Administration (FDA) has indicated that the drug is safe and efficacious. 35 U.S.C.A. § 271(e)(2)(A).

[35 Cases that cite this headnote](#)

[7] Patents

🔑 [Particular fields of invention](#)

Patent assignee failed to show that competitor directly infringed upon its patent that disclosed and claimed use of certain cyclic amino acid compounds, as well as salts and esters derived from them, for treatment of neurodegenerative diseases, since assignee did not provide any evidence that competitor directly practiced or would ever practice any

methods claimed in the neurodegenerative method patent. 35 U.S.C.A. § 271(a).

[7 Cases that cite this headnote](#)

[8] Patents

🔑 [Inducement to infringe](#)

To succeed on a claim of patent infringement on an active inducement theory, a plaintiff must prove that the defendants' actions induced infringing acts and that they knew or should have known that their actions would induce actual infringement; however, that defendants have knowledge of the acts alleged to constitute infringement is not enough. 35 U.S.C.A. § 271(b).

[51 Cases that cite this headnote](#)

[9] Patents

🔑 [Inducement to infringe](#)

Proof of actual intent to cause the acts which constitute the infringement of a patent is a necessary prerequisite to finding active inducement; inducement requires proof that the accused infringer knowingly aided and abetted another person's direct infringement of the patent. 35 U.S.C.A. § 271(b).

[25 Cases that cite this headnote](#)

[10] Patents

🔑 [Participation, intent, and contributory infringement](#)

While proof of intent is necessary in a claim of patent infringement on an active inducement theory, direct evidence is not required; rather, circumstantial evidence may suffice. 35 U.S.C.A. § 271(b).

[9 Cases that cite this headnote](#)

[11] Patents

🔑 [Inducement to infringe](#)

Mere knowledge of possible infringement by other persons does not amount to inducement to infringe a patent; specific intent and action

to induce infringement must be proven. 35 U.S.C.A. § 271(b).

67 Cases that cite this headnote

[12] Patents

🔑 Filing of applications for drug approval

The request to make and sell a drug labeled with a permissible, non-infringing use cannot reasonably be interpreted as an act of infringement, induced or otherwise, with respect to a patent on an unapproved use, as the Abbreviated New Drug Application (ANDA) does not induce anyone to perform the unapproved acts required to infringe. 35 U.S.C.A. § 271(b).

23 Cases that cite this headnote

[13] Patents

🔑 Inducement to infringe

Where a product has substantial noninfringing uses, intent to induce infringement cannot be inferred even when the defendant has actual knowledge that some users of its product may be infringing the patent. 35 U.S.C.A. § 271(b).

38 Cases that cite this headnote

[14] Federal Courts

🔑 Intellectual property

Patents

🔑 Filing of applications for drug approval

An “artificial” act of infringement creates case or controversy jurisdiction enabling the resolution of an infringement dispute before the applicant for an Abbreviated New Drug Application (ANDA) has actually made or marketed the proposed product; however, once jurisdiction is established, the substantive determination whether actual infringement or inducement will take place is determined by traditional patent infringement analysis, just the same as it is in other infringement suits, including those in a non-ANDA context, the only difference being that the inquiries now are hypothetical because the

allegedly infringing product has not yet been marketed. 35 U.S.C.A. § 271(e)(2)(A).

36 Cases that cite this headnote

[15] Patents

🔑 Filing of applications for drug approval

The proper inquiry under the statute that provides a cause of action for an “artificial” act of infringement is whether, if a particular drug were put on the market, it would infringe the relevant patent. 35 U.S.C.A. § 271(e)(2)(A).

15 Cases that cite this headnote

[16] Patents

🔑 In general;utility

US Patent 4,024,175, US Patent 4,087,544, US Patent 4,894,476. Cited.

2 Cases that cite this headnote

[17] Patents

🔑 In general;utility

US Patent 5,084,479. Valid and Not Infringed.

Cases that cite this headnote

Attorneys and Law Firms

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Before [MICHEL](#), Circuit Judge, [PLAGER](#), Senior Circuit Judge, and [LOURIE](#), Circuit Judge.

Opinion

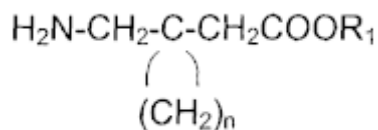
[LOURIE](#), Circuit Judge.

Warner Lambert Company appeals from the final order of the United States District Court for the Northern District of Illinois, granting summary judgment of noninfringement for Apotex Corp., Apotex Inc., and TorPharm, Inc. (collectively “Apotex”). *Warner Lambert Co. v. Apotex Corp.*, No. 98 C 4293, 2001 U.S. Dist. LEXIS 14592, 2001 WL 1104618 (N.D.Ill. Sept.14, 2001). Because we hold that Apotex was entitled to judgment as a matter of law, we affirm.

BACKGROUND

Warner Lambert is the assignee of [U.S. Patent 5,084,479](#), entitled “Novel Methods for Treating [Neurodegenerative Diseases](#).” The [#479 patent](#) (the “neurodegenerative method patent”) discloses and claims the use of certain cyclic amino acid compounds, as well as salts and esters derived from them, for the treatment of [neurodegenerative diseases](#) such as [stroke](#), [Alzheimer's disease](#), [Huntington's disease](#), [amyotrophic lateral sclerosis](#) (“ALS”), and [Parkinson's disease](#). Claim 1, the only independent claim in the 2C479 patent, defines the invention as follows:

1. A method for treating [neurodegenerative diseases](#) which comprises administering a therapeutically effective amount of a compound of formula



wherein R is hydrogen or a lower alkyl and n is 4, 5, or 6 or a pharmaceutically acceptable salt thereof, in unit dosage form, to a mammal in need of said treatment. [#479 patent](#), col. 10, ll. 8-19. One of these cyclic amino acid compounds, 1 aminomethyl 1 cyclohexane acetic acid, corresponding to the formula in claim 1 in which R is hydrogen and n is 5, is commonly known as

“[gabapentin](#).” [Gabapentin](#) is the subject of the present action.

Warner Lambert is also the assignee of expired [U.S. Patent 4,024,175](#), expired [U.S. Patent 4,087,544](#), and [U.S. Patent 4,894,476](#). The [#175 patent](#) (the “product patent”), entitled “Cyclic Amino Acids,” disclosed and claimed the actual compounds [*1352](#) that are used in the methods claimed in the neurodegenerative method patent; claim 2 specifically claimed 1 aminomethyl 1 cyclohexane acetic acid (*i.e.*, [gabapentin](#)). The [#544 patent](#) (the “[epilepsy](#) method patent”), entitled “Treatment of Cranial Dysfunctions using Novel Cyclic Amino Acids,” disclosed and claimed a method of treating certain forms of [epilepsy](#), faintness attacks, hypokinesia, and cranial traumas using the cyclic amino acid compounds claimed in the product patent and used in the methods of the neurodegenerative method patent, again including [gabapentin](#). The [#476 patent](#) (the “monohydrate patent”), entitled “[Gabapentin Monohydrate](#) and a Process for Producing the Same,” claims a specific crystalline form of [gabapentin monohydrate](#). [Gabapentin monohydrate](#) is a complex made up of [gabapentin](#) and water.

Warner Lambert sells [gabapentin](#) under the trade name [Neurontin®](#). In 1993, Warner Lambert obtained approval of a New Drug Application (“NDA”) from the United States Food and Drug Administration (“FDA”) to market [gabapentin](#) for use in “adjunctive therapy in the treatment of partial seizures with and without secondary generalization in adults with [epilepsy](#),” one of the several indications claimed in the now-expired [epilepsy](#) method patent. Significantly, the FDA has not approved [gabapentin](#) for any additional uses, let alone for the uses claimed in the 2C479 neurodegenerative method patent.

Apotex filed an Abbreviated New Drug Application (“ANDA”) under the Drug Price Competition and Patent Term Restoration Act of 1984, 98 Stat. 1585 (popularly known as the Hatch Waxman Act, hereinafter “the Act”), at the FDA on April 17, 1998, seeking approval to market a generic formulation of [gabapentin](#) upon the expiration of Warner Lambert's [epilepsy](#) method patent on January 16, 2000. As mandated by [21 U.S.C. § 355\(j\)\(2\)\(A\)\(i\)](#), Apotex sought approval to market [gabapentin](#) only for the same indication for which Warner Lambert's [Neurontin®](#) was approved, *i.e.*, for “adjunctive therapy in the treatment of partial seizures with and without secondary generalization in adults with [epilepsy](#).” Along with the bioavailability/bioequivalence

test data required to be included in its ANDA, Apotex filed a certification under 21 U.S.C. § 355(j)(2)(A)(vii) (IV) (a “paragraph IV certification”), declaring that its proposed manufacture, use, and sale of gabapentin would not infringe either the monohydrate patent or the neurodegenerative method patent. According to Apotex, its formulation would be anhydrous (*i.e.*, would not contain water), and would accordingly be outside the scope of the monohydrate patent. Moreover, Apotex declared that its “pharmaceutical product’s labeling does not include any indication for use in the treatment of either neurodegenerative or neurogenerative diseases.” Because all of the claims of the neurodegenerative method patent “are directed to a use of gabapentin in the treatment of neurodegenerative diseases,” Apotex argued, the manufacture, use, or sale of its gabapentin products would not infringe the neurodegenerative method patent.

Under 21 U.S.C. § 355(j)(2)(B)(i), an ANDA applicant who files a paragraph IV certification is required to include in its application a statement that it will give notice of that filing to the owner of the patent to which the certification pertains, § 355(j)(2)(B)(i)(I), and to the holder of the approved NDA for that drug, § 355(j)(2)(B)(i)(II). Pursuant to those provisions, Apotex notified Warner Lambert that it had filed the ANDA and paragraph *1353 IV certification. Also, as required by 21 U.S.C. § 355(j)(2)(B)(ii), Apotex provided in its notice letter a detailed statement of the factual and legal basis for its opinion of noninfringement of the neurodegenerative method patent. It explained that its “indicated use for its pharmaceutical product is partial seizure. The 2C479 neurodegenerative method patent does not claim a method of using gabapentin and its derivatives for partial seizure.” Because the claims of the neurodegenerative method patent were limited to “a method of using gabapentin and its derivatives in the treatment of neurodegenerative diseases,” and “partial seizure is not a neurodegenerative disease,” Apotex argued that its gabapentin would “not fall within the scope of any of the claims of ... the 2C479 patent.”

Warner Lambert commenced the present patent infringement action on July 14, 1998, alleging that Apotex’s submission of its ANDA was an act of infringement of the neurodegenerative method patent under 35 U.S.C. § 271(e)(2)(A). Although the FDA had not approved the use of gabapentin for any of the indications claimed in the neurodegenerative method

patent, and 21 C.F.R. § 202.1(e)(4) forbids the promotion of unapproved uses by NDA or ANDA holders, Warner Lambert argued that “patients will use the Apotex Defendants’ gabapentin for all purposes for which Warner Lambert’s Neurontin® product has been and customarily is used, and doctors will prescribe the Apotex Defendants’ gabapentin product for such uses, including the treatment of neurodegenerative diseases.”

1 Warner Lambert also included a claim under the monohydrate patent. The district court granted summary judgment of noninfringement with respect to that patent on March 2, 2001. *Warner Lambert Co. v. Apotex Corp.*, No. 98 C 4293, Doc. No. 67 (N.D.Ill. Mar. 2, 2001). The propriety of summary judgment with respect to that patent is not an issue raised by Warner Lambert in this appeal.

Apotex moved for summary judgment. Warner Lambert opposed Apotex’s motion, arguing that: (1) the FDA does not regulate the uses for which doctors prescribe drugs once they are approved, (2) “more than three-quarters of the prescriptions written by doctors for Warner Lambert’s Neurontin® are for indications other than epilepsy, including the treatment of neurodegenerative diseases,” and (3) “doctors, managed care organizations, and other institutions commonly and routinely substitute generic drugs for all indications for which the brand name drug is used.” Warner Lambert’s “Memorandum in Opposition to Apotex’s Motion for Summary Judgment” at 20 (Dec. 10, 1998). Warner Lambert further argued that “Apotex knows and expects that its generic gabapentin will be prescribed by doctors for all the same reasons they prescribe Neurontin,” including “the treatment of ... neurodegenerative diseases.” *Id.* at 21. The district court denied Apotex’s motion. *Warner Lambert Co. v. Apotex Corp.*, No. 98 C 4293, 1999 U.S. Dist. LEXIS 6208, 1999 WL 259946 (N.D.Ill. Apr. 8, 1999). At the close of discovery, however, Apotex again moved for summary judgment, and the district court granted that second motion. *Warner Lambert Co. v. Apotex Corp.*, No. 98 C 4293, 2001 U.S. Dist. LEXIS 14592, 2001 WL 1104618 (N.D.Ill. Sept. 14, 2001).²

2 The second opinion mistakenly stated that “Plaintiff does not contend that defendants have violated 35 U.S.C. § 271(e)(2)(A).” *Warner Lambert*, 2001 WL 1104618, 2001 U.S. Dist. LEXIS 14592, at *6 n. 3. Not only did Warner Lambert assert a claim under § 271(e)(2)(A) in its complaint, but the applicability

of that statutory provision is also one of the central issues in this appeal.

Warner Lambert now appeals. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(1).

*1354 DISCUSSION

“We review a district court's grant of summary judgment *de novo*, reapplying the standard used by the district court.” *Ethicon Endo Surgery, Inc. v. U.S. Surgical Corp.*, 149 F.3d 1309, 1315, 47 USPQ2d 1272, 1275 (Fed.Cir.1998). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c). “The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

A. Infringement under 35 U.S.C. § 271(e)(2)

The principal statute at issue in the present case provides as follows:

It shall be an act of infringement to submit (A) an application under section 505(j) of the Federal Food, Drug, and Cosmetic Act [codified at 21 U.S.C. § 355(j)]; *i.e.*, an ANDA] ... for a drug claimed in a patent or the use of which is claimed in a patent, ... if the purpose of such submission is to obtain approval under such Act [*i.e.*, Title 21 of the United States Code] to engage in the commercial manufacture, use, or sale of a drug ... claimed in a patent or the use of which is claimed in a patent before the expiration of such patent.

35 U.S.C. § 271(e)(2) (2000).

The district court's opinion took for granted that our decision in *Bayer AG v. Elan Pharmaceutical Research Corp.*, 212 F.3d 1241, 1248 49, 54 USPQ2d 1711, 1715 16 (Fed.Cir.2000), foreclosed Warner Lambert's claim of infringement under 35 U.S.C. § 271(e)(2)(A). *Warner Lambert*, 2001 WL 1104618, 2001 U.S. Dist. LEXIS 14592, at *6 n. 3. The court then discussed whether or not Apotex would, alternatively, induce infringement of the neurodegenerative method patent under 35 U.S.C. § 271(b). Although we agree with the district court that Warner Lambert has no cause of action under 35 U.S.C. § 271(e)(2)(A), we will also address the question whether Warner Lambert has presented a genuine issue of material fact with respect to the elements of an inducement claim under § 271(b).

[1] The central issue in the present case is whether it is an act of infringement under 35 U.S.C. § 271(e)(2)(A) to submit an ANDA seeking approval to make, use, or sell a drug for an approved use if any other use of the drug is claimed in a patent, or if it is only an act of infringement to submit an ANDA seeking approval to make, use, or sell a drug if the drug or the use *for which FDA approval is sought* is claimed in a patent. That issue presents a matter of first impression for this court. Although we have previously construed portions of 35 U.S.C. § 271(e)(2) in *Glaxo, Inc. v. Novopharm, Ltd.*, 110 F.3d 1562, 42 USPQ2d 1257 (Fed.Cir.1997), and in *Bayer*, we have not yet had occasion to parse the specific statutory language at issue here. For the reasons stated below, we conclude that it is not an act of infringement to submit an ANDA for approval to market a drug for a use when neither the drug nor that use is covered by an existing patent, and the *1355 patent at issue is for a use not approved under the NDA.

[2] [3] Because statutory interpretation is a legal issue, we review the district court's interpretation without deference. *Waymark Corp. v. Porta Sys. Corp.*, 245 F.3d 1364, 1366, 58 USPQ2d 1456, 1458 (Fed.Cir.2001). “The starting point of every case involving construction of a statute is the language itself.” *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975). Moreover, we “give effect, if possible, to every clause and word of [the] statute.” *United States v. Menasche*, 348 U.S. 528, 538 39, 75 S.Ct. 513, 99 L.Ed. 615 (1955) (citation omitted). When a statute does not define a given word or phrase, we presume that Congress intended the word or phrase to have its ordinary

meaning. *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187, 115 S.Ct. 788, 130 L.Ed.2d 682 (1995). However, “[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.” *U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 455, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993) (internal quotation marks omitted). “When interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give it such a construction as will carry into execution the will of the Legislature.” *Kokoszka v. Belford*, 417 U.S. 642, 650, 94 S.Ct. 2431, 41 L.Ed.2d 374 (1974) (internal quotation marks omitted).

Warner Lambert argues that the district court erred in interpreting § 271(e)(2). It asserts that, under that provision, a patent claiming a use of a drug is infringed by the filing of an ANDA irrespective of whether approval is sought to market the drug for the patented use. We disagree. Warner Lambert quotes the “pertinent part” of 35 U.S.C. § 271(e)(2)(A) as follows:

It shall be an act of infringement to submit ... an application under [the ANDA provisions of the Hatch Waxman] Act for a drug ... the use of which is claimed in a patent before the expiration of such patent.

Warner Lambert's abridged quotation suggests that the mere filing of an ANDA for a drug having a use claimed in a patent is an infringing act *per se*. Based on that reading, Warner Lambert argues that Apotex's ANDA infringes the neurodegenerative method patent:

Apotex submitted an ANDA seeking FDA approval “for a drug” (gabapentin) “the use of which is claimed in” the 2C479 patent in suit. Section 271(e)(2)(A) explicitly defines the filing of an ANDA in the face of such a patent as an act of infringement.

Warner Lambert's interpretation is incorrect. It has eviscerated an important part of the statutory provision

by conflating the first and second clauses of § 271(e)(2)(A) in its quotation; the phrase “before the expiration of such patent” cannot be read apart from the phrase “if the purpose of such submission is to obtain approval under such Act.” Whether or not other portions of the statute may be unclear, *cf. Eli Lilly & Co. v. Medtronic, Inc.*, 496 U.S. 661, 679, 110 S.Ct. 2683, 110 L.Ed.2d 605 (1990) (“No interpretation we have been able to imagine can transform § 271(e)(1) into an elegant piece of statutory draftsmanship.”), it is abundantly clear *1356 that the statute does not make the filing of an ANDA prior to patent expiration an act of infringement unless the ANDA seeks approval to manufacture, use, or sell the drug prior to expiration of a patent *that would otherwise be infringed* by such manufacture, use, or sale, *apart from* the provisions of § 271(e)(2). Accordingly, to prevail in this case, where the relevant patents covering the drug and the indication for which approval is sought have both expired, the plaintiff must prove that the defendant's manufacture, use, or sale of the drug would nonetheless infringe the neurodegenerative method patent under a traditional infringement analysis. At the very least, to succeed in this appeal of the district court's grant of summary judgment, Warner Lambert would have needed to demonstrate the existence of a genuine issue of material fact to support a traditional infringement claim, *i.e.*, that Apotex induced or will induce infringement of the neurodegenerative method patent.

[4] As Apotex notes, because an ANDA may not seek approval for an unapproved or off-label use of a drug under 21 U.S.C. § 355(j)(2)(A)(i), it necessarily follows that 35 U.S.C. 271(e)(2)(A) does not apply to a use patent claiming only such a use. The statute recites “a drug ... *the* use of which is claimed” (emphasis added), not “a drug ... *a* use of which is claimed,” or “a drug ... *any* use of which is claimed,” or “a drug *having a use* which is claimed.” The FDA does not grant across-the-board approval to market a drug. Rather, it grants approval to make, use, and sell a drug for a specific purpose for which that drug has been demonstrated to be safe and efficacious. Read in the context of the Act, of which the provision now codified at 35 U.S.C. § 271(e) was just a part, it is clear that the phrase “the use” in § 271(e)(2)(A) refers to the use for which the FDA has granted an NDA. That is, as we indicated above, the *only* use for which an ANDA applicant can seek approval. While a physician may prescribe an approved drug for any use consistent with acceptable medical practice, an NDA, and hence an

ANDA, only approves a use for which safety and efficacy have been proven.

It is also significant that Congress used the word “a” before “drug” and the word “the” before “use.” The words “the use” require antecedent basis; thus, “the use” refers to a specific “use” rather than a previously undefined “use.” See, e.g., *Freytag v. Comm’r*, 501 U.S. 868, 902, 111 S.Ct. 2631, 115 L.Ed.2d 764 (Scalia, J., concurring) (analyzing the definite article “the” as narrowing a class to specific “envisioned” members of the class); *Work v. United States*, 262 U.S. 200, 208, 43 S.Ct. 580, 67 L.Ed. 949 (1923); *Am. Bus Ass’n v. Slater*, 231 F.3d 1, 4 5 (D.C.Cir.2000) (“[I]t is a rule of law well established that the definite article ‘the’ particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of ‘a’ or ‘an.’” (citations omitted)). Thus, the statutory language “the use” is most reasonably interpreted to mean “the use listed in the ANDA.” Congress could have been expected to use quite different language if it wanted to reach the opposite result.

The history of the Hatch Waxman Act is well known, see, e.g., *Eli Lilly*, 496 U.S. at 665 78, 110 S.Ct. 2683, and we will not attempt to provide an exhaustive treatment of it here. Nonetheless, a brief review of that history will shed some light on the proper interpretation of § 271(e)(2)(A). Under federal law at the time the Act was negotiated and signed into law, a patent *1357 “granted to the patentee, his heirs, or assigns, for the term of seventeen years ... the right to exclude others from making, using, or selling the invention throughout the United States.” 35 U.S.C. § 154. “Except as otherwise provided ..., whoever without authority makes, uses, or sells any patented invention, within the United States during the term of the patent therefor, infringes the patent.” *Id.* § 271(a).³

³ Pub.L. No. 103 465, Dec. 8, 1994, expanded the definition of infringement in § 271(a) to include offers to sell patented inventions and importation into the United States.

As the Supreme Court wrote in *Eli Lilly*, the Act was designed to respond to two problems that the patent and pharmaceutical regulatory statutes were perceived to have led to by the 1980s. 496 U.S. at 669, 110 S.Ct. 2683. One of those problems arose from the fact that an inventor ordinarily applies for patent protection for newly discovered drugs, or for methods for the use of new or existing drugs, well before securing regulatory

approval, even though it generally cannot legally market such products or promote their use until it obtains that approval. Since the FDA generally took much longer to approve an NDA than the United States Patent and Trademark Office took to grant a patent, a manufacturer's patent term was substantially eroded by the time the patentee was able to derive any profit from the invention. *Id.*⁴

⁴ Pub.L. No. 103 465 also revised § 154 such that, except as otherwise provided, for patents granted on applications filed on or after June 8, 1995, “such grant shall be for a term beginning on the date on which the patent issues and ending 20 years from the date on which the application for the patent was filed in the United States. That revision does not affect the present discussion, as it did not attenuate the potential distortions of patent term resulting from regulatory approval periods.

The second problem inhered in the need for a generic manufacturer to obtain its own NDA if it wanted to market a product.⁵ A new NDA required the generic company to provide its own safety and efficacy data, which it was argued was a waste of resources. This need was complicated by the assumption, confirmed by this court's holding in *Roche Products, Inc. v. Bolar Pharmaceutical Co.*, 733 F.2d 858, 221 USPQ 937 (Fed.Cir.1984), that the plain language of § 271(a) made the manufacture and testing (a use) of a patented product prior to the expiration of the patent an act of infringement, even if that manufacture or use was solely for the purpose of conducting tests and developing the necessary information to apply for regulatory approval later on. *Eli Lilly*, 496 U.S. at 670, 110 S.Ct. 2683. Because it took a substantial amount of time for a second or subsequent manufacturer to obtain data and secure regulatory approval, requiring those manufacturers to wait until after the expiration of the patent to begin testing and other pre-approval activities resulted in a *de facto* extension of the patent term. The Hatch Waxman Act intended to deal with both of these issues, *i.e.*, to restore to innovators patent time lost during testing and regulatory approval, but to enable generic manufacturers to be ready to enter the market once patents expired. The latter no longer would have to prove the safety and efficacy of a drug that was already the object of an NDA; they would just have to prove bioequivalence.

⁵ A separate statute once existed for antibiotics (21 U.S.C. § 357).

Section 201 of the Act, codified at 35 U.S.C. § 156, accordingly provided for patent *1358 term extension for products “subject to a regulatory review period before its commercial marketing or use,” if “the permission for the commercial marketing or use of the product after such regulatory review period [was] the first permitted commercial marketing or use of the product.” *Id.* at 676, 110 S.Ct. 2683 (quoting 35 U.S.C. § 156(a)).

Section 202 of the Hatch Waxman Act added to 35 U.S.C. § 271 a new subsection, (e)(1), on the other hand, that provided that “it shall not be an act of infringement to make, use, or sell a patented invention ... solely for uses reasonably related to the development and submission of information under a Federal law which regulates the manufacture, use, or sale of drugs.” *Id.* Section 271(e) (1) thus partially eliminated the second problem, *i.e.*, the *de facto* unintended extension of the patent term, and enabled generic manufacturers to test and seek approval to market during the patent term. To further the overall goals of the Act, § 101 also amended § 505 of the Federal Food, Drug, and Cosmetic Act (“FDCA”), codified at 21 U.S.C. § 355, to authorize the filing and approval of ANDAs. *Id.* Included in the ANDA provisions was a mechanism to facilitate the adjudication of claims of infringement of patents relating to the innovator's drugs. That mechanism included, *inter alia*, provision for patentees and NDA holders to list patents that claim the approved drug or the approved use of the drug, 21 U.S.C. § 355(b)(1); and provision for ANDA applicants to “certify”: (I) that no such patent information is listed, or, if such information is listed, then, for each listed patent, (II) that it has expired, (III) that it will expire prior to the ANDA applicant's marketing of the drug, or (IV) that it is invalid or will not be infringed by the manufacture, use, or sale of the drug by the ANDA applicant, 21 U.S.C. § 355(j)(2)(A)(vii)(I)-(IV). *Eli Lilly*, 496 U.S. at 676 77, 110 S.Ct. 2683. The ANDA provisions now codified at 35 U.S.C. § 271(e)(2)(A) also created an artificial act of infringement that consists of submitting an ANDA containing a certification under 21 U.S.C. § 355(j) (2)(A)(vii)(IV) that a listed patent is invalid or that the manufacture, sale, or use of the proposed product would not infringe that patent. *Eli Lilly*, 496 U.S. at 678, 110 S.Ct. 2683.

The Hatch Waxman Act was accordingly a compromise between two competing sets of interests: those of innovative drug manufacturers, who had seen their effective patent terms shortened by the testing and regulatory processes; and those of generic drug manufacturers, whose entry into the market upon expiration of the innovator's patents had been delayed by similar regulatory requirements. The legislative history of the Act stated its ultimate purposes:

The purpose of Title I of the Bill is to make available more low cost generic drugs by establishing a generic drug approval procedure for pioneer drugs first approved after 1962....

The purpose of Title II of the Bill is to create a new incentive for increased expenditures for research and development of certain products which are subject to premarket government approval. The incentive is the restoration of some of the time lost on patent life while the product is awaiting pre-market approval.

H.R.Rep. No. 98 857(I), at 14 15 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2647, 2647 48. In light of this history, as well as the legislative language itself, we cannot agree with Warner Lambert that Congress intended it to be an act of infringement *1359 under 35 U.S.C. § 271(e)(2)(A) to submit an ANDA for a drug if just *any* use of that drug were claimed in a patent and the applicant sought approval of its ANDA prior to the expiration of that patent.

Warner Lambert's proposed interpretation is inconsistent with both of the stated purposes of the Hatch Waxman Act, and would confer substantial additional rights on pioneer drug patent owners that Congress quite clearly did not intend to confer. If Warner Lambert's interpretation were correct, for example, an NDA holder would be able to maintain its exclusivity merely by regularly filing a new patent application claiming a narrow method of use not covered by its NDA. It would then be able to use § 271(e) (2)(A) as a sword against any competitor's ANDA seeking approval to market an off-patent drug for an approved use not covered by the patent. Generic manufacturers would effectively be barred altogether from entering the market. That would certainly not advance the purpose of making available “more low cost generic drugs,” and was not what Congress intended. Moreover, although Warner Lambert argues that our affirming the district court's decision would be a disincentive for research and

development by innovators, Congress explicitly stated that the incentive created by the Act was patent term restoration. There is no evidence that Congress intended to enable an innovator to extend its exclusivity merely by asserting patents on unapproved uses. Moreover, if an innovator has not made the investment to test and obtain approval of the new use, what investment is to be protected by creating an added incentive?

Other relevant portions of the legislative history support our interpretation. For example, [House Report No. 98 857\(I\)](#) states, in part:

... [A]n ANDA must include a certification by the applicant regarding the status of certain patents applicable to the listed drug if the patent information has been submitted under section 505(b) or (c). With respect to all product patents which claim the listed drug and all use patents which claim an indication for the drug for which the applicant *is seeking approval* (hereafter described as a *controlling* use patent), the applicant must certify, in his opinion and to the best of his knowledge, as to one of four circumstances.

...

If appropriate, the applicant may certify that one or more of the product or *controlling* use patents provided have expired.... [A]n applicant may certify if applicable that one or more of the product or *controlling* use patents are invalid or will not be infringed.

The committee recognizes that in some instances an applicant will have to make multiple certifications with respect to product or controlling use patents. For example, if the product patent has expired and a valid *controlling* use patent will not expire for three years, then the applicant must certify that one patent has expired and the other will expire in three years. The committee intends that the applicant make the appropriate certification for each product and *controlling* use patent.

... [I]f there are indications which are claimed by any use patent and for which the applicant *is not seeking approval*, then an ANDA must state that the applicant is not seeking approval for those indications which are claimed by such use patent. For example, the listed drug may be approved for two indications. If the applicant is seeking approval *1360 only for Indication No. 1, and not Indication No. 2 *because it is protected by a use*

patent, then the applicant must make the appropriate certification and a statement *explaining that it is not seeking approval for Indication No. 2.*

[H.R.Rep. No. 98 857\(I\)](#), at 22, 1984 U.S.C.C.A.N. at 2655 (emphasis added).

The quoted portion of the House Report demonstrates that Congress recognized that a single drug could have more than one indication and yet that the ANDA applicant could seek approval for less than all of those indications. Congress clearly contemplated that the FDA could grant approval of an NDA, and hence eventually an ANDA, seeking to market a drug for a single indication even when other indications were known or even approved. Moreover, and perhaps more importantly, Congress made it clear that the ANDA applicant need not certify with respect to every “use” patent that claims an indication for the drug. Rather, the applicant needs only to certify with respect to use patents that claim an indication *for which the applicant is seeking approval to market the drug.* *Id.*; see also [H.R. Rep. No. 98 857\(II\)](#), at 13 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2686, 2697 (“With respect to ... all use patents which claim an indication for the drug for which the applicant is seeking approval, i.e., a controlling use patent, the applicant must certify....”). And an ANDA applicant can only seek approval for a use approved in the underlying NDA.

The last example in the above-quoted portion of [H.R. Rep. 98 857\(I\)](#) describes a scenario very similar to the one at issue in the present case. Here, Apotex is seeking approval only for the indication of treating epilepsy, which corresponds to “Indication No. 1.” It is not seeking approval for “Indication No. 2,” *i.e.*, treatment of [neurodegenerative diseases](#). Although Congress did not explicitly provide an example in which only Indication No. 1 is FDA-approved while only Indication No. 2 is still patented, the same conclusion applies *a fortiori* to that situation as to the provided example in which both indications are approved. The applicant here is not only *stating* that it is not seeking approval for Indication No. 2, it is positively *forbidden* from obtaining such approval, unless it files its own NDA with full safety and efficacy data. Thus, according to [H.R. Rep. 98 857\(I\)](#), Apotex only needed to provide a statement explaining that it was not seeking approval for Indication No. 2. That it did. Although formally labeled as a “paragraph IV certification,” we note that Apotex’s statement with respect to the neurodegenerative method patent was

effectively a statement of non-applicable use pursuant to 21 U.S.C. § 355(j)(2)(A)(viii).

[5] Warner Lambert argues that Apotex was required to certify under one of the subparagraphs of 21 U.S.C. § 355(j)(2)(A)(vii) with respect to the neurodegenerative method patent, because that patent was listed in the FDA's "Approved Drug Products with Therapeutic Equivalence Evaluations" publication (the "Orange Book"). That is incorrect. That provision and 21 U.S.C. § 355(j)(2)(A)(viii), which follows it, provide in pertinent part that:

[An abbreviated application for a new drug shall contain]

(vii) a certification, in the opinion of the applicant and to the best of his knowledge, *with respect to each patent which claims the listed drug referred to in clause (i) or which claims a use for such listed drug for which the applicant is seeking approval under this subsection *1361 and for which information is required to be filed under subsection (b) or (c) ... and*

(viii) if with respect to the listed drug referred to in clause (i) information was filed under subsection (b) or (c) for a method of use patent which does not claim a use for which the applicant is seeking approval under this subsection, a statement that the method of use patent does not claim such a use.

21 U.S.C. § 355(j)(2)(A)(vii)-(viii) (emphasis added). Thus, a certification need not be provided for a patent claiming a use for which the ANDA applicant is not seeking approval, *i.e.*, a use not covered by the NDA.

Warner Lambert has not produced any authority that information regarding the neurodegenerative method patent was "required to be filed under subsection (b) or (c)"; indeed, the evidence of record suggests that it need not have been. The listing provision, 21 U.S.C. § 355(b), simply allows the innovator to give warning of all of its *relevant* patents, by requiring that it file with its application "the patent number and expiration date of any patent which claims the drug ... or which claims a method of using such drug *and with respect to which a claim of patent infringement could reasonably be asserted.*" 21 U.S.C. § 355(b)(1) (emphasis added).⁶ Of course, the mere listing of even a properly listed patent would not in itself entitle the patent owner to a judgment that that patent would be infringed by sale of the drug for an approved

use. It simply provides the basis for a lawsuit that may be won or lost based on the general infringement provisions of the patent laws.

6 According to FDA regulations, only patents that claim an approved or pending use of a new drug can be submitted for listing in the Orange Book. The FDA promulgated 21 C.F.R. § 314.53 for submission of patent information by an NDA applicant for the Orange Book listing. For patents that claim a method of use, the FDA regulations state that "the applicant shall submit information only on those patents that claim indications or other conditions of use of a pending or approved application. 21 C.F.R. § 314.53(b). Further, the FDA regulations expressly exclude from the certification requirements patents that claim no uses for which the applicant is seeking approval. 21 C.F.R. § 314.52(a)(3). The neurodegenerative method patent does not claim an indication in Warner Lambert's currently approved NDA at issue in this case, and we have no information whether that patent claims a use in a pending application.

As noted above, the House Reports indicate that Congress intended to draw a distinction in the Act between those indications for which an ANDA applicant is seeking approval and those for which it is not when determining if certification is necessary. The applicant needs to certify only with respect to (a) product patents that claim the listed drug for which approval is sought, and (b) "controlling use patents," defined as patents that claim "an indication for the drug for which the applicant is seeking approval." Even when a listed drug is *approved* for more than one indication, Congress contemplated the possibility that there could be indications that are claimed by a use patent but for which the applicant is not seeking approval. There is no suggestion whatsoever in the statute or the legislative history that Congress intended that approval of a drug for a particular indication should be denied or even delayed by the existence of a patent that claims some other, unapproved indication of the drug. Although the issue is irrelevant to this case, we note that Apotex was likely required to, and did, certify under paragraph IV with respect to the *1362 monohydrate patent. We see no reason why the fact that Apotex *also* certified under paragraph IV with respect to the neurodegenerative method patent, perhaps in an overabundance of caution, should subject them to the Draconian penalty that Warner Lambert seeks under 35 U.S.C. § 271(e)(4)(A) of having approval of their ANDA

delayed until the expiration of the neurodegenerative method patent in the year 2010.

Warner Lambert attempts in its reply brief to find significance in the fact that subsections (vii) and (viii) of 21 U.S.C. § 355(j)(2)(A) are connected with “the conjunctive ‘and’ rather than the disjunctive ‘or,’ ” arguing that an ANDA applicant is required to file *both* a certification under subsection (vii) and a statement of inapplicable use under subsection (viii). That fact is irrelevant to our conclusion. As our analysis of the legislative history, *supra*, indicates, Congress contemplated the possibility that there could be more than one approved indication for a given drug, and that an ANDA applicant can seek approval to label and market the drug for fewer than all of those indications. In that situation, it would be necessary to certify under subsection (vii) with respect to a patent claiming an indication for which approval is sought, and to file a statement of inapplicable use under subsection (viii) with respect to the other indications. In a situation such as the one at issue in the present case, however, where the applicant is *not* seeking approval to market a drug for a use claimed in a patent, there is no need to file any certification at all under subsection (vii).

Warner Lambert further argues that “[a] comparison of the language in subparts (vii) and (viii) confirms that the antecedent for the phrase ‘for which the applicant is seeking approval’ in subpart (vii) is ‘drug’ rather than ‘use’. In contrast ... subpart (viii) ... does use the phrase ‘a use for which the applicant is seeking approval,’ and the phrase ‘for which the applicant is seeking approval’ obviously modifies ‘use.’” That argument is unconvincing. As we noted above, one does not obtain across-the-board approval to market a drug. Instead, one obtains approval to market a drug for a specific use for which the drug has been demonstrated to be safe and effective. Thus, the antecedent for the phrase “for which the applicant is seeking approval” in subpart (vii) is neither “drug” nor “use,” but “use for such listed drug.”

[6] In summary, Warner Lambert does not have a cause of action under § 271(e)(2)(A). Congress clearly intended to limit actions for infringement of method-of-use patents under § 271(e)(2)(A) to “controlling use patents,” or patents that claim an approved use of a drug. An ANDA applicant, who necessarily “piggybacks” on the approved NDA of the innovator, can only apply to sell the approved drug, which, in this case, is no longer under patent, and to

market it for the use for which the FDA has indicated that the drug is safe and efficacious, for which use the patent here has also expired. Apotex has neither submitted an application to sell a drug claimed in an extant patent, nor submitted an application to sell a drug the use of which is claimed in an extant patent. Both gabapentin and its only FDA-approved use are now off-patent.

Because Apotex is not submitting an application to sell a drug for treatment of [neurodegenerative diseases](#), which is the only use covered by the patent involved in this case, we conclude that Apotex is entitled to summary judgment of noninfringement.

***1363 B. Infringement under 35 U.S.C. § 271(b)**

Having concluded that 35 U.S.C. § 271(e)(2)(A) is inapplicable to the present case and that Warner Lambert accordingly does not have a cause of action against Apotex under that statute, we might close this opinion here. However, since the issue has been decided by the district court and argued here, and since it may arise if Apotex's ANDA is approved, we will address the question whether Warner Lambert has demonstrated the existence of a genuine issue of material fact with respect to inducement under 35 U.S.C. § 271(b).

[7] As an initial matter, we note that there is no evidence in the record that Apotex has directly practiced or will ever practice any of the methods claimed in the neurodegenerative method patent, all of which are directed to a method for treating [neurodegenerative diseases](#) by administering [gabapentin](#) or another cyclic amino acid compound to a mammal.⁷ Accordingly, Warner Lambert has not established that there is any genuine issue of material fact with regard to direct infringement by Apotex, and Warner Lambert therefore has no cause of action for direct infringement under 35 U.S.C. § 271(a).

⁷ That is hardly surprising pharmaceutical companies do not generally treat diseases; rather, they sell drugs to wholesalers or pharmacists, who in turn sell the drugs to patients possessing prescriptions from physicians. Pharmaceutical companies also occasionally give samples of drugs to doctors and hospitals. In none of these cases, however, does the company itself *treat* the disease. There can of course be exceptions to this rule, such as in house testing to establish bioequivalence and bioavailability (which

would in any event be noninfringing according to 35 U.S.C. § 271(e)(1), but they are not relevant here.

[8] [9] [10] Warner Lambert has asserted inducement of infringement under 35 U.S.C. § 271(b). Under § 271(b), “whoever actively induces infringement of a patent shall be liable as an infringer.” To succeed on this theory, a plaintiff must prove that the defendants’ “actions induced infringing acts and that [they] knew or should have known [their] actions would induce actual infringement.” *Manville Sales Corp. v. Paramount Sys., Inc.*, 917 F.2d 544, 553, 16 USPQ2d 1587, 1594 (Fed.Cir.1990). However, that defendants have “knowledge of the acts alleged to constitute infringement” is not enough. *Id.* “[P]roof of actual intent to cause the acts which constitute the infringement is a necessary prerequisite to finding active inducement.” *Hewlett Packard Co. v. Bausch & Lomb Inc.*, 909 F.2d 1464, 1469, 15 USPQ2d 1525, 1529 (Fed.Cir.1990). “Inducement requires proof that the accused infringer knowingly aided and abetted another’s direct infringement of the patent.” *Rodime PLC v. Seagate Tech., Inc.*, 174 F.3d 1294, 1306, 50 USPQ2d 1429, 1437 (Fed.Cir.1999). “While proof of intent is necessary, direct evidence is not required; rather, circumstantial evidence may suffice.” *Water Techs. Corp. v. Calco, Ltd.*, 850 F.2d 660, 668, 7 USPQ2d 1097, 1103 (Fed.Cir.1988).

Warner Lambert argues that the district court erred in requiring that, to be liable for inducement, Apotex had to have “known” that physicians were prescribing gabapentin for treatment of neurodegeneration. Warner Lambert contends that the district court ignored the “should have known” standard. According to Warner Lambert, by 1998, only about 22% of gabapentin sales were for treatment of epilepsy *1364, the remaining 78% being prescribed for off-label uses, including the infringing use of treating neurodegenerative diseases. By October 1999, the percentage of uses other than for epilepsy treatment had risen to “more than 89%.” In addition, Warner Lambert argues that: (1) it is common knowledge to many in and out of the pharmaceutical field that physicians routinely prescribe approved drugs for purposes other than those listed on the drugs’ labels; indeed, such off-label use is supported by both the FDA and the American Medical Association, (2) information regarding both on- and off-label prescriptions is readily available to the public from publications and databases to which most pharmaceutical companies subscribe, (3) “pharmacists and other drug dispensing organizations ... commonly substitute generic drugs for name brand

drugs wherever possible unless specifically instructed otherwise by the physician writing the prescription,” and, “in many states, substitution is mandatory,” (4) Apotex expects to get an “A B rating” for its gabapentin, which would allow physicians and pharmacists to substitute generic gabapentin for Neurontin® regardless of the indication for which it is to be used, and (5) Apotex should be assumed to have considered the market size and growth potential of gabapentin when it made the strategic decision to file an ANDA and enter the gabapentin market.

[11] Whether or not these statements are true, and for the purposes of deciding whether or not summary judgment was proper we must assume they are, we have already observed that precedent holds that mere knowledge of possible infringement by others does not amount to inducement; specific intent and action to induce infringement must be proven. *Manville Sales*, 817 F.2d at 554. Thus, if a physician, without inducement by Apotex, prescribes a use of gabapentin in an infringing manner, Apotex’s knowledge is legally irrelevant. In the absence of any evidence that Apotex has or will promote or encourage doctors to infringe the neurodegenerative method patent, there has been raised no genuine issue of material fact.

[12] Warner Lambert also argues that the court ignored its own earlier ruling that intent and knowledge must be assessed as of the date of hypothetical FDA approval, rather than at the time the decision was made to file the ANDA. According to that ruling, the relevant question would be whether Apotex would actively induce infringement when its ANDA is approved and it introduces generic gabapentin to the market, rather than whether Apotex had the intent to induce infringement at the time it filed its ANDA. Even if Warner Lambert is correct, however, and if we assume that Apotex did not have knowledge of the potential for infringing use at the time it filed its ANDA, but that it does now as a result of this lawsuit, we have already held that mere knowledge alone of possible infringement by others is insufficient to prove inducement. In any event, the ANDA must be judged on its face for what an accused infringer seeks the FDA’s approval to do. Section 271(e)(2) does not encompass “speculative” claims of infringement. The statute explicitly defines the act of infringement as the filing of the ANDA. The infringement case is therefore limited to an analysis of whether what the generic drug

maker is requesting authorization for in the ANDA would be an act of infringement if performed. Here, the request to make and sell a drug labeled with a permissible (non-infringing) use cannot reasonably be interpreted *1365 as an act of infringement (induced or otherwise) with respect to a patent on an unapproved use, as the ANDA does not induce anyone to perform the unapproved acts required to infringe. That a generic maker may someday induce someone to infringe can only be determined when that act occurs, and § 271(e)(2) was not designed to cover such future acts.

Moreover, according to Warner Lambert's own data, only about 2.1% of the prescriptions written for gabapentin from August 1999 to July 2000 were for neurodegenerative diseases. Even viewing the evidence in the light most favorable to Warner Lambert, and assuming that Apotex is "counting on" sales for off-label uses, it defies common sense to expect that Apotex will actively promote the sale of its approved gabapentin, in contravention of FDA regulations, for a use that (a) might infringe Warner Lambert's patent and (b) constitutes such a small fraction of total sales.

[13] Even if Warner Lambert's estimate that 2.1% represents \$50 million is correct,⁸ it is an inescapable fact that the remaining 97.9% still represents more than 46 times that amount. Especially where a product has substantial noninfringing uses, intent to induce infringement cannot be inferred even when the defendant has actual knowledge that some users of its product may be infringing the patent. Where there are many uses for a product, as the record reflects to be true of gabapentin, and fewer than 1 in 46 sales of that product are for infringing uses, we are not in a position to infer or not infer intent on the part of Apotex without any direct evidence.

⁸ It is not entirely clear what the basis is for Warner Lambert's \$50 million figure; 2.1% of Warner Lambert's own \$1.1 billion in Neurontin® sales in 2000 is only about \$23 million, and there is no evidence of record to controvert Apotex's assertion that that market will shrink as a result of studies showing that gabapentin is ineffective for treatment of ALS and spinal muscular atrophy.

Warner Lambert raises two other rather curious arguments in its briefs. First, it argues that the district court erred by applying principles regarding the law of inducement under 35 U.S.C. § 271(b) to actions brought

under 35 U.S.C. § 271(e)(2)(A). Warner Lambert asserts that "Section 271(e)(2)(A) states that the filing of an ANDA for a drug 'the use of which is claimed in a patent' is an act of infringement and mentions neither inducement nor any of the judicially developed intent factors that give rise to inducement." Therefore, Warner Lambert argues, once it is established that prescriptions are being written for a patented use, the ANDA filing itself represents an act of infringement.

[14] [15] Warner Lambert is mistaken. As we explained in *Glaxo*, 35 U.S.C. § 271(e)(2)(A) simply provides an "artificial" act of infringement that creates case-or-controversy jurisdiction to enable the resolution of an infringement dispute before the ANDA applicant has actually made or marketed the proposed product. 110 F.3d at 1569, 42 USPQ2d at 1263. Once jurisdiction is established, however, the substantive determination whether actual infringement or inducement will take place is determined by traditional patent infringement analysis, just the same as it is in other infringement suits, including those in a non-ANDA context, the only difference being that the inquiries now are hypothetical because the allegedly infringing product has not yet been marketed. *1366 *Id.* (holding that the patentee still carries the burden to prove that the product a generic drug maker ultimately will put on the market would likely infringe the patent). "The plain language of [35 U.S.C. § 271(e)(2)(A)] does not alter a patentee's burden of proving infringement." *Id.* at 1567, 110 F.3d 1562, 42 USPQ2d at 1262. The proper inquiry under § 271(e)(2)(A) is "whether, if a particular drug were put on the market, it would infringe the relevant patent." *Bristol Myers Squibb Co. v. Royce Labs., Inc.*, 69 F.3d 1130, 1135, 36 USPQ2d 1641, 1646 (Fed.Cir.1995). In *Glaxo*, we also rejected the argument that an action brought under § 271(e)(2)(A) requires a unique type of infringement analysis in which the burden is shifted to the accused infringer to disprove infringement where the ANDA would permit sale of a composition that may include an infringing product. 110 F.3d at 1568, 42 USPQ2d at 1262. We held in that case that "a patentee seeking relief under § 271(e)(2) must prove by a preponderance of the evidence that what is to be sold will infringe. That burden is not shifted under § 271(e)(2)." *Id.*

Secondly, Warner Lambert argues that the district court transplanted into § 271(e)(2)(A) principles "developed in a wholly inapposite non-ANDA context," and extrapolated from both § 271(b) and the holding in *Manville Sales*

to formulate a more stringent standard and to impose a higher burden of proof than would have been encountered in an infringement suit brought directly under § 271(b) rather than under § 271(e)(2)(A). Again, Warner Lambert is mistaken. The district court did not transplant any alien principles into § 271(e)(2)(A); rather, the court concluded that Warner Lambert's claim under § 271(e)(2)(A) was foreclosed, and then proceeded to address the question whether or not a genuine issue of material fact existed with regard to an inducement claim. *Warner Lambert*, 2001 WL 1104618, 2001 U.S. Dist. LEXIS 14592, at *6.

We have considered Warner Lambert's other arguments, including its argument that the court resolved several

genuinely disputed issues of material fact adversely to Warner Lambert, and find them unpersuasive.

CONCLUSION

The district court did not err in granting summary judgment of noninfringement in favor of Apotex. The court's decision to award judgment to Apotex is therefore

AFFIRMED.

All Citations

316 F.3d 1348, 65 U.S.P.Q.2d 1481

EXHIBIT 253

The Chicago Manual of Style *Online***5: Grammar and Usage****5.71: Definite article**

A definite article points to a definite object that (1) is so well understood that it does not need description (e.g., *the package is here* is a shortened form of *the package that you expected is here*); (2) is a thing that is about to be described {**the** sights of Chicago}; or (3) is important {**the** grand prize}. The definite article belongs to nouns in the singular {**the** star} or the plural number {**the** stars}.

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EXHIBIT 254

The Chicago Manual of Style *Online***5: Grammar and Usage****5.72: Indefinite article**

An indefinite article points to a nonspecific object, thing, or person that is not distinguished from the other members of a class. The thing may be singular {**a** student at Princeton}, or uncountable {**a** multitude}, or generalized {**an** idea inspired by Milton's *Paradise Lost*}.

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EXHIBIT 255

EN

IRP-IOT Meeting

Thursday, June 7, 2018 -- 19:00-20:00

>> HELLO, EVERYONE, THIS IS DAVID MCAULEY SPEAKING. I HOPE YOU CAN HEAR ME. BUT I SEE IN THE TRANSCRIPT THAT'S TRUE. WE'RE A SMALL GROUP SO FAR SO I WILL COME BACK ON IN JUST A COUPLE MINUTES, MAYBE AS LATE AS 3 MINUTES PAST THE HOUR. SO, I WILL BE ON SHORTLY. LET'S GIVE MORE FOLKS TIME TO GATHER.

>> HELLO EVERYBODY AND WELCOME. THIS IS DAVID MCAULEY SPEAKING. I BELIEVE WE HAVE A QUORUM SO START THE MEETING. SO, LET ME ASK THAT THE RECORDING BE STARTED.

>> THIS MEETING IS NOW BEING RECORDED.

>> THANK YOU. HI, WELCOME. WE'RE JUST STARTED. SO, WITH THAT DONE CAN I ASK IF THERE IS ANYBODY THAT'S IN ATTENDANCE ON THE AUDIO BRIDGE BUT NOT SHOWING UP IN THE ADOBE ROOM, IF THEY WOULD PLEASE IDENTIFY THEMSELVES NOW. I DON'T HEAR ANYONE. SO, WE'LL PRESS ON.

>> THIS IS KAVOUSS. I CAN'T CONNECT [INDISCERNIBLE]

>> OKAY, THANK YOU KAVOUSS. I ACTUALLY SEE YOUR NAME AT THE BOTTOM OF THE LIST OF PARTICIPANTS BUT I TAKE YOUR POINT YOU'RE ON THE AUDIO ONLY. THANK YOU. AND COULD I ASK NOW IF ANYBODY HAS ANY A CHANGE OR AMENDMENT TO THEIR STATEMENT OF INTEREST. COULD THEY MENTION IT NOW? AND DON'T SEE ANY HANDS, HAVEN'T HEARD ANYTHING SO WE'LL PRESS ON TO AGENDA ITEM NUMBER 2. LAST WEEK WE DISCUSSED THIS AND CONFIRMED, I BELIEVE, THAT WE HAVE REACHED LANGUAGE FOR THE ISSUE THAT WE'RE GOING TO SEEK FOR PUBLIC COMMENT ON THE TIME FOR FILING ISSUE. SO, I THINK WE'VE DONE THAT. WE'VE REACHED AN AGREEMENT ON THE BODY OF THE LANGUAGE. AND SO NOW I JUST WANT TO GET INTO A BRIEF DISCUSSION ABOUT, YOU KNOW, HOW WE DO THIS, WHAT IS THE ADMINISTRATIVE PROCESS OF GETTING SOMETHING OUT TO PUBLIC COMMENT, HOW LONG WILL THE PUBLIC COMMENT LAST, WHAT CAN WE EXPECT? AND I THINK IT'S IN ALL OF OUR INTEREST TO GET IT OUT SOON. SO, BERNIE COULD I ASK YOU TO TALK ABOUT THAT A LITTLE BIT?

>> SURE. WE HAVE TO PUT A WRAPPER AROUND THIS TEXT, WHICH IS THE STANDARD WRAPPER TO ANNOUNCE THE PUBLIC CONSULTATION. AND THEN THERE'S THE DOCUMENT WHICH WE'VE AGREED TO IN THIS FOR THE PUBLIC CONSULTATION. AND WE GOT THAT OUT. IT WILL PROBABLY TAKE ME A COUPLE OF DAYS TO GET THE WRAPPER AROUND IT. IT'S NOT ANY NEW MATERIAL, IT'S JUST THE STANDARD STUFF WE PUT AROUND IT FOR THE PUBLIC CONSULTATION. THERE'S A FEW ELEMENTS THAT WE RUN THROUGH WITH THE RAPPORTEUR AND ICANN LEGAL JUST TO MAKE SURE THAT WE'RE MEETING QUALIFICATIONS THEN WE SEND IT TO THE TEAM, THEY LOOK AT IT AND MAKE SURE IT'S OKAY THEN THEY POST IT, STANDARD CONSULTATION PERIOD IS FOR 42 DAYS OR 6 WEEKS. AFTER THAT WE

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HAVE A MONTH OR TWO, DEPENDING ON WHAT WE'RE LOOKING FOR TO ANALYZE THE COMMENTS AND PRODUCE A REPORT ON THE PUBLIC CONSULTATION. I'LL BE GLAD TO TAKE ANY QUESTIONS IF THERE ARE ANY.

>> THANKS, BERNIE. I DON'T SEE ANY HANDS. I HAVE A QUESTION, ONE OR TWO SMALL QUESTIONS. I TAKE IT PARDON ME I TAKE IT FROM WHAT YOU SAID THAT IN ORDER TO GET IT OUT WE'RE TALKING PROBABLY A WEEK OR TWO OR SO. BUT AT LEAST IT WOULD BE RELEASED PRIOR TO ICANN 62 IS MY GUESS? AND IF I'M CORRECT IN THAT THEN I MIGHT ASK YOU IF I COULD GET JUST, YOU KNOW, TWO OR THREE MINUTES AT THE CCWG PLENARY TO ANNOUNCE TO THE ASSEMBLED GROUP THAT THIS IS OUT FOR PUBLIC COMMENT. I KNOW IT WILL BE ANNOUNCED ON THE LIST BUT WE MIGHT AS WELL TRY AND MENTION THIS AS WIDELY AS WE CAN AND SINCE IRP SORT OF EMANATED FROM THAT GROUP IT WOULD BE NICE TO MENTION IT TO THEM. AM I CORRECT IN THAT ASSUMPTION, IT WILL PROBABLY BE OUT BEFORE ICANN 62.

>> WE'LL DO OUR DARNEST BUT WHEN YOU GET RIGHT UP AGAINST THE MEETING SOMETIMES THINGS TAKE A LITTLE LONGER TO POST. BUT WE WILL BE WORKING ON TRYING TO MAKE SURE THAT WE GET THAT UP AS SOON AS POSSIBLE. IT SHOULD BE POSSIBLE TO GET IT UP BEFORE ICANN 62. AND I'M CERTAIN THE COCHAIRS WOULD BE GLAD TO GIVE YOU A 5 MINUTES ON THE WORK STREAM 2 AGENDA IN THE FACE TO FACE MEETING AT ICANN 62 OR RIGHT THE DAY BEFORE ICANN 62, ACTUALLY. SO, YOU CAN CHAT ABOUT THIS.

>> OKAY, GOOD. YEAH, I WANT TO DISSEMINATE IT WIDELY. SO, THANK YOU. EXCUSE ME. DOES ANYBODY HAVE ANY COMMENT, ANY CONCERN, QUESTION ABOUT THIS? WE'RE GOING TO MOVE FORWARD WITH GETTING THIS ISSUE OUT TO PUBLIC COMMENT. ONE OF THE IMPLICIT ASSUMPTIONS BEHIND THAT IS WE'RE GOING TO BE ABLE TO SORT OF WORKOUT THE DIFFERENCES ON THE REMAINING ISSUES AND I PERSONALLY THINK THAT'S POSSIBLE AND PROBABLE. BUT IF ANYBODY HAS A COMMENT, PLEASE WEIGH IN NOW OR DURING THIS CALL. I DON'T SEE ANY HANDS SO WE CAN PROBABLY MOVE ON TO AGENDA ITEM NUMBER 3. AND I'M JUST TRYING TO GET MY LAPTOP BEAR WITH ME ONE SECOND.

>> DAVID? THIS IS BERNIE.

>> YES, GO AHEAD BERNIE.

>> I BELIEVE FROM LAST WEEK THE GROUP WAS EXPECTING A CONFIRMATION OF THE SECOND READING OF THIS REQUEST TO GO TO PUBLIC COMMENT SO WE CAN BE WELL WITHIN THE RULES. MAYBE YOU CAN JUST ADD IF THERE ARE NO OBJECTIONS.

>> EXACTLY. THANK YOU. THAT'S A GOOD POINT. SO, ARE THERE ANY OBJECTIONS TO CONSIDERING THIS DISCUSSION A SECOND READING ON THE ISSUE ON THE PLAN TO SUBMIT TO PUBLIC COMMENT THE TIME FOR FILING RULE DISCUSSION USING THE LANGUAGE THAT YOU'VE SEEN ON THE LIST? DOES

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ANYBODY HAVE ANY OBJECTION OR ANY CONCERN ABOUT THAT? I DON'T SEE MY HANDS. AND DON'T HEAR ANYTHING. SO, I THINK WE CAN CONSIDER THAT DONE. THANK YOU, BERNIE. THE NEXT ISSUE IS ONE SORRY THAT MALCOM IS NOT ON THE CALL BUT IT'S ONE ABOUT TYPES OF HEARING. I WOULD JUST LIKE TO GO THROUGH THIS BRIEFLY. I'LL DO MY BEST TO GIVE AN OBJECTIVE STATEMENT AS TO WHAT MALCOM WAS SAYING ABOUT THIS BUT I ACTUALLY THINK WE'RE QUITE CLOSE ON THIS SO WE CAN CLOSE THIS DOWN. BUT, THE TWO SORT OF COMPETING DOCUMENTS AND THEY'RE LARGELY IN AGREEMENT, BUT I'LL CALL THEM COMPETING FOR THE PURPOSES OF THIS CALL ARE RULE 5 IN THE UPDATED SUPPLEMENTARY PROCEDURES AND RULE 5 IS WHAT WE AGREED TO AS IT WENT OUT AS PART OF THE SUPPLEMENTARY PROCEDURES THAT WENT OUT FOR PUBLIC COMMENT AND AS I MENTIONED ON THE LIST THIS MORNING I'VE TAKEN A LOOK AT RULE 5 AND HERE'S THE WAY I WOULD SORT OF MENTION THE PRINCIPLES THAT UNDERLIE RULE 5. AND THEY ARE THINGS SUCH THEY ARE THINGS THAT STATE THAT AN IRP SHOULD BE CONDUCTED IN SUCH A WAY THAT IT'S EXPEDITIOUS AND REASONABLY IT WOULD HAVE A REASONABLY LOW COST. IT WOULD ENSURE FUNDAMENTAL FAIRNESS AND ENSURE DUE PROCESS WITH PURPOSES OF THE IRP. THE PANEL WOULD HAVE TO CONSIDER NOTIONS OF ACCESSIBILITY, FAIRNESS AND EFFICIENCY AND THAT EFFICIENCY WOULD BE BOTH AS RESPECT TO TIME AND COST. IN CONDUCTING AN IRP. IRPS WOULD BE CONDUCTED BY ELECTRONICS. PRESUMPTION IF ALL 3 CONDITIONS ARE MET OF THE FOLLOWING 3. IN-PERSON HEARING NEEDED FOR FAIR RESOLUTION OF THE CASE IN-PERSON HEARING NEEDED TO FURTHER THE IRP AND CONSIDERATIONS IN FURTHERANCE OF THESE PURPOSES OUTWEIGH TIME AND COST, FINANCIAL EXPENSE. ANY SUCH IN-PERSON HEARING WOULD NOT BE FOR INTRODUCING NEW ARGUMENT OR EVIDENCE THAT COULD BE PRESENTED OTHERWISE. HEARINGS ARE LIMITED TO ARGUMENT ONLY EXCEPT UNLESS A REQUEST FOR WHAT THIS TESTIMONY DEMONSTRATES OF THE 3 CONDITIONS I MENTIONED. MALCOM ON JANUARY 3 PUT OUT HE WAS LARGELY IN AGREEMENT AND I THINK HE SAID THAT ON THE PHONE BUT HE HAD SOME SMALL I SHOULDN'T SAY SMALL. HE HAD SOME DIFFERENCES AND HE PUT OUT A STRAWMAN AND I SORT OF CITED TO IT ON THE LIST A COUPLE TIMES. BUT IN HIS STRAWMAN, HE TALKS ABOUT COST MINIMIZATION BUT THAT LOOKS PRETTY MUCH THE SAME AS RULE 5, AT LEAST IN MY READING. I'M PUTTING MY OWN INTERPRETATION ON TOP OF THAT. HE ALSO HIS STRAWMAN EMPHASIZED THE USE OF ELECTRONIC MEANS TO THE GREATEST EXTENT FEASIBLE I THINK WAS THE LANGUAGE HE USED. HE HAS A PRESUMPTION FOR RESOLVING THINGS ON PAPER OR ARGUMENT WITHOUT TESTIMONY. BECAUSE WE DO PROVIDE FOR WITNESS STATEMENTS IN RULE 5 NEAR THE END IT SAYS ALL EVIDENCE INCLUDING WITNESS STATEMENTS MUST BE SUBMITTED IN SO MANY DAYS BEFORE THE HEARING. SO, WE OBVIOUSLY ANTICIPATE WRITTEN STATEMENTS. SO, MALCOM'S LANGUAGE IS A LITTLE BIT MORE STRINGENT THAN OURS IN THAT RESPECT. WHEN IT GETS TO PROCEEDINGS IN PERSON, MALCOM'S LANGUAGE IN HIS STRAWMAN SAID THAT, YOU KNOW, THE IRP PANEL WOULD HAVE THE POWER TO CONDUCT HEARINGS ON ARGUMENT AND HEARINGS OF WITNESS TESTIMONY IN PERSON. AND HE GAVE 8 CONDITIONS LIMITING IT, PRETTY STRINGENTLY. AND HE SAID THESE HEARINGS COULD BE INCLUDING BY VIDEO CONFERENCE. LATER IN THE DOCUMENT HE SAID THESE HEARINGS SHALL BE CONDUCTED BY VIDEO CONFERENCE. AND THAT POTENTIAL AMBIGUITY WAS RESOLVED LATER WHERE HE SAID ONLY IN EXCEPTIONAL CIRCUMSTANCES

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MAY THE IRP PANEL ORDER AN IN-PERSON HEARING TO BE HELD WITH THE PARTICIPANTS FIRSTALLY TRAVELING TO THE SAME GEOGRAPHIC LOCATION. BEFORE ORDERING THAT KIND OF A HEARING IN MALCOM'S STRAWMAN HE SAID THE PANEL MUST SATISFY PURPOSES OF THE IRP IN A FAIR AND JUST OUTCOME CANNOT BE ACHIEVED WITHOUT THAT ORDER. AND NO AVAILABLE ELECTRONIC MEANS WOULD SUFFICE FOR THIS PURPOSE. NOW, THE REASON I'M SORT OF SORRY THAT MALCOM IS NOT HERE TO DISCUSS THIS LET ME SEE IF HE'S ARRIVED IS THAT MY ARGUMENT WOULD BE AND I'M SPEAKING AS A PARTICIPANT OBVIOUSLY NOW. MY ARGUMENT WOULD BE THAT I JUST CAN'T ENVISION ANY CIRCUMSTANCES, I CONTINUE TO BELIEVE THAT RULE 5 ADEQUATELY AND FAIRLY COVERS WHAT WE'RE ADDRESSING HERE. AND I RECALL LIZ'S COMMENT LAST WEEK THAT THERE HAVE BEEN HEARINGS WHERE THE HEARING HAS REACHED COST LEVELS OF 1 MILLION AND 2 MILLION. AND SO, THE IDEA OF PHYSICALLY TRAVELING TO THE SAME GEOGRAPHIC LOCATION IS REALLY CAUSING ME PAUSE. MY CONCERN OR MY ARGUMENT AS A PARTICIPANT IS THAT THIS SHOULD BE SOMETHING WHERE WE STATE PRINCIPLES, I THINK RULE 5 DOES THAT AS I SUMMARIZED JUST A MOMENT AGO, WHERE WE GIVE THE PANEL THE ABILITY TO SORT OF FILL IN THE GAPS ON THESE PRINCIPLES, KNOWING WHAT THE PRINCIPLES ARE, INCLUDING COST MINIMIZATION AND I WOULD ARGUE AS A PARTICIPANT WE HAVE TO RECOGNIZE NO ONE IS GOING TO BE SHUT OUT OF A REMEDY. EVERYBODY CAN GO TO COURT IF THEY'VE BEEN TREATED UNFAIRLY. THIS IS ARBITRARY REASONABLY LOW COST, EFFICIENT. SO THAT'S WHERE I STAND. SO, I GUESS I'LL HAVE TO COME ON THE LIST AND SORT OF STATE THAT AS A PARTICIPANT. BUT I WOULD WELCOME ANY OTHER VIEWS RIGHT NOW. AND I THANK MALCOM FOR HIS STRAWMAN BY THE WAY. BUT I THINK HIS STRAWMAN IS EXTRAORDINARILY CLOSE TO WHAT WE HAVE ALREADY. AND THAT'S WHY I FEEL SOME CONFIDENCE THAT WE CAN WORK THIS OUT. BUT I CERTAINLY WOULD LIKE TO INVITE COMMENTS OR QUESTIONS OR CONCERNS IF ANYBODY HAS ANY. IF NOT THEN I WILL STATE I GUESS ON LIST WHAT I JUST STATED NOW, MAKING THAT ARGUMENT AND WE'LL SEE WHAT MALCOM'S REPLY IS. BUT I WOULD LIKE TO MOVE THIS ON IF WE CAN AND GET MOVING. ANYBODY I SEE A HAND FROM GREG. GO AHEAD, GREG.

>> THANKS, GREG FOR THE RECORD, THANK YOU DAVID FOR GOING OVERALL THAT. I GUESS AND IT IS UNFORTUNATE THAT MALCOM IS NOT HERE. WHAT I'M TRYING TO UNDERSTAND IS KIND OF ON A MORE CONCEPTUAL LEVEL WHAT MALCOM IS TRYING TO ACCOMPLISH AND WHERE HE DIVERGES FROM WHAT WE HAD BEFORE. BECAUSE ON THE DRAFTING LEVEL IT SEEMS THAT, YOU KNOW, IT'S MADE SOME THINGS MORE COMPLICATED AND LESS LIKELY AND OTHER THINGS MORE SLIGHTLY LIKELY, MAYBE ONE MAJOR DIFFERENCE IS THAT THE PANEL HAS THE POWER RATHER THAN THE PARTICIPANTS TO CALL FOR AN IN PERSON HEARING OR VIDEO HEARING. WHICH I THINK IS WORTH WHILE, YOU KNOW, ALLOWING THE PANEL TO HAVE THAT DISCRETION AS WELL AS THE PARTIES, IF THAT'S WHERE THERE'S A DIFFERENCE. YOU KNOW, ALL THE CONDITIONALITY, YOU KNOW, I FEEL THAT WITHOUT KIND OF A STRONG UNDERSTANDING OF WHY THIS WORKS BETTER THAN RULE 5 OR IS FAIRER OR CONTAINS COSTS BETTER WITHOUT AFFECTING RESULTS, THAT WE'RE KIND OF BETTER OFF WITH RULE 5. BUT, YOU KNOW, IF THERE ARE ANY PARTICULAR TWEAKS THAT COME FROM MALCOM'S STRAWMAN THAT CAN HELP RULE 5 THAT'S A POSSIBILITY IF IT'S NOT A BINARY CHOICE, WHICH IT MIGHT BE. ONE LAST

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THING, YOU KNOW, SINCE THIS IS IT IS AN ARBITRATION, I THINK WHEN YOU SAY ANYBODY WHO WANTS TO CAN GO SUE, THERE WILL BE A QUESTION WHETHER YOU EXHAUSTED ADMINISTRATIVE REMEDIES. I'M NOT SURE WHETHER THIS WOULD BE A REQUIRED ADMINISTRATIVE REMEDY TO EXHAUST BUT CERTAINLY THE COURT WOULD LOOK AT YOU SIDEWAYS IF WE SAID WE DIDN'T DO THE IRP BUT CAME TO SUE BECAUSE WE THOUGHT IT WAS USELESS, TOO EXPENSIVE, WHY NOT GO TO COURT, ET CETERA, ET CETERA. THE IDEA IS TRY TO KEEP THESE THINGS OUT OF COURT. AND I THINK THAT WE MAY HAVE HAD EXPENSIVE HEARINGS IN THE PAST, THESE ARE COMPLEX MATTERS AND WHETHER WE CAN WITHOUT LOOKING AT THE HEARINGS THAT ARE TAKING PLACE IN THE PAST, CAN'T KNOW FOR SURE HOW VALUABLE OR USEFUL IT WAS AND WHETHER IT WAS JUST A WASTE OF TIME AND MONEY. BUT I'M GOING TO ASSUME UNLESS I KNOW OTHERWISE THERE WERE GOOD REASONS TO HAVE THESE EXPENSIVE HEARINGS AND THAT IT WAS A BETTER WAY TO ACHIEVE WHAT NEEDED TO BE ACHIEVED THEN DOING IT ON THE PAPERS. THANKS.

>> THANK YOU, GREG. I WOULD NOTE THAT UNDER RULE 5 THE IRP PANEL IS SUPPOSED TO USE ELECTRONIC MEANS TO THE EXTENT FEASIBLE BUT THEY CAN ORDER LIVE TELEPHONIC OR VIDEO CONFERENCES WHERE MEASURE AND ALLOW FOR HEARINGS IF THOSE 3 CONDITIONS I MENTIONED ARE OVERCOME. SO, RULE 5 GIVES SOME LATITUDE ON HAVING HEARING. WHERE MALCOM'S STRAWMAN DIFFERS THOUGH IS HIS EXPLICITLY ALLOWS AN IN PERSON HEARING TO BE HELD WITH THE PARTICIPANTS FIRSTALLY TRAVELING TO THE SAME GEOGRAPHIC LOCATION RATHER THAN BY E MEANS. NOW HE HAS A PREFERENCE FOR ELECTRONIC MEANS RATHER THAN THIS IN THIS HIS STRAWMAN. IF THE TWO CIRCUMSTANCES WHERE MEANT, A FAIR AND JUST OUTCOME COULD NOT BE ACHIEVED WITHOUT SUCH A HEARING AND THAT THERE'S NO AVAILABLE ELECTRONIC MEANS. AND WHERE I WOULD COME ON THE LIST AND SORT OF TAKE THAT UP WITH MALCOM IS I CAN'T ENVISION THOSE CONDITIONS EVER BEING MET. IT'S TOO FINE A POINT. WE SHOULD LET THE PANEL HANDLE THIS UNDER SECTION 5. BUT I TAKE YOUR POINT AND I TAKE IT YOU'RE LARGELY IN AGREEMENT THAT RULE 5 IS PROBABLY THE WAY TO GO. I TAKE YOUR POINT ON ADMIN REMEDIES HAVE TO BE EXHAUSTED. I GUESS I WAS THINKING MORE ALONG THE LINES THAT SOMEONE HAS A REMEDY IF THEY'RE EVER TIMED OUT BUT I SHOULDN'T NECESSARILY MAKE THAT POINT IN THIS CASE. DOES ANYBODY ELSE GREG IS THAT A NEW HAND YOU HAVE?

>> FOLLOW UP, DAVE.

>> UNDER RULE 5 IS THERE THE OPTION ULTIMATELY OF AN IN PERSON HEARING? I DON'T HAVE IT IN FRONT OF ME.

>> I HAVE IT HERE AND I DON'T SEE THAT. WHEN YOU SAY IN PERSON I TAKE IT YOU MEAN TRAVELING TO THE SAME GEOGRAPHIC LOCATION?

>> I MEAN FLESH AND BLOOD.

>> IN THE SAME ROOM?

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>> YEAH.

>> NO, I DON'T SEE THAT IN RULE 5.

>> I WOULD ADD THAT. I THINK THAT IS AN OPTION THAT SHOULD BE CONSIDERED. AND I THINK THE PROBLEM WITH MALCOM'S STATEMENTS, THEY'RE STATED TOO HIGH. THERE HAS TO BE, YOU KNOW, SOMETHING COULD NOT POSSIBLY IT'S EVEN BEYOND A REASONABLE DOUBT, THE STANDARD IS A STANDARD OF CERTAINTY ABOUT SOMETHING IN THE FUTURE. YOU KNOW, THERE'S NOT EVEN A REASONABLY IN THE FIRST OF THE TWO STANDARDS THAT YOU READ. SO, THE WAY THEY'RE DRAFTED THEY BASICALLY YOU WOULD HAVE TO HAVE SOME SITUATION WHERE YOU WOULD HAVE TO POSITIVELY DEMONSTRATE ANYTHING OTHER THAN HEARING WAS IMPOSSIBLE IT GOES TOO FAR. IF WE DIALED IT BACK A BIT AND MADE IT HIGH BAR, BECAUSE IT SHOULD BE A HIGH BAR BUT A BAR THAT HAS SOME REALISTIC POSSIBILITY OF BEING MET UNDER EXCEPTIONAL CIRCUMSTANCES, THEN THAT WOULD MAKE MORE SENSE. THANKS.

>> THANKS GREG. SAMANTHA HAS HER HAND UP. OVER TO YOU SAM.

>> HI, I WAS PRIVY IN THE CHAT AS WELL. MY READING IS AND I THINK SOMEONE CORRECT ME IF I'M WRONG BUT RULE 5 STATES THAT THERE IS THE ABILITY TO REPUT THE PRESUMPTION AGAINST IN PERSON HEARING. EVEN THOUGH THERE'S A PRESUMPTION THERE'S THE ABILITY TO REBUT IT AND MOVE FORWARD WITH AN IN PERSON HEARING WHICH I THINK IS WHAT GREG SAID WAS IMPORTANT TO HAVE SO THERE WOULD BE POTENTIAL TO CALL EVERYONE TO ONE PLACE. DOES THAT GO TO YOUR CONCERN, GREG OR DID YOU HAVE A DIFFERENT CONCERN?

>> GOES TO MY CONCERN, THANKS.

>> OKAY.

>> DAVID SPEAKING AGAIN. I GUESS I READ IT DIFFERENTLY. SAM, YOU'RE CORRECT. LET ME READ THE OPERATIVE LANGUAGE AS I SEE IT FROM RULE 5, THE ONE THAT WE DRAFTED AND WENT OUT TO PUBLIC COMMENT. IT SAYS, THE IRP PANEL SHOULD CONDUCT ITS PROCEEDINGS WITH THE PRESUMPTION THAT IN PERSON HEARING SHALL NOT BE PERMITTED. THE PRESUMPTION AGAINST IN PERSON HEARINGS MAY BE REBUTTED ONLY UNDER EXTRAORDINARY CIRCUMSTANCES WHERE UPON MOTION BY A PARTY, THE IRP PANEL DETERMINES THE PARTY SEEKING AN IN PERSON HEARING DEMONSTRATED ONE AN IN PERSON HEARING IS NECESSARY FOR FAIR RESOLUTION OF A CLAIM, TWO, AN IN PERSON HEARING IS NECESSARY TO FURTHER THE PURPOSES OF THE IRP AND 3, CONSIDERATIONS OF FAIRNESS IN FURTHERANCE OF THE PURPOSES OF THE IRP OUTWEIGH THE TIME AND FINANCIAL EXPENSE OF AN IN PERSON HEARING IN THOSE CIRCUMSTANCES SHALL IN PERSON HEARINGS BE PERMITTED FOR THE PURPOSE OF INTRODUCING MUST ARGUMENTS THAT WERE PREVIOUSLY PRESENTED BUT NOT PREVIOUSLY PRESENTED TO THE PANEL. PARDON ME. SO, THAT'S THE LANGUAGE. I THINK THAT'S ACCEPTABLE TOO. I THINK IT ALLOWS FOR FLEXIBILITY AND WE OUGHT TO GO WITH

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THAT. BECAUSE MALCOM HAS AN INTEREST IN THAT I THINK I WILL COME OUT TO THE LIST AND SAY MALCOM, AND IT WILL BE TO THE LIST, WE DISCUSSED THIS AND I THINK EVERYBODY IS SATISFIED WITH RULE 5 AND I THINK THAT'S A FAIR STATEMENT, WHEN I SAY EVERYBODY, I MEAN EVERYBODY ON THIS CALL. TO ANSWER AVRI'S QUESTION, ASKED WHAT EXACTLY IS DIFFERENT IN MALCOM'S CHANGE. I LOST IT. MALCOM IS A LITTLE MORE STRINGENT IN ONE RESPECT BUT HE ACTUALLY GETS INTO THE RULE 5 DOES NOT TALK ABOUT PHYSICAL MEETINGS. MALCOM'S RULE DOES. I'M PARAPHRASING HERE, PHYSICAL MEETINGS OR HEARINGS COULD BE HELD ONLY IN EXCEPTIONAL CIRCUMSTANCES WHERE THE IRP PANEL HAS DETERMINED PURPOSES OF THE IRP AND A FAIR AND JUST OUTCOME IS IMPOSSIBLE WITHOUT SUCH AN IN PERSON PHYSICAL HEARING AND THAT THERE'S NO ELECTRONIC MEANS THAT COULD SATISFY HAVING A FAIR HEARING. SO, I THINK THAT'S I THINK THAT'S WHERE WE ARE. I NEED TO COME TO THE LIST BUT I THINK WE CAN PRESS ON WITH THE ASSUMPTION THIS IS NOT SOMETHING WE'RE GOING TO NEED PUBLIC COMMENT ON. AVRI YOUR HAND IS UP. PLEASE TAKE THE FLOOR.

>> THANKS FOR REEXPLAINING IT TO ME. SO REALLY, HE'S NOT ASKING FOR ANYTHING DIFFERENT, JUST FAR MORE STRINGENT CONDITIONING? AND BECAUSE THE OTHER WAS KIND OF IMPLICIT ALREADY IN 5 AS IT EXISTS, IF IT'S A PRESUMPTION THAT IT'S NOT ACCEPTING EXCEPTIONS THEN TO SAY IT ISN'T ACCEPTING EXCEPTIONS ARE FAIRLY SIMILAR. SO, OKAY. NOT QUITE SURE I UNDERSTAND WHY HE WANTS IT THAT MUCH MORE STRINGENT BUT I UNDERSTAND THE FAVOR ABILITY TO 5. THANKS.

>> THANK YOU AVRI. ME AGAIN STRESS I'M TRYING TO READ THE STRAWMAN OBJECTIVELY. IT'S NOT SOMETHING I DRAFTED SO I HOPE I'M BEING FAIR TO MALCOM. BUT MALCOM ALSO WENT INTO MUCH MORE DETAIL ON WHEN AN IRP PANEL WOULD HAVE THE POWER TO CONDUCT HEARINGS. AND HE HAD HE LISTED 8 CONDITIONS AND A NUMBER OF THEM HAVE SUBPOINTS. SO, HE'S MUCH MORE DETAILED, HIS STRAWMAN WAS MUCH MORE DETAILED. I BELIEVE IT LARGELY AGREES WITH SECTION 5 OR RULE 5. AND I BELIEVE MALCOM HAS EVEN SAID AS MUCH. BUT THIS WAS IMPORTANT TO HIM. IT DID ADDRESS SOME DIFFERENCE ITSELF HE THOUGHT WERE IMPORTANT. AND SO, FOR ME TO COME OUT IN THE LIST IT'S GOING TO TAKE ME A DAY OR PROBABLY NOT UNTIL MONDAY. SO, IN THE MEANTIME I WOULD ENCOURAGE THOSE ON THE CALL TO READ HIS STRAWMAN. MAYBE YOU WILL PICK SOMETHING UP IN IT THAT I HAVEN'T BUT I BELIEVE WE'RE BOTH VERY CLOSE. MY POSITION IS I'M STATING IT AS A PARTICIPANT WHICH IS REALLY RULE 5 IS SUFFICIENT. AND MALCOM'S POSITION STATED IN THE STRAWMAN. I ENCOURAGE PEOPLE TO LOOK AT IT. I'M TRYING TO DESCRIBE IT BUT IT'S NOT THE SAME AS READING IT. THANKS, AVRI. SO, WE'LL PROCEED FORWARD ON THE ASSUMPTION THAT THIS IT GOING TO BE WORKED OUT. I BELIEVE IT WILL BE. AND WE CAN MOVE ON TO THE NEXT TO NEXT AGENDA ITEM AND THAT IS TO REVIEW THE INTERIM RULES. I'VE ASKED SAM OR LIZ IF THEY COULD SORT OF LEAD THIS PART OF THE DISCUSSION AND STEP US THROUGH THE INTERIM RULES. AND SO, I HAVE SOME COMMENTS ALONG THE WAY BUT I SHOULD PROBABLY GIVE UP THE FLOOR AND NOT NECESSARILY TRY TO TEE THIS UP. AND ASK SAM OR LIZ IF YOU WOULD KINDLY TAKE US THROUGH THE INTERIM RULES.

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>> SURE, DAVID. BERNIE, CAN YOU FLASH UP THE DOCUMENT THAT WE SENT IN MAY? AND I DON'T RECALL BUT I DON'T THINK I HAVE SEEN RESPONSES BACK OR AREAS YOU WOULD LIKE ME TO FOCUS ON. SO, I'LL FIRST THROW OUT THE QUESTION TO THOSE ON THE CALL TODAY, IS THERE ANYTHING FROM WHAT YOU REVIEWED IN THE DOCUMENT, IF YOU HAVE REVIEWED THE DOCUMENT THAT YOU WOULD LIKE ME TO FOCUS ON FIRST?

>> SAM, YES, I PUT IT UP BECAUSE I WILL DO THIS AS A PARTICIPANT. AND I APOLOGIZE FOR NOT BEING MORE SPECIFIC. THE THINGS I WOULD MOST BE INTERESTED IN YOU TALKING ABOUT ARE JOINDER, TRANSLATIONS AND I'VE SEEN THE TRAFFIC ON THE LIST. ON THE INTERIM AND ON THE INTERIM RULE FOR TIME FOR FILING I'VE SEEN SOME MAIL BACK AND FORTH BETWEEN YOU ANIMAL COME AND I THINK YOU ANSWERED THE QUESTIONS AND IT'S IN GOOD SHAPE BUT DEAL WITH THOSE FIRST. THE TIME FOR FILING IN LIGHT OF YOUR EMAILS WITH MALCOM THEN JOINDER THEN TRANSLATION. THANK YOU.

>> SURE. SO, ON TIME FOR FILING, FOR THOSE OF YOU WHO WERE ON LAST WEEK'S CALL YOU MIGHT REMEMBER DAVID POSED A QUESTION ABOUT THERE'S A CONCERN ABOUT SOME FAIRNESS TO THOSE WHO MIGHT BE CROSSING DEADLINE IF WE HAD A REPOSE PERIOD PROPOSED WITHIN THE INTERIM RULES WHILE WE AWAIT THE OUTCOMES OF THE PUBLIC COMMENT FOR DETERMINING WHAT WILL ACTUALLY BE PUT INTO THE FINAL RULES. AND SO, I IDENTIFIED LAST WEEK THAT I THOUGHT THAT ICANN CAN BE IN A POSITION TO AGREE THAT WE COULD HAVE SOME TRANSITIONARY CLAUSES IN THE FINAL SET OF RULES THAT WOULD GIVE SOME TIME FOR THOSE WHO HAD 120 DAY PERIOD RUN DURING THE TIME THAT THE INTERIM RULES WERE IN PLACE B WERE ACTUALLY TIME BARRED BECAUSE THE ACTION HAPPENED MORE THAN A YEAR BEFORE. UNDER THE INTERIM RULES. AND SO, I CONFIRMED THAT INTERNALLY AND SO I SENT A NOTE OUT TO THE IOT LAST NIGHT, LA TIME, TO IDENTIFY THAT WE AGREE THAT WE CAN DO SOMETHING LIKE THAT, SO WE'RE NOT ACTUALLY PREJUDICING ANYONE IN THE EVENT WE WIND UP WITH A LONGER PERIOD THEN 1 YEAR FOR AN OUTSIDE REPOSE AND IN THE FINAL SET OF RULES. MALCOM CAME BACK WITH A QUESTION ABOUT WHAT DOES THAT MEAN, HOW LONG WOULD THEY HAVE TO FILE? I THINK THAT THAT'S ONE OF THOSE TIME PERIODS WHERE MAYBE THE IOT WOULD WANT TO THINK ABOUT IT. I THINK IN MY RESPONSE TO HIM I SAID I DON'T THINK IT WOULD MAKE SENSE TO BE ANY LONGER THAN 120 DAYS AFTER THE NEW RULES OR THE NEW SUPPLEMENTARY PROCEDURES ARE IN PLACE BUT WE CAN IDENTIFY WITHIN THE IOT WHAT BEING WE CONSIDER TO BE THAT REASONABLE TIME FRAME AFTER THE NEW RULES ARE IN PLACE FOR THAT "OLD CLAIM" TO BE BROUGHT. SO, I THINK THAT'S A DETAIL THAT WE CAN TALK ABOUT FURTHER. BUT WE WERE TRYING TO ADDRESS THAT CONCERN AND ALSO TO DEMONSTRATE OUR COMMITMENT THAT WE'RE REALLY NOT TRYING TO USE THE INTERIM RULE PROCESS AS A WAY TO PREJUDICE ANYONE IN HOW THEY WOULD PARTICIPATE IN THE IRP LATER. SO, I DON'T KNOW IF THERE ARE ANY OTHER QUESTIONS ON THIS LIST ABOUT IT OR THE EMAIL TRAFFIC ON THAT HAS ANSWERED YOUR QUESTIONS.

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>> THANKS, SAM. DAVID SPEAKING AS A PARTICIPANT. I THINK IT DID ANSWER THE QUESTION. I DO THINK THAT YOU BRING UP A GOOD QUESTION. WE HAVE TO COME UP WITH A TIME LIMIT THAT SOMEONE WOULD HAVE TO FILE TO MEET 120 DAYS PROBABLY SOUNDS LIKE A NATURAL BUT PROBABLY NOT MORE THAN THAT BUT THAT'S SOMETHING WE CAN DISCUSS. I DON'T THINK IT NEEDS TO HOLD US UP RIGHT NOW. WELL I SHOULDN'T SAY THAT. I SHOULD SAY THAT'S MY FEELING ON IT. IF ANYBODY ELSE WOULD LIKE TO STATE A SUGGESTION IN THAT RESPECT, PLEASE DO. BUT I BELIEVE WHAT YOU'VE DONE AND WHAT YOU'VE SAID, SAM, IS THAT NO ONE WOULD BE PREJUDICED BY US GOING OUT TO PUBLIC COMMENT. I TEND TO DISAGREE WITH MALCOM IN HIS RESPONSE TO LIZ WHERE HE SAID WE'VE NEVER AGREED TO THE 12 MONTH. ACTUALLY, THAT'S THE RULE WE SENT OUT. WE DID AGREE IN OUR FIRST ITERATION. I DON'T HAVE A PROBLEM WITH 120 ON ONE HAND AND ONE YEAR ON THE WE ARE WITH A CARVE OUT YOU DESCRIBE NOBODY IS GOING TO BE PREJUDICE WHILE WE'RE SEEKING PUBLIC COMMENT. SO, I'M HAPPY WITH THAT. THAT'S MY FEELING ON IT. THANK YOU.

>> ALL RIGHT.

>> LET ME ASK IF ANYBODY ELSE HAS A COMMENT. IF NOT, SAM WE CAN MOVE TO JOINDER AND TRANSLATION, UNLESS YOU HAVE SOMETHING ELSE YOU WANT TO SAY ABOUT THAT.

>> I THINK THAT THAT'S ALL I HAVE ON THAT ONE. I WILL SCROLL DOWN TO FIND TRANSLATION. SO, LET ME DEAL WITH TRANSLATION FIRST. IF ANYONE THAT IS OFF THE TOP OF THEIR HEAD, THE PAGE NUMBER, LET ME KNOW BECAUSE WE WILL HAVE TO HAVE EVERYONE SCROLL THROUGH THAT. I THINK WE'RE ON PAGE 6.

>> OKAY, AND ALSO LET ME JUST MENTION TO FOLKS THIS WAS IN YOUR EMAIL OF THURSDAY MAY 31ST.

>> YES, THANK YOU. SO, UNDER RULE 5 WE'VE PREVIOUSLY AGREED AMONG THE IOT THAT WE NEEDED TO MAKE SURE THERE WAS SOME REFERENCE TO TRANSLATION OF PROCEEDINGS. THERE IS ACTUALLY A REFERENCE TO TRANSLATION IN THE ICANN BYLAWS. AND SO, WE KNOW THAT THIS HAS TO BE WE THINK IT MAKES SENSE TO HAVE IT INCLUDED IN THE PROCEDURES AS WELL. SO, AS WE WERE LOOKING OVER THE CONVERSATION FROM WITHIN THE IOT TO CONSIDER IF THERE WAS TEXT READY ENOUGH TO GO INTO AN INTERIM SET OF RULES, WE IDENTIFIED AND YOU CAN SEE ON THE FOOTNOTE THAT WE INCLUDE IN HERE, FOOTNOTE 20 THAT WE HAVE WE INITIALLY SAID IT NEEDED TO BE IN PUBLIC COMMENT BUT THERE WAS A QUESTION OF WHAT TRANSLATION SERVICES MEAN. I WOULD LIKE TO POINT THE IOT MEMBERS TO THAT MAY 31ST EMAIL BECAUSE IN THERE WE IDENTIFIED SOME MORE SPECIFICS ABOUT WHY WE THOUGHT THIS RULE WAS NOT READY TO GO INTO THE INTERIM PROCEDURES AND WHERE WE THOUGHT WE MIGHT NEED TO FOCUS SOME EFFORT ON DRAFTING AND SOME DECISION MAKING AMONG THE IOT IN ORDER TO GET TO THE FINAL RULES. AND SO, I RAISED SOME OF THE CONCERNS SUCH AS TRANSLATION OF PLEADINGS OR PEOPLE'S BRIEFINGS ACTUALLY CAN BE CONSIDERED PART OF A LEGAL STRATEGY. IT'S REALLY IMPORTANT FOR PEOPLE TO BELIEVE THAT

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THE TRANSLATION IS AN ADEQUATE REPRESENTATION OF WHAT THEY'VE PUT FORWARD. SO, I THINK WE NEED TO CONSIDER IF WE THINK THAT ALL TRANSLATIONS ARE PART OF ADMINISTRATIVE OR IF THERE ARE CERTAIN PARTS OF TRANSLATION THAT IS ARE CONSIDERED LEGAL COSTS, WOULD WE THINK THAT TRANSLATION IS ALWAYS ICANN'S RESPONSIBILITY TO OBTAIN OR IF IT'S A LEGAL PLEAING WOULD THAT BE THE RESPONSIBILITY OF THE SUBMITTING PARTY AND PART OF THEIR LEGAL COSTS? IF YOU RECALL WITHIN THE COST STRUCTURE OF THE IRP, ICANN IS RESPONSIBLE FOR ALL ADMINISTRATIVE COSTS AND FOR THE EXCEPTION OF THE COMMUNITY IRPS, EACH PARTY IS RESPONSIBLE FOR THEIR LEGAL COSTS. AND SO, THIS DOES HAVE SOME ACTUAL IMPACT IN TERMS OF THE COST OF THE PROCEEDINGS TO BOTH ICANN AND THE CLAIMANT, DEPENDING ON WHERE THAT IS CUT. SO, WE LAID OUT SOME ITEMS IN THERE, IN THAT ELM MAIL TO THINK ABOUT. THE PROPOSAL I MADE WITHIN THAT E MAIL WAS THAT I THINK WE CAN GO ONE OF TWO WAYS. WE CAN EITHER GET SOME OF THESE THOUGHTS OVER TO EXTERNAL COUNSEL NOW TO START A DRAFTING EXERCISE TO SEE IF THEY HAVE PROPOSALS OF HOW THESE ITEMS CAN BE WORKED INTO A FINAL SET OF RULES OR ON THE IOT WE COULD CARVE OUT SOME TIME IN ONE OF OUR MEETINGS THAT WILL HAPPEN SOON TO SEE IF WE HAD A SENSE OF WHERE THE IOT WANTED TO GO ON THIS. I THINK WE COULD GO EITHER WAY. FOR THE TIMING CONCERN, BECAUSE WE DO HAVE SOME BUDGETARY CONCERNS AROUND EXTERNAL COUNSEL AND WHEN WE CAN ACCESS THEM. I THINK I LEAN MORE TOWARD GETTING THIS ISSUE TO EXTERNAL COUNSEL TO HAVE THEM WEIGH IN ON THE TEXT AND POSE QUESTIONS BACK TO THE IOT IF WE'RE NOT ABLE TO GET THIS ISSUE TEED UP FOR CONVERSATION WITHIN THE IOT SOONER. BUT I THINK THAT ALSO WEIGHS TOWARDS IF WE'RE LOOKING AT GETTING OUT A SET OF INTERIM RULES THAT I ALSO ASK FOR THE IOT'S CONFIRMATION THAT THIS ISN'T YET AN ISSUE THAT'S READY FOR INCLUSION IN THE INTERIM RULES, BUT WE WILL HAVE IT READY LIKELY WITHOUT NEED FOR PUBLIC COMMENT, I REALLY DON'T THINK WE NEED IT, IN ORDER TO GET INTO THE FINAL SET OF PROCEDURES. DAVID.

>> THANKS, SAM. DAVE MCAULEY SPEAKING AS A PARTICIPANT. THANK YOU FOR THE COMMENTS IN THE EMAIL YOU SENT MAY 31ST. IN MY OPINION I THINK YOU RAISE A GOOD POINT ABOUT COSTS, ABOUT LEGAL STRATEGY AND WHETHER PART OF THIS MAY BE IN COSTS. LET ME JUST BEFORE I GO ON TO MY CONCLUSION ON THAT JUST ADDRESS ONE OR TWO OTHER THINGS IN YOUR MAIL. WITH RESPECT TO THE APPENDICES, TRANSLATION OF APPENDICES WE DON'T HAVE PAGE LIMITS. THE ONE THING THAT WE DID SAY IS IN WHAT WE WERE GOING TO SEND WE SAID WHEN CONSIDERING THE TRANSLATION OF DOCUMENTS, THE PANEL OR EMERGENCY PANELISTS SHOULD ENDEAVOR TO STRIKE A FAIR BALANCE BETWEEN THE MATERIALALITY OF THE DOCUMENT AND THE COST TO TRANSLATE. IT SEEMS MATERIALALITY MAY BE LESSER THEN THE AN PEPPED CEASE. IT MAY BE COVERED AND WE MIGHT WANT TO SEE WHAT IS SENT BACK IN RESPONSE TO THAT REQUEST. AND THE OTHER THING YOU MENTIONED IN YOUR MAIL WAS MENTION SHOULD BE MADE OF THE PROFICIENCY OF THE CLAIMANT'S REPRESENTATIVE IN ENGLISH. AND I THINK WHAT WE SAID, WE SAID IN OUR SUGGESTION IN ADDITION IF THE CLAIMANT INCLUDES MORE THAN ONE PERSON, FOR INSTANCE CLAIMANT IS A CORPORATION THEN IF A RESPONSIBLE MEMBER OF SUCH PERSONS. I TAKE OPTION 1, WE SHOULD POSE THESE AS QUESTION AND DO WHATEVER WE CAN TO GET THEM TO THEM. WE ARE ELEMENT OUT OF TIME FROM

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GETTING ANYTHING FROM SIDLY. I DON'T THINK WE CAN TEE IT UP ANY FURTHER. WHAT I WOULD SUGGEST IS WE I CAN'T READ FOOTNOTE 20 RIGHT NOW BUT BASICALLY, WE SEND WHAT WE HAD IN OUR SUGGESTED INSTRUCTION TO SIDLY ASKING FOR ALTERNATIVES FOR US. DOES ANYBODY ELSE HAVE ANY COMMENTS ALONG THE LINES OR SAM DO YOU HAVE ANYTHING YOU WANT TO SAY IN RESPONSE?

>> THANKS DAVID. I AGREE WITH YOUR SUGGESTION. THE INFORMATION AND COST COULD GO TO THE APPENDICES, I THINK WE MIGHT WANT TO BE A LITTLE CLEARER ABOUT THAT BUT I THINK IT'S STILL I HAVE THE SAME SENTIMENT BUT I THOUGHT IT STILL LACKED A LITTLE BIT THERE MIGHT BE MORE THAT WE CAN DO ON THAT. BUT, I THINK THAT YOU AND I SOUNDS LIKE WE'RE ON THE SAME PAGE.

>> THANKS, I THINK WE'RE ON THE SAME PAGE BUT SAM I NEED TO ASK YOU AND LIZ FOR SOME HELP HERE AND WHAT I'M SPEAKING ABOUT IS IN GETTING SOMETHING TO SIDLY, I WOULD SORT OF ASK I THINK WE'RE GOING DOWN THE ROAD OF USING YOUR RED LINE DOCUMENT. AND SO, WE HAD TWO CHOICES. WE COULD HAVE GIVEN THE INSTRUCTIONS THE WAY WE WERE GOING, BUT THAT DID LEAVE A LOT OF UNCERTAINTY. AND AS AN ALTERNATIVE YOU PROPOSED A RED LINE VERSION. SO, I WILL NEED YOU TO MAKE SURE YOU HAVE THE RED LINE VERSION IN SUCH FASHION THAT WE CAN SEND IT TO SIDLY. MAYBE THE CLEAN COPY. WHAT YOU SHOULD SEND TO THE LIST IS THE FINAL RED LINE VERSION AND CLEAN COPY SHOWING WHAT WE'VE DISCUSSED. AND I THINK MALCOM WOULD PROBABLY AGREE WITH WHAT YOU SAID ON TIME FOR FILING. I THINK YOU PROBABLY ANSWERED HIS QUESTION SATISFILY. AND SHOWING THE JOINDER WITH SOME TRANSLATION QUESTIONS, YOU KNOW, BOIL YOUR EMAIL OF MAY 31ST QUESTIONS TO SIDLY THAT WE CAN SAY YES THIS IS WHAT WE NEED TO SEND OR NO IT'S NOT, LET'S TWEAK HERE SO WE CAN GET IT DONE. WE HAVE TO GET IT OUT. TODAY IS JUNE 7. IF WE FINALIZE THAT NEXT WEEK, JUNE 14TH WE WOULD GIVE SIDLY HALF A MONTH. LET ME STATE PARENTHETICALLY BERNIE, COULD I ASK YOU TO MAKE AN ACTION ITEM THAT YOU AND I SHOULD GET READY TO CALL HOLLY AND TELL HER UNFORTUNATELY IT'S COMING LATE BUT IT WILL BE COMING? AND WE NEED TO FIGURE OUT A WAY TO MAKE IT HAPPEN IN THIS FISCAL YEAR. I THINK SAM YOU SAID WE HAVE TO MAKE SURE WE GET A BILL IN THIS FISCAL YEAR. I DON'T KNOW HOW IT WORKS.

>> WE DON'T NEED A BILL IN THIS FISCAL YEAR. WE NEED TO HAVE THEM WE NEED TO ACTUALLY HAVE THEM DO THEIR WORK WITHIN THIS MONTH. WE GET THE BILL A LITTLE BIT AFTER THE END OF THE FISCAL YEAR BUT THEY NEED TO DO THE WORK WITHIN THE FISCAL YEAR. AND ALSO, DAVID I KNOW YOU AND I HAD AN EARLIER EXCHANGE WITH HOLLY WHEN WE GAVE HER A HEADS UP SO WE CAN ALSO JUST WRITE ON TO THAT CHAIN AND SAY, HEY, THIS IS GOING TO START TO COME.

>> OKAY.

>> SO, WHAT I TAKE FROM YOUR POINT, DAVID IS AN ACTION ITEM OF SO WE WOULD SEND THEM THE INTERIM RULES, NOT REALLY AS A DIRECTION OF WHAT THEY'RE DOING BUT TO SHOW THEM WHAT WE'RE THINKING ON THE INTERIM RULES AND DOCUMENTS THEY CAN WORK FROM AND IT SHOWS SOME OF THE PLACES WE'VE PROGRESSED. AND THEN THEY MIGHT HAVE SOME IDEAS ON SOME OF

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THE LANGUAGE THAT MAYBE WE'VE INSERTED IN THERE AND HOW WE CAN BETTER IT FOR A FINAL SET OF RULES. AND THEN WE ALSO HAVE AT LEAST THIS TRANSLATION ISSUE AND I THINK THE JOINDER ISSUE AS WELL WHICH LIZ WILL TALK TO IN A MINUTE, WHICH ARE PLACES WHERE WE'VE IDENTIFIED SOME CONCRETE QUESTIONS THAT WE THINK WOULD HELP GUIDE THE FINAL DRAFTING OF IT, WHICH ALSO SUPPORTS WHY WE'RE NOT READY FOR IT TO BE IN THIS INTERIM SET. ON THE TIME FOR FILING, I THINK WE NEED TO AWAIT THE OUTCOMES OF THE PUBLIC COMMENT BEFORE WE GET TOO MUCH OTHER LANGUAGE OR USE THEIR TIME TOO MUCH ON IT, BECAUSE WE DON'T WANT TO JUST BECAUSE THERE'S MONEY AVAILABLE DOESN'T MEAN WE SHOULD HAVE THEM BILLED UNDER COMMUNITY CONVERSATION.

>> I THINK THE LANGUAGE WE HAVE IS GOOD. I DON'T THINK WE NEED SIDLY'S HELP ON THAT ONE. LET ME SAY YES AND WE'LL GET TO LIZ IN JUST A MINUTE BECAUSE WE HAVE 15 MINUTES LEFT. BUT DOES ANYBODY IN THE GROUP HAVE A COMMENT, QUESTION, CONCERN WITH WHAT THE DISCUSSION HAS BEEN OVER THE LAST SEVERAL MINUTES? IF NOT, LET'S PRESS ON THEN, LIZ, IF YOU'RE DONE WITH THIS SAM, I'M SORRY. IF WE'RE DONE WITH THIS WE CAN MOVE TO LIZ, THEN WE OUGHT TO DO IT.

>> WORKS FOR ME.

>> OKAY, LIZ YOU HAVE THE FLOOR THEN.

>> OKAY. THANK YOU, DAVID. THIS IS LIZ FROM ICANN ORG FOR THE RECORD. WITH RESPECT TO JOINDER AS SAM INDICATED, WE THINK THAT THERE'S STILL SOME WORK THAT NEEDS DEVELOPMENT. SO, IT'S NOT YET READY TO BE INCLUDED AS PART OF THE SET OF THE INTERIM RULES THAT GOES TO SIDLY. BUT, YOU KNOW, LET ME GO OVER IT. I THINK THE LANGUAGE THAT WE HAVE IN THE DRAFT INTERIM RULES THAT SAM CIRCULATED IS PRETTY MUCH THE LANGUAGE THAT BASED UPON OUR VARIOUS DISCUSSIONS, SEEM TO HAVE AGREED UPON. I DON'T RECALL THERE BEING ANY OPPOSITIONS OR DISCUSSIONS TO THE CONTRARY ON THE CURRENT LANGUAGE. I THINK WHERE IT SEEMS THAT ADDITIONAL WORK IS NEEDED FROM THE GROUP BUT NOT THE KIND OF MATERIAL CHANGE THAT WOULD REQUIRE US GOING OUT FOR PUBLIC COMMENT, BUT THERE ARE CERTAIN CONCERNS THAT I THINK HAVE BEEN RAISED BY ICANN AND OTHERS IN THE GROUP, SUCH AS IF YOU HAD SOMEBODY WHO IS JOINING AS A PARTY, HOW IS THE PARTY HOW IS PARTY DEFINED IN THAT INSTANCE? MEANING IS THAT INTERVENER THEN DEFINED IN THE SAME WAY AS THE CLAIMANT. AND THEY HAVE THE SAME STATUS AS A CLAIMANT IN THE IRP. I THINK WE'VE ALSO RAISED CERTAIN QUESTIONS ABOUT NEEDING TO WORKOUT THE PROCEDURES RELATED TO BRIEFINGS AND SCHEDULINGS AND FILING FEES AND ANY ISSUES THAT MAY AFFECT THE EFFICIENCY AND PROGRESS OF THE IRP. FOR EXAMPLE, IN INSTANCES WHERE THE INTERVENER JOINS AT A STAGE WHEN THE IRP HAS SIGNIFICANTLY PROGRESSED ALONG, AND SHOULD THERE BE SOME KIND OF LIMITATION ON THE RIGHT OF A PARTY TO INTERVENE? I THINK OTHER THINGS WE'VE RAISED AND DISCUSSED AS A GROUP THAT WE STILL NEED TO WORKOUT IS FOR INTERVENTION AS A RIGHT. AND IS THERE SOME TETHERING WE NEED TO DEVELOP TO THE DISPUTE SO THAT NOT EVERYONE AND EVERYONE CAN JOIN AND INTERVENE AS A RIGHT, BUT THERE SHOULD BE

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SOME KIND OF NEXTS REQUIREMENT. SO, THESE NEED TO BE VETTED BY THE GROUP BEFORE INCLUSION INTO THE FINAL SET OF RULES.

>> THANKS, LIZ. LET ME ASK YOU THIS. THE THINGS YOU WERE JUST MENTIONING, SOUND REASONABLE TO ME. YOU KNOW, TIMING, ET CETERA. I'M TRYING LIKE IN THE RED LINE THAT SAM SENT AROUND, ARE THOSE ADDRESSED IN THE RED LINE? I'M JUST MAYBE I MISSED IT. I DON'T KNOW.

>> THEY'RE ADDRESSED DAVID IN THE NOTE. SHE'S ANNOTATED IT IN THE NOTE THAT THERE ARE CERTAIN ISSUES THAT WE NEED TO FLUSH OUT STILL.

>> UH HUH.

>> IF YOU GO TO PAGE 8

>> NO, I SEE IT NOW. YEAH. SO, THERE'S A FEW ISSUES WE DO NOT HAVE A DEFINITION OF PARTY HERE, SO WE NEED... OKAY. HOW DO YOU PROPOSE WE PROCEED ON THIS?

>> I THINK THIS IS SOMETHING, A CONVERSATION THAT WE EITHER WE CAN SEEK COMMENTS FROM THE GROUP ON LIST OR IF WE CAN DISCUSS IT IN THE NEXT COUPLE MEETINGS. BUT, I THINK IT'S SOMETHING WHERE YOU WOULD LIKE US TO PROPOSE SOMETHING THAT CAN BE A STARTING POINT FOR DISCUSSION?

>> WELL, THANK YOU. I'LL TELL YOU WHERE I'M COMING FROM WHEN I ASK SUCH A QUESTION AND THAT IS WE HAVE TO GET SOMETHING TO SIDLY NOW. SO, MY SENSE OF THIS IS ON QUESTIONS LIKE YOU POSED, FOR INSTANCE WE DON'T HAVE A DEFINITION OF PARTY HERE. SO, WE WOULD HAVE TO DECIDE WHAT DO WE MEAN BY A PARTY, THAT SOMEONE COMES INTO THIS, THEY'VE JOINED HAVING THE QUALITY OF A PARTY. WHAT DO WE MEAN BY THAT? ARE THEY A CLAIMANT? IF THEY ARE ARE THEY MAKING A REQUEST FOR A JUDGMENT THAT SOMETHING DID OR DID NOT VIOLATE THE BYLAWS OR DO THEY HAVE OTHER STANDING? THOSE THINGS I IMAGINE WE'LL AGREE ON. WHAT I WOULD LIKE TO KNOW BEFORE NEXT WEEK IS WHAT IMPACT DOES THIS HAVE ON US GETTING SOMETHING OUT TO SIDLY. AND THE REASON I ASK IS WE DON'T REALLY HAVE A COUPLE OF WEEKS TO SORT THROUGH THE NUANCES OF THIS AND GET SOMETHING TO SIDLY. I TAKE IT WE WILL HAVE TO WORK ON THIS IN THE BACKGROUND SEPARATELY. AND SO, ARE YOU PROPOSING THAT WE SEND THE LANGUAGE THAT YOU DO HAVE IN SECTION 7, TO SIDLY RIGHT NOW WITH THE UNDERSTANDING THAT WE WILL THEN BE WORKING ON THE QUESTIONS POSED IN THE NOTE? IS THAT WHAT THE REQUEST IS?

>> YES.

>> DOES ANYBODY

>> I THINK THAT'S A FAIR APPROACH TO GO FORWARD.

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>> OKAY. SO, THEN I'M GOING TO ASK IN A MINUTE IF ANYBODY HAS ANY COMMENTS, CONCERNS OR QUESTIONS. I SEE SAM'S HAND IS UP. I WILL COME TO YOU IN JUST A SECOND, SAM. BUT IN ANYONE ELSE HAS SOMETHING TO SAY ABOUT THIS, PLEASE DO. I WILL BE LOOKING LIZ TO YOU AND SAM TO SORT OF TEE THIS UP THEN. BUT GO AHEAD, SAM. YOU HAVE THE FLOOR.

>> THANKS, DAVID. I THINK WHEN WE SEND THEM THIS INFORMATION WE SHOULD ALSO ACCOMPANY IT WITH A NOTE OF THESE ARE THE OTHER THINGS THAT THE IOT IS STILL LOOKING AT OR THE THINGS WE'RE DISCUSSING. SO THAT WAY WE CAN KIND OF FLAG FOR THEM WHAT THE OTHER WORK IS, THEY CAN PROVIDE SOME INPUTS IF THEY HAVE ADDITIONAL THOUGHTS ON THOSE OR SOME GUIDANCE. AND SO, I THINK WE CAN WE SHOULD READ THEM IN ON WHAT THE OTHER THINGS WE'RE STILL CONSIDERING ARE WHEN IT'S SENT OVER.

>> THANKS, SAM. AND CAN I LOOK TO YOU AND LIZ TO SORT OF TEE THIS UP? TO TEE UP THIS WHOLE DOCUMENT, WITH THE IDEA OF SOME QUESTIONS ON TRANSLATIONS AND ON JOINDER?

>> YEP. AND WE'LL LOOK THROUGH AND SEE IF THERE ARE ANY OTHER THINGS WE HIGHLIGHTED AS NECESSARY FOR SOME FURTHER CONVERSATION.

>> OKAY. THANKS. I THINK IT WOULD BE A GOOD IDEA IF WE CAN, BERNIE I MIGHT ASK YOU TO HELP IN THIS RESPECT, IF WE COULD FIND A 15 MINUTE SLOT WHERE MAYBE BERNIE AND SAM AND I COULD TALK TO HOLLY, NOT ABOUT THE SUBSTANTIVE WORK WE'RE DOING, BUT JUST ON WITH RESPECT TO HEADS UP, WE'RE GOING TO BE ASKING QUESTIONS WE NEED TO GET DONE BY THE END OF JUNE, THAT KIND OF DISCUSSION. SAM, DO YOU THINK WE CAN HANDLE IT IN EMAIL? THAT'S FINE. BUT I JUST WANT TO I GUESS WE HAVE TO GET THAT PART OF IT MOVING. SO, AGAIN I'LL INVITE OTHERS ON THE CALL TO COMMENT OR STATE ANY QUESTION THEY MIGHT HAVE. IF THERE ARE NONE I THOUGHT I SAW A HAND. IF THERE ARE NONE I'LL ASK LIZ, ARE YOU DONE WITH WHAT YOU WANTED TO SAY ON JOINDER?

>> YES, DAVID, I AM.

>> I THINK WE CAN MOVE TO SECTION 5 AGENDA ITEM 5. FURTHER THOUGHTS ON OUR WORK AFTER THE RULES, UNLESS SOMEBODY HAS SOMETHING ELSE THEY WOULD LIKE TO COMMENT ON, ON THE DISCUSSION SO FAR. I DON'T SEE ANY HANDS. SO, YOU'LL NOTE THAT I SENT AN EMAIL TO THE LIST ABOUT WORK THAT WE HAVE ONCE WE GET THE RULES SORT OF TENDED TO. AND WHAT I MEAN BY TENDED TO IS SOMETIME SOON WE'RE GOING TO HAVE ONE RULE OUT FOR PUBLIC COMMENT. TIME FOR FILING AND WE WILL HAVE A DOCUMENT FROM FRONT OF SIDLY FOR FEEDBACK ON THE INTERIM RULES AND QUESTIONS IN THE BACKGROUND. WE'LL HAVE THOSE 3 GOING BUT IT'S QUITE POSSIBLE THOSE 3 WILL BE WRAPPED UP BY MID JULY. WHEN I SAY WRAPPED UP WE WILL NOT HAVE HAD PUBLIC COMMENT BACK, UNDERSTANDING THAT. BUT WE MAY SOON COME TO A POINT WHERE WE CAN TURN OUR ATTENTION ELSEWHERE WHICH MAY BE A WELCOME DAY. AND SO THAT'S WHY I PUT THAT LIST OUT THERE. I KNOW SHERINE WAS INTERESTED IN WHAT ELSE WE MIGHT HAVE ON OUR PLATE SO

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PLEASE BE AWARE AND WE WILL WANT TO TURN OUR ATTENTION TO THE COOPERATIVE ENGAGEMENT AND MAYBE NEXT WEEK OR MAYBE IN THE CALL AFTER NEXT WEEK BUT WE MAY AT SOME POINT WANT TO DISCUSS THE CONSTITUTION OF THE IOT TEAM ITSELF, YOU KNOW, HOW DO WE FEEL? WE'RE A SMALL GROUP AND WE HAVE BECOME MUCH MORE EFFECTIVE RECENTLY, DO WE WANT TO CONSIDER HOW WE MOVE FORWARD? I'LL JUST STATE IT GENERALLY LIKE THAT. AND SORT OF AS A FOLLOW ON ON TO WHAT WE DISCUSSED LAST WEEK. BUT THAT'S REALLY WHAT THE PURPOSE WAS TO PUT MY THOUGHTS ON PAPER OF WHAT WE YET HAVE TO DO. I DON'T THINK I MISSED ANYTHING BUT I MIGHT HAVE SO IF YOU SEE ANYTHING WHILE YOU GO THROUGH THE RULES I ENCOURAGE YOU TO FLAG IT. ANY QUESTIONS OR COMMENTS BEFORE WE GO TO ANY OTHER BUSINESS? SO, LET'S GO TO ANY OTHER BUSINESS. I'LL STATE ONE THING. I'LL REITERATE WHAT I WAS ASKING. THIS MAY BE ESPECIALLY HELPFUL AT ICANN 62 FOR THOSE GOING TO ATTEND IS PLEASE, AGAIN, BE MINDFUL TO HELP YOUR VARIOUS ADVISORY COMMITTEES AND SUPPORTING ORGANIZATIONS ON THEIR WORK TO ESTABLISH A STANDING PANEL. IT'S IMPORTANT WORK AND I KNOW THERE'S A LOT GOING ON BUT PLEASE HELP YOUR ORGANIZATION AS BEST YOU CAN. ANYBODY ELSE HAVE ANYTHING THEY WANT TO STATE ON ANY OTHER BUSINESS? IF NOT, I'LL GO TO WORK IN THE NEXT DAY OR SO ON A MAIL ABOUT TYPES OF HEARINGS AND WE'LL LOOK FOR SOMETHING FROM SAM AND LIZ ON THE INTERIM RULES AND BERNIE I MIGHT ASK YOU TO SORT OF REMIND US THAT WE NEED TO GET IN TOUCH WITH HOLLY AND WE'LL FIGURE OUT HOW TO DO THAT. AGAIN, THAT'S NOT GOING TO BE A SUBSTANTIVE DISCUSSION, IT'S GOING TO BE DEAR HOLLY, HERE IS WORK COMING YOUR WAY, SORRY IT'S LATE AND HAS TO BE DONE IN THE NEXT FEW WEEKS, BUT THAT'S THE WAY IT IS. BEFORE WE WRAP UP, DOES ANYBODY WANT TO MAKE ANY STATEMENTS, HAVE ANY COMMENTS? QUESTIONS? I'LL LOOK UP TO THE TOP. NOPE. IF NOT THEN THAT'S THE END OF THIS CALL. I WANT TO THANK EVERYBODY FOR BEING HERE AND SEE YOU NEXT WEEK AND THEY'LL BE SOME MAIL IN THE INTERIM. GOOD BYE EVERYBODY. THANKS VERY MUCH.

EXHIBIT 256

Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP)¹

Style Definition: Subtle Emphasis

Style Definition: ntense Emphasis

Style Definition: ntense Quote

Style Definition: Subtle Reference

Style Definition: ntense Reference

Revised as of [Day, Month], 2018

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These interim procedures (Interim Supplementary Procedures) supplement the International Centre for Dispute Resolution’s international arbitration rules in accordance with the independent review process set forth in Article 4, Section 4.3 of ICANN’s Bylaws. These procedures apply to all independent review process proceedings filed after 1 May 2018.

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In drafting these Interim Supplementary Procedures, the IRP Implementation Oversight Team (IOT) applied the following principles: (1) remain as close as possible to the current Supplementary Procedures or the Updated Supplementary Procedures (USP) posted for public comment on 28 November 2016³; (2) to the extent public comments received in response to the

¹ CONTEXTUAL NOTE: These Interim Supplementary Procedures are intended to supplement the ICDR RULES. Therefore, when the ICDR RULES appropriately address an item, there is no need to re-state that Rule within the Supplemental Procedures. The IOT, through its work, may identify additional places where variance from the ICDR RULES is recommended, and that would result in addition or modification to the Supplemental Procedures.

³ See <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>

USP reflected clear movement away from either the current Supplementary Procedures or the USP, to reflect that movement unless doing so would require significant drafting that should be properly deferred for broader consideration; (3) take no action that would materially expand any part of the Supplementary Procedures that the IOT has not clearly agreed upon, or that represent a significant change from what was posted for comment and would therefore require further public consultation prior to changing the supplemental rules to reflect those expansions or changes.

1. Definitions

In these Interim Supplementary Procedures:

A CLAIMANT is any legal or natural person, group, or entity including, but not limited to the Empowered Community, a Supporting Organization, or an Advisory Committee, that has been materially affected by a Dispute. To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.

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COVERED ACTIONS are any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a DISPUTE.

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DISPUTES are defined as:

(A) Claims that COVERED ACTIONS violated ICANN's Articles of Incorporation or Bylaws, including, but not limited to, any action or inaction that:

- 1) exceeded the scope of the Mission;
- 2) resulted from action taken in response to advice or input from any Advisory Committee or Supporting Organization that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
- 3) resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
- 4) resulted from a response to a DIDP (as defined in Section 22.7(d)) request that is claimed to be inconsistent with the Articles of Incorporation or Bylaws; or
- 5) arose from claims involving rights of the EC as set forth in the Articles of Incorporation or Bylaws;

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(B) Claims that ICANN, the Board, individual Directors, Officers or Staff members have not enforced ICANN’s contractual rights with respect to the IANA Naming Function Contract; and

(C) Claims regarding the Post-Transition IANA entity service complaints by direct customers of the IANA naming functions that are not resolved through mediation

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EMERGENCY PANELIST refers to a single member of the STANDING PANEL designated to adjudicate requests for interim relief or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for emergency relief (ICDR RULES Article 6).

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IANA refers to the Internet Assigned Numbers Authority.

ICDR refers to the International Centre for Dispute Resolution, which has been designated and approved by ICANN’s Board of Directors as the IRP Provider (IRPP) under Article 4, Section 4.3 of ICANN’s Bylaws.

ICANN refers to the Internet Corporation for Assigned Names and Numbers.

INDEPENDENT REVIEW PROCESS or IRP refers to the procedure that takes place upon the Claimant’s filing of a written statement of a DISPUTE with the ICDR.

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IRP PANEL refers to the panel of three neutral members appointed to decide the relevant DISPUTE.

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IRP PANEL DECISION refers to the final written decision of the IRP PANEL that reflects the reasoned analysis of how the DISPUTE was resolved in compliance with ICANN’s Articles and Bylaws.

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ICDR RULES refers to the ICDR’s International Arbitration rules in effect at the time the relevant request for independent review is submitted.

PROCEDURES OFFICER refers to a single member of the STANDING PANEL designated to adjudicate requests for consolidation, intervention, and/or participation as an amicus, or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to its International Arbitration Rules relating to appointment of panelists for consolidation (ICDR Rules Article 8).

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PURPOSES OF THE IRP are to hear and resolve Disputes for the reasons specified in the ICANN Bylaws, Article 4, Section 4.3(a).

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STANDING PANEL refers to an omnibus standing panel of at least seven members from which three-member IRP PANELS are selected to hear and resolve DISPUTES consistent with the purposes of the IRP.

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2. Scope

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The ICDR will apply these Interim Supplementary Procedures, in addition to the ICDR RULES, in all cases submitted to the ICDR in connection with Article 4, Section 4.3 of the ICANN Bylaws after the date these Interim Supplementary Procedures go into effect. In the event there is any inconsistency between these Interim Supplementary Procedures and the ICDR RULES, these Interim Supplementary Procedures will govern. These Interim Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is commenced. IRPs commenced prior to the adoption of these Interim Supplementary Procedures shall be governed by the Supplementary Procedures in effect at the time such IRPs were commenced.

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In the event that any of these Interim Supplementary Procedures are subsequently amended, the rules surrounding the application of those amendments will be defined therein.

3. Composition of Independent Review Panel

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The IRP PANEL will comprise three panelists selected from the STANDING PANEL, unless a STANDING PANEL is not in place when the IRP is initiated. The CLAIMANT and ICANN shall each select one panelist from the STANDING PANEL, and the two panelists selected by the parties will select the third panelist from the STANDING PANEL. A STANDING PANEL member's appointment will not take effect unless and until the STANDING PANEL member signs a Notice of STANDING PANEL Appointment affirming that the member is available to serve and is Independent and Impartial pursuant to the ICDR RULES. In addition to disclosing relationships with parties to the DISPUTE, IRP PANEL members must also disclose the existence of any material relationships with ICANN, and/or an ICANN Supporting Organization or Advisory Committee. In the event that a STANDING PANEL is not in place when the relevant IRP is initiated or is in place but does not have capacity due to other IRP commitments, the CLAIMANT and ICANN shall each select a qualified panelist from outside the STANDING PANEL, and the two panelists selected by the parties shall select the third panelist. In the event that the two party-selected panelists cannot agree on the third panelist, the ICDR RULES shall apply to selection of the third panelist. In the event that a panelist resigns, is incapable of performing the duties of a panelist, or is removed and the position becomes vacant, a substitute arbitrator shall be appointed pursuant to the provisions of this Section [3] of these Interim Supplementary Procedures.

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Comment [A1]: "Independent" and "Impartial" are terms of art under the ICDR Rules, so we suggest capitalizing them here

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4. Time for Filing¹⁸

An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.

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Comment [A2]: On 30 April 2018 David McAuley proposed to the IRP IOT that the repose issue be put "into a second 'bucket' -the bucket of rules that are not yet ready for release. This would be a de facto moratorium while the IOT does further work on the notion of repose."

In order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.

However, we still need to include some level of guidance to the panel on timing, and so we propose that this be included because it aligns with what was included in the public comment, and it is far easier to move to a less restrictive rule in the full update than it would be to move to a more restrictive rule. As public comment is needed in order to make a substantial change to get to no repose, if the outcome of the further public comment supports no repose and that is in alignment with the global public interest, the final set of rules will incorporate that standard.

5. Conduct of the Independent Review

It is in the best interests of ICANN and of the ICANN community for IRP matters to be resolved expeditiously and at a reasonably low cost while ensuring fundamental fairness and due process consistent with the PURPOSES OF THE IRP. The IRP PANEL shall consider accessibility, fairness, and efficiency (both as to time and cost) in its conduct of the IRP.

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In the event that an EMERGENCY PANELIST has been designated to adjudicate a request for interim relief pursuant to the Bylaws, Article 4, Section 4.3(p), the EMERGENCY PANELIST shall comply with the rules applicable to an IRP PANEL, with such modifications as appropriate.

5A. Nature of IRP Proceedings

The IRP PANEL should conduct its proceedings by electronic means to the extent feasible.

Hearings shall be permitted as set forth in these Interim Supplementary Procedures. Where necessary, the IRP PANEL may conduct hearings via telephone, video conference or similar technologies. The IRP PANEL should conduct its proceedings with the presumption that in-person hearings shall not be permitted. For purposes of these Interim Supplementary Procedures, an "in-person hearing" refers to any IRP proceeding held face-to-face, with participants physically present in the same location. The presumption against in-person hearings may be rebutted only under extraordinary circumstances, where, upon motion by a Party, the IRP PANEL determines that the party seeking an in-person hearing has demonstrated that: (1) an in-

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¹⁸ The IOT recently sought additional public comment to consider the Time for Filing rule that will be recommended for inclusion in the final set of Supplementary Procedures. In the event that the final Time for Filing procedure allows additional time to file than this interim Supplementary Procedure allows, ICANN committed to the IOT that the final Supplementary Procedures will include transition language that provides potential claimants the benefit of that additional time, so as not to prejudice those potential claimants.

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person hearing is necessary for a fair resolution of the claim; (2) an in-person hearing is necessary to further the PURPOSES OF THE IRP; and (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of an in-person hearing. In no circumstances shall in-person hearings be permitted for the purpose of introducing new arguments or evidence that could have been previously presented, but were not previously presented, to the IRP PANEL.

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All hearings shall be limited to argument only unless the IRP Panel determines that a the party seeking to present witness testimony has demonstrated that such testimony is: (1) necessary for a fair resolution of the claim; (2) necessary to further the PURPOSES OF THE IRP; and (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of witness testimony and cross examination.

All evidence, including witness statements, must be submitted in writing 15 days in advance of any hearing.

With due regard to ICANN Bylaws, Article 4, Section 4.3(s), the IRP PANEL retains responsibility for determining the timetable for the IRP proceeding. Any violation of the IRP PANEL’s timetable may result in the assessment of costs pursuant to Section 10 of these Interim Supplementary Procedures.

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5B. Translation

As required by ICANN Bylaws, Article 4, Section 4.3(l), “All IRP proceedings shall be administered in English as the primary working language, with provision of translation services for CLAIMANTS if needed.” Translation may include both translation of written documents/transcripts as well as interpretation of oral proceedings.

The IRP PANEL shall have discretion to determine (i) whether the CLAIMANT has a need for translation services, (ii) what documents and/or hearing that need relates to, and (iii) what language the document, hearing or other matter or event shall be translated into. A CLAIMANT not determined to have a need for translation services must submit all materials in English (with the exception of the request for translation services if the request includes CLAIMANT’s certification to the IRP PANEL that submitting the request in English would be unduly burdensome).

In determining whether a CLAIMANT needs translation, the IRP PANEL shall consider the CLAIMANT’s proficiency in spoken and written English and, to the extent that the CLAIMANT is represented in the proceedings by an attorney or other agent, that representative’s proficiency

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in spoken and written English. The IRP PANEL shall only consider requests for translations from/to English and the other five official languages of the United Nations (i.e., Arabic, Chinese, French, Russian, or Spanish).

In determining whether translation of a document, hearing or other matter or event shall be ordered, the IRP PANEL shall consider the CLAIMANT’s proficiency in English as well as in the requested other language (from among Arabic, Chinese, French, Russian or Spanish). The IRP PANEL shall confirm that all material portions of the record of the proceeding are available in English.

In considering requests for translation, the IRP PANEL shall consider the materiality of the particular document, hearing or other matter or event requested to be translated, as well as the cost and delay incurred by translation, pursuant to ICDR Article 18 on Translation, and the need to ensure fundamental fairness and due process under ICANN Bylaws, Article 4, Section 4.3(n)(iv).

Unless otherwise ordered by the IRP PANEL, costs of need-based translation (as determined by the IRP PANEL) shall be covered by ICANN as administrative costs and shall be coordinated through ICANN’s language services providers. Even with a determination of need-based translation, if ICANN or the CLAIMANT coordinates the translation of any document through its legal representative, such translation shall be considered part of the legal costs and not an administrative cost to be born by ICANN. Additionally, in the event that either the CLAIMANT or ICANN retains a translator for the purpose of translating any document, hearing or other matter or event, and such retention is not pursuant to a determination of need-based translation by the IRP PANEL, the costs of such translation shall not be charged as administrative costs to be covered by ICANN.

6. Written Statements

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A CLAIMANT’S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE, but such claims may be asserted as independent or alternative claims.

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font. All necessary and available evidence in support of the CLAIMANT’S claim(s) should be part of the initial written submission. Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence. The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.

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In addition, the IRP PANEL may grant a request for additional written submissions from any person or entity who is intervening as a CLAIMANT or who is participating as an amicus upon the showing of a compelling basis for such request. In the event the IRP PANEL grants a request for additional written submissions, any such additional written submission shall not exceed 15 pages, double-spaced and in 12-point font.

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For any DISPUTE resulting from a decision of a process-specific expert panel that is claimed to be inconsistent with ICANN’s Articles of Incorporation or Bylaws, as specified at Bylaw Section 4.3(b)(iii)(A)(3), any person, group or entity that was previously identified as within a contention set with the CLAIMANT regarding the issue under consideration within such expert panel proceeding shall receive notice from ICANN that the INDEPENDENT REVIEW PROCESS has commenced. ICANN shall provide notice by electronic message within two business days (calculated at ICANN’s principal place of business) of receiving notification from the ICDR that the IRP has commenced.

7. Consolidation, Intervention, and Participation as an Amicus

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A PROCEDURES OFFICER shall be appointed from the STANDING PANEL to consider any request for consolidation, intervention, and/or participation as an amicus. Requests for consolidation, intervention, and/or participation as an amicus are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for consolidation.

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In the event that requests for consolidation or intervention, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion consistent with the PURPOSES OF THE IRP.

Consolidation

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact among multiple IRPs such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. If DISPUTES are consolidated, each existing DISPUTE shall no longer be subject to further separate consideration. The

Deleted: Any person or entity qualified to be a CLAIMANT may intervene in an IRP with the permission of the PROCEDURES OFFICER. CLAIMANT’S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE, but such claims may be asserted as independent or alternative claims³²

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PROCEDURES OFFICER may in its discretion order briefing to consider the propriety of consolidation of DISPUTES.

Intervention

Any person or entity qualified to be a CLAIMANT pursuant to the standing requirement set forth in the Bylaws may intervene in an IRP with the permission of the PROCEDURES OFFICER, as provided below. This applies whether or not the person, group or entity participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)).

Intervention is appropriate to be sought when the prospective participant does not already have a pending related DISPUTE, and the potential claims of the prospective participant stem from a common nucleus of operative facts based on such briefing as the PROCEDURES OFFICER may order in its discretion.

In addition, the Supporting Organization(s) which developed a Consensus Policy involved when a DISPUTE challenges a material provision(s) of an existing Consensus Policy in whole or in part shall have a right to intervene as a CLAIMANT to the extent of such challenge. Supporting Organization rights in this respect shall be exercisable through the chair of the Supporting Organization.

Any person, group or entity who intervenes as a CLAIMANT pursuant to this section will become a CLAIMANT in the existing INDEPENDENT REVIEW PROCESS and have all of the rights and responsibilities of other CLAIMANTS in that matter and be bound by the outcome to the same extent as any other CLAIMANT. All motions to intervene or for consolidation shall be directed to the IRP PANEL within 15 days of the initiation of the INDEPENDENT REVIEW PROCESS. All requests to intervene or for consolidation must contain the same information as a written statement of a DISPUTE and must be accompanied by the appropriate filing fee. The IRP PANEL may accept for review by the PROCEDURES OFFICER any motion to intervene or for consolidation after 15 days in cases where it deems that the PURPOSES OF THE IRP are furthered by accepting such a motion.

The IRP PANEL shall direct that all materials related to the DISPUTE be made available to entities that have intervened or had their claim consolidated unless a CLAIMANT or ICANN objects that such disclosure will harm commercial confidentiality, personal data, or trade secrets; in which case the IRP PANEL shall rule on objection and provide such information as is consistent with the PURPOSES OF THE IRP and the appropriate preservation of confidentiality as recognized in Article 4 of the Bylaws.

Comment [A3]: NOTE to IOT: In the process of trying to include this agreed upon concept, we recommend that it is not yet ready for inclusion. There are a few issues: (1) we do not have a definition of a "party" here, and so we need to vet if we mean a claimant (2) for intervention as of right, we need to build in some sort of tethering to the dispute; it's not that anyone can join in, it should be that those with related issues may join. We also need to consider things like filing fees and other practical issues

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Comment [A4]: Neither "party" nor "amicus" are defined terms

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In the event that requests for consolidation, intervention, and joinder are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion

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Participation as an Amicus Curiae

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an amicus curiae before an IRP PANEL, subject to the limitations set forth below. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)) shall be deemed to have a material interest relevant to the DISPUTE and may participate as an amicus before the IRP PANEL.

All requests to participate as an amicus must contain the same information as the Written Statement (set out at Section 6), specify the interest of the amicus curiae, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion, that the proposed amicus curiae has a material interest relevant to the DISPUTE, he or she shall allow participation by the amicus curiae. Any person participating as an amicus curiae may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion. The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an amicus curiae.

8. Exchange of Information

The IRP PANEL shall be guided by considerations of accessibility, fairness, and efficiency (both as to time and cost) in its consideration of requests for exchange of information.

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On the motion of either Party and upon finding by the IRP PANEL that such exchange of information is necessary to further the PURPOSES OF THE IRP, the IRP PANEL may order a Party to produce to the other Party, and to the IRP PANEL if the moving Party requests, documents or electronically stored information in the other Party’s possession, custody, or control that the Panel determines are reasonably likely to be relevant and material to the resolution of the CLAIMS and/or defenses in the DISPUTE and are not subject to the attorney-client privilege, the work product doctrine or otherwise protected from disclosure by applicable law. Where such method(s) for exchange of information are allowed, all Parties shall be granted the equivalent rights for exchange of information.

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A motion for exchange of documents shall contain a description of the specific documents, classes of documents or other information sought that relate to the subject matter of the Dispute

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along with an explanation of why such documents or other information are likely to be relevant and material to resolution of the Dispute.

Depositions, interrogatories, and requests for admission will not be permitted.

In the event that a Party submits what the IRP PANEL deems to be an expert opinion, such opinion must be provided in writing and the other Party must have a right of reply to such an opinion with an expert opinion of its own.

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9. Summary Dismissal

An IRP PANEL may summarily dismiss any request for INDEPENDENT REVIEW where the Claimant has not demonstrated that it has been materially affected by a DISPUTE. To be materially affected by a DISPUTE, a Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.

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An IRP PANEL may also summarily dismiss a request for INDEPENDENT REVIEW that lacks substance or is frivolous or vexatious.

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10. Interim Measures of Protection

A Claimant may request interim relief from the IRP PANEL, or if an IRP PANEL is not yet in place, from the STANDING PANEL. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN action or decision in order to maintain the status quo until such time as the opinion of the IRP PANEL is considered by ICANN as described in ICANN Bylaws, Article 4, Section 4.3(o)(iv).

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An EMERGENCY PANELIST shall be selected from the STANDING PANEL to adjudicate requests for interim relief. In the event that no STANDING PANEL is in place when an EMERGENCY PANELIST must be selected, a panelist may be appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for emergency relief. Interim relief may only be provided if the EMERGENCY PANELIST determines that the Claimant has established all of the following factors:

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- (i) A harm for which there will be no adequate remedy in the absence of such relief;
- (ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and
- (iii) A balance of hardships tipping decidedly toward the party seeking relief.

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Interim relief may be granted on an ex parte basis in circumstances that the EMERGENCY PANELIST deems exigent, but any Party whose arguments were not considered prior to the granting of such interim relief may submit any opposition to such interim relief, and the EMERGENCY PANELIST must consider such arguments, as soon as reasonably possible. The EMERGENCY PANELIST may modify or terminate the interim relief if the EMERGENCY PANELIST deems it appropriate to do so in light of such further arguments.

11. Standard of Review

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Each IRP PANEL shall conduct an objective, de novo examination of the DISPUTE.

- a. With respect to COVERED ACTIONS, the IRP PANEL shall make findings of fact to determine whether the COVERED ACTION constituted an action or inaction that violated ICANN'S Articles or Bylaws.
- b. All DISPUTES shall be decided in compliance with ICANN's Articles and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.
- c. For Claims arising out of the Board's exercise of its fiduciary duties, the IRP PANEL shall not replace the Board's reasonable judgment with its own so long as the Board's action or inaction is within the realm of reasonable business judgment.
- d. With respect to claims that ICANN has not enforced its contractual rights with respect to the IANA Naming Function Contract, the standard of review shall be whether there was a material breach of ICANN's obligations under the IANA Naming Function Contract, where the alleged breach has resulted in material harm to the Claimant.
- e. IRPs initiated through the mechanism contemplated at Article 4, Section 4.3(a)(iv) of ICANN's Bylaws shall be subject to a separate standard of review as defined in the IANA Naming Function Contract.

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12. IRP PANEL Decisions

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IRP PANEL DECISIONS shall be made by a simple majority of the IRP PANEL. If any IRP PANEL member fails to sign the IRP PANEL DECISION, the IRP PANEL member shall endeavor to provide a written statement of the reason for the absence of such signature.

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13. Form and Effect of an IRP PANEL DECISION

- a. IRP PANEL DECISIONS shall be made in writing, promptly by the IRP PANEL, based on the documentation, supporting materials and arguments submitted by the parties.
- b. The IRP PANEL DECISION shall specifically designate the prevailing party as to each Claim.
- c. Subject to Article 4, Section 4.3 of ICANN's Bylaws, all IRP PANEL DECISIONS shall be made public, and shall reflect a well-reasoned application of how the DISPUTE was resolved in compliance with ICANN's Articles and Bylaws, as understood in light of prior IRP PANEL DECISIONS decided under the same (or an equivalent prior) version of the provision of the Articles and Bylaws at issue, and norms of applicable law.

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14. Appeal of IRP PANEL Decisions

An IRP PANEL DECISION may be appealed to the full STANDING PANEL sitting en banc within 60 days of the issuance of such decision. The en banc STANDING PANEL will review such appealed IRP PANEL DECISION based on a clear error of judgment or the application of an incorrect legal standard. The en banc STANDING PANEL may also resolve any disputes between panelists on an IRP PANEL or the PROCEDURES OFFICER with respect to consolidation of CLAIMS or intervention.

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15. Costs

The IRP PANEL shall fix costs in its IRP PANEL DECISION. Except as otherwise provided in Article 4, Section 4.3(e)(ii) of ICANN's Bylaws, each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, as defined in Article 4, Section 4.3(d) of ICANN's Bylaws, including the costs of all legal counsel and technical experts.

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Except with respect to a Community IRP, the IRP PANEL may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.

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- i. (S)he/it/they may only intervene as a party if they satisfy the standing requirement to be a CLAIMANT as set forth in the Bylaws.
- ii. If the standing requirement is not satisfied, then (s)he/it/they may intervene as an *amicus*.

Any person, group, or entity that did not participate in the underlying proceeding may intervene as a CLAIMANT if they satisfy the standing requirement set forth in the Bylaws. If the standing requirement is not satisfied, such persons may intervene as an *amicus* if the PROCEDURES OFFICER determines, in her/his discretion, that the proposed *amicus* has a material interest at stake directly relating to the injury or harm that is claimed by the CLAIMANT to have been directly and causally connected to the alleged violation at issue in the DISPUTE.

In the event that requests for consolidation, intervention, and joinder are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion.

Discovery Methods¹

¹ There is no existing Supplemental Rule. The [CCWG Final Proposal and] ICANN Bylaws recommend that discovery methods be considered by IOT. See ICANN Bylaws, Article 4, Section 4.3(n)(iv)(D).

EXHIBIT 257

[IOT] Status of ICANN staff in IOT

Malcolm Hutto Contact Information Redacted

Thu Dec 6 12:47:55 UTC 2018

- Previous message: [\[IOT\] FW: Reviewing the consultation responses](#)
 - Next message: [\[IOT\] Status of ICANN staff in IOT](#)
 - Messages sorted by: [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)
-

Dear David,

I write to confirm for the written record my request as raised in our last meeting.

When this group was formed, you took the extraordinary step of including ICANN staff and external counsel as full members of this group:

- they are listed as full participants on the group membership page
- they are included in quorum counts
- they are invited to speak on all issues on an equal basis: that is, not merely to describe the practical effects of matters proposed, but also to opine on the balance of values
- they are included in consensus calls

In the Board resolution in Barcelona adopting the Interim Supplementary Rules, the Board resolved to urge this group to come to a prompt conclusion on final Supplementary Rules of Procedure.

During the Open Forum session, I offered the Board my opinion that we would have completed our work earlier had we not been so split, as a result of the divergent views of the team from ICANN Legal and Jones Day. I asked whether it was normal for ICANN staff and agents to engage in community processes like this one as full participants, and whether there was guidance available.

Göran answered my question on behalf of the Board. He stated very clearly and firmly that staff "are not members of the community" and participate as staff support, not as co-participants. He appeared to me to be angry that I was even suggesting that staff would overstep such bounds, and that he had to defend them from such an accusation which he gave every impression as regarding as an unfair accusation of impropriety. He was plainly unaware of your decision.

In the light of this response, I request that we revisit the classification of ICANN staff and Jones Day.

In my view, it was never proper to regard ICANN Legal and Jones Day as co-equal participants in this group. The matter under discussion is the procedures that apply in a core process for holding ICANN to account: ICANN is plainly irredeemably conflicted.

Moreover, the conflict goes beyond the institutional to the personal. An

IRP case can only be brought on the basis that ICANN has acted inconsistently with the Bylaws. Usually, ICANN will have taken the advice of its lawyers before acting in a manner that might give rise to such a claim. Accordingly, an IRP case will quite commonly be a direct challenge to the advice that Samantha, Elizabeth and the team have previously given, personally. It is quite wrong to involve them in directly in the decision-making as to how such a challenge can be brought. This is not to impugn their professional integrity: any lawyer would recognise this as an irreconcilable conflict of interests and obligations. Your decision places them in an impossible and untenable position, that fundamentally compromises the legitimacy of this group's output.

Now that Göran has confirmed that staff should not be regarded as members of the community for the purpose of participation in community processes, I ask that their status be reclassified as staff support, with the following consequences:

- they will not be counted in quorum counts
- they will not be included in consensus calls
- they will be permitted to attend meetings, and their input sought on factual matters, such as how procedures operate, where that assists the group, but their opinion will be not be sought as to the balance of expedience.

Kind Regards,

Malcolm Huty.

--

Malcolm Huty | tel: **Contact Information Redacted**
Head of Public Affairs | Read the LINX Public Affairs blog
London Internet Exchange | <http://publicaffairs.linx.net/>

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- Previous message: [\[IOT\] FW: Reviewing the consultation responses](#)
 - Next message: [\[IOT\] Status of ICANN staff in IOT](#)
 - Messages sorted by: [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)

[More information about the IOT mailing list](#)

EXHIBIT 258

[IOT] Text suggestions following call on Tuesday

McAuley, David Contact Information Redacted

Thu Oct 11 15:57:11 UTC 2018

- Previous message: [\[IOT\] IOT - DAIRs and captioning for meeting of 20181009](#)
- Next message: [\[IOT\] IOT - Meeting - 20181011 - DAIRs and raw captioning](#)
- Messages sorted by: [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)

Dear members of the IRP IOT,

On Tuesday's call I promised to suggest some text to reflect the safe harbor on the 12-month portion of the 'Repose' rule (Rule 4 Time-for-Filing) and on the rules 7 and 8 that I mentioned.

My suggestions are attached.

Hope to see you on the call in several hours time.

Best regards,

David

David McAuley

Sr International Policy & Business Development Manager

Verisign Inc.

Contact Information Redacted

----- next part -----

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URL: <<http://mm.icann.org/pipermail/iot/attachments/20181011/f7cfbbd7/attachment-0001.html>>

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Name: DMc.IRPrules.Joinder etc.docx

Type: application/vnd.openxmlformats-officedocument.wordprocessingml.document

Size: 19960 bytes

Desc: DMc.IRPrules.Joinder etc.docx

URL:

<<http://mm.icann.org/pipermail/iot/attachments/20181011/f7cfbbd7/DMc.IRPrules.Joinderetc-0001.docx>>

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- Previous message: [\[IOT\] IOT - DAIRs and captioning for meeting of 20181009](#)
 - Next message: [\[IOT\] IOT - Meeting - 20181011 - DAIRs and raw captioning](#)
 - Messages sorted by: [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)

[More information about the IOT mailing list](#)

EXHIBIT 259

Dear members of the IRP IOT,

On Tuesday's call I said I would float specific language for a safe harbor with respect to the 12-month overall time limitation in Rule 4 (Repose) and specific language following my comments on Rules 7 and 8. Here below are the suggested texts:

With respect to Rule 4, I propose adding this language at the end of the current first paragraph of the rule:

During the pendency of these supplementary procedures as "Interim Supplementary Procedures," however, no CLAIMANT shall be time-barred from submitting a written statement of a DISPUTE due solely to passage of the twelve (12) months period described in the second part of the immediately preceding sentence, it being understood that the IRP Implementation Oversight Team continues its consideration of this aspect of such sentence for treatment in the Supplementary Procedures to follow in due course.

And here below shown in 'track-change' format are my suggestions for rules 7 and 8.

Rule (7): Consolidation, Intervention and Participation as an Amicus

A PROCEDURES OFFICER shall be appointed from the STANDING PANEL to consider any request for consolidation, intervention, and/or participation as an *amicus*. Except as otherwise expressly stated herein, Rrequests for consolidation, intervention, and/or participation as an *amicus* are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for consolidation.

In the event that requests for consolidation or intervention, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion consistent with the PURPOSES OF THE IRP.

Consolidation

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact among multiple IRPs such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. If DISPUTES are consolidated, each existing DISPUTE shall no longer be subject to further separate consideration. The PROCEDURES OFFICER may in its discretion order briefing to consider the propriety of consolidation of DISPUTES.

Intervention

Any person or entity qualified to be a CLAIMANT pursuant to the standing requirement set forth in the Bylaws may intervene in an IRP with the permission of the PROCEDURES OFFICER, as provided below. This applies whether or not the person, group or entity participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)).

Intervention is appropriate to be sought when the prospective participant does not already have a pending related DISPUTE, and the potential claims of the prospective participant stem from a common nucleus of operative facts based on such briefing as the PROCEDURES OFFICER may order in its discretion.

In addition, the Supporting Organization(s) which developed a Consensus Policy involved when a DISPUTE challenges a material provision(s) of an existing Consensus Policy in whole or in part shall have a right to intervene as a CLAIMANT to the extent of such challenge. Supporting Organization rights in this respect shall be exercisable through the chair of the Supporting Organization.

In addition, any person, group or entity shall have a right to intervene as a CLAIMANT where (1) that person, group or entity claims a significant interest relating to the subject(s) of the INDEPENDENT REVIEW PROCESS and adjudicating the INDEPENDENT REVIEW PROCESS in that person, group or entity's absence might impair or impede that person, group or entity's ability to protect such interest, and/or (2) where any question of law or fact that is common to all who are similarly situated as that person, group or entity is likely to arise in the INDEPENDENT REVIEW PROCESS.

Any person, group or entity who intervenes as a CLAIMANT pursuant to this section will become a CLAIMANT in the existing INDEPENDENT REVIEW PROCESS and have all of the rights and responsibilities of other CLAIMANTS in that matter and be bound by the outcome to the same extent as any other CLAIMANT. All motions to intervene or for consolidation shall be directed to the IRP PANEL within 15 days of the initiation of the INDEPENDENT REVIEW PROCESS. All requests to intervene or for consolidation must contain the same information as a written statement of a DISPUTE and must be accompanied by the appropriate filing fee. The IRP PANEL may accept for review by the PROCEDURES OFFICER any motion to intervene or for consolidation after 15 days in cases where it deems that the PURPOSES OF THE IRP are furthered by accepting such a motion.

Excluding materials exempted from production under Rule 8 (Exchange of Information) below, the IRP PANEL shall direct that all materials related to the DISPUTE be made available to entities that have intervened or had their claim consolidated unless a CLAIMANT or ICANN objects that such disclosure will harm commercial confidentiality, personal data, or trade secrets; in which case the IRP PANEL shall rule on objection and provide such information as is consistent with the PURPOSES OF THE IRP and the appropriate preservation of confidentiality as recognized in Article 4 of the Bylaws.

Participation as an *Amicus Curiae*

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)) shall be deemed to have a material interest relevant to the DISPUTE and may participate as an *amicus* before the IRP PANEL.

All requests to participate as an *amicus* must contain the same information as the Written Statement (set out at Section 6), specify the interest of the *amicus curiae*, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*. Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion. The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an *amicus curiae*.

Rule (8): Exchange of Information

The IRP PANEL shall be guided by considerations of accessibility, fairness, and efficiency (both as to time and cost) in its consideration of requests for exchange of information.

On the motion of either Party and upon finding by the IRP PANEL that such exchange of information is necessary to further the PURPOSES OF THE IRP, the IRP PANEL may order a Party to produce to the other Party, and to the IRP PANEL if the moving Party requests, documents or electronically stored information in the other Party's possession, custody, or control that the Panel determines are reasonably likely to be relevant and material to the resolution of the CLAIMS and/or defenses in the DISPUTE and are not subject to the attorney-client privilege, the work product doctrine or otherwise protected from disclosure by applicable law (including, without limitation, disclosures to competitors of the disclosing person, group or entity, of any competition-sensitive information of any kind). Where such method(s) for exchange of information are allowed, all Parties shall be granted the equivalent rights for exchange of information.

A motion for exchange of documents shall contain a description of the specific documents, classes of documents or other information sought that relate to the subject matter of the Dispute along with an explanation of why such documents or other information are likely to be relevant and material to resolution of the Dispute.

Depositions, interrogatories, and requests for admission will not be permitted.

In the event that a Party submits what the IRP PANEL deems to be an expert opinion, such opinion must be provided in writing and the other Party must have a right of reply to such an opinion with an expert opinion of its own.

EXHIBIT 260

ARIF HYDER ALI

Contact Information Redacted

December 21, 2018

VIA E-MAIL

ICANN Board
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Request for Documents under ICANN’s Documentary Information Disclosure Policy

Dear ICANN:

We write on behalf of our client, Afilias Domains No. 3 Limited (“**Afilias**”), regarding the Interim Supplementary Procedures for ICANN’s Independent Review Process (the “**Interim Procedures**”). As stated in our past correspondence, Afilias has serious concerns—which we believe will also be shared by the Internet Community—about the self-serving manner in which VeriSign, Inc. (“**VeriSign**”) participated in the drafting of the Interim Procedures and, specifically the last-minute changes that made with respect to Section 7 of those procedures.¹ We write to request documents from ICANN related to the discussions, negotiations, and drafting of the Interim Procedures under ICANN’s Documentary Information Disclosure Policy (“**DIDP**”) that would shed light on the matter and kindly request that ICANN address this request on an expedited basis. The requested documents are pertinent to ongoing accountability proceedings relating to the .WEB gTLD initiated by Afilias, and in which VeriSign and NU DOT CO LLC are seeking to participate, *inter alia*, on the basis of the provisions of the Interim Procedures inserted by VeriSign shortly after Afilias informed ICANN of its intention to commence an IRP.

ICANN is obligated by its Bylaws to maintain “open and transparent processes.”² The Bylaws require that ICANN (1) “[e]mploy open, transparent and bottom-up,

¹ Exhibit 1, Letter from A. Ali to ICANN Board (21 Dec. 2018).

² ICANN Bylaws (18 June 2018), Art. 1, Sec. 1.2(a), *available at* <https://www.icann.org/resources/pages/governance/bylaws-en/>.

multistakeholder policy development processes”³ and (2) to “operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.”⁴ The DIDP was created pursuant to these transparency obligations. The process is “intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”⁵

Therefore, pursuant to the DIDP, Afilias requests that ICANN provide the following documents:

1. All communications between ICANN and VeriSign, including between and among legal counsels to ICANN and VeriSign,⁶ regarding or that reference Afilias’ complaints about the .WEB contention set;
2. All communications between ICANN and VeriSign, including between and among legal counsels to ICANN and VeriSign, regarding or that reference the Cooperative Engagement Process (“CEP”) between ICANN and Afilias regarding the .WEB generic top-level domain (“gTLD”);
3. All communications between ICANN and VeriSign, including between and among legal counsels to ICANN and VeriSign, regarding or that reference the *Afilias Domains No. 3 Limited v. ICANN* Independent Review Process (“IRP”);

³ *Id.* at Art. 1, Sec. 1.2(a)(iv).

⁴ *Id.* at Art. 3, Sec. 3.1.

⁵ ICANN DIDP, available at <https://icann.org/resources/pages/didp-2012-02-25-en>. In responding to a request submitted pursuant to the DIDP, ICANN adheres to its *Process for Responding to ICANN’s Documentary Information Disclosure Policy (DIDP) Requests*.

⁶ During the 30 November 2018 hearing before the Emergency Panelist in the *Afilias Domains No. 3 Limited v. ICANN* Independent Review Process, counsel to ICANN, Mr. LeVee, stated that ICANN and VeriSign are not parties to a joint defense or common interest agreement concerning its dispute with Afilias.

4. All communications between ICANN representatives on the Independent Review Process-Implementation Oversight Team (“**IRP-IOT**”), including Samantha Eisner, and any other employee of ICANN regarding any the drafting, text, effect, or interpretation of the final or any prior draft of what is now Section 7 of the Interim Procedures;
5. All communications between Samantha Eisner and David McAuley concerning the development, drafting, text, effect, or interpretation of the Interim Procedures, and/or, the mandate and/or work of the IRP-IOT, including all communications concerning or that reference the modifications to Section 7 that were circulated to the IRP-IOT on 19 October 2018;
6. All communications circulated among members of the IRP-IOT between 19 October 2018 and 21 October 2018 on any subject related to or that references the Interim Procedures;⁷
7. Documents sufficient to show the sum and substance of representations that were made to the ICANN Board concerning the drafting of the Interim Procedures and, in particular, the development of the text of Section 7;
8. Documents sufficient to show the sum and substance of representations that were made to the ICANN Board concerning the changes made to Section 7 of the Interim Procedures as compared with the version of Section 7 that had been posted for public comment on 28 November 2016; and
9. Documents sufficient to show the sum and substance of representations that were made to the ICANN Board concerning the need to seek a

⁷ Afilias is aware of the materials that ICANN has posted to its website concerning the work produced by the IRP-IOT, including the transcripts of its calls and the emails that have been collected and posted there. For the avoidance of doubt, this DIDP Request seeks materials other than the materials posted to ICANN’s website.

further public consultation regarding Section 7 of the Interim Procedures.

There are no compelling reasons as to why the requested documents should not be made available to Afiliias and all interested parties. The insertions engineered by VeriSign potentially give VeriSign the ability to participate in many IRPs, even where no interests of VeriSign are directly, or even indirectly, implicated. The legitimacy of the Interim Procedures and of ICANN's accountability mechanisms depend on the extent users of the Interim Procedures were properly informed about their development and ultimately on the information the Board relied on when approving them. We trust therefore that ICANN will agree with us that disclosure of the requested documents is required in the interests of transparency and to maintain the legitimacy of ICANN's procedures.

We reserve the right to request additional documents based on the provision of the above documents.

Sincerely,



Arif Hyder Ali

Exhibit 1

December 21, 2018

ARIF HYDER ALI

Contact Information Redacted

VIA E-MAIL

ICANN Board of Directors
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094

Re: Adoption of the Interim Supplementary Procedures

Dear Members of the ICANN Board:

We write on behalf of Afilias Domains No. 3 Limited (“**Afilias**”) regarding what would appear to be a serious irregularity in the development of the Interim Supplementary Procedures for ICANN’s Independent Review Process (“**Interim Procedures**”), adopted by the Board on 25 October 2018 (the “**Board-Approved Procedures**”). From our review of the drafting history of the Board-Approved Procedures, it appears that VeriSign, Inc. (“**VeriSign**”) likely caused specific language to be included in the final draft of the procedures presented to the Board to support an argument that VeriSign and NDC should be allowed to participate in Afilias’ IRP with ICANN over the .WEB gTLD. In fact, barely six weeks after the Interim Procedures were approved, VeriSign and NDC specifically invoked this very language in an effort to insert themselves into the ICANN-Afilias dispute. We ask that the Board immediately investigate this matter and take whatever action is necessary to address any irregularities, including suspension of the Interim Procedures.

The Board approved the Board-Approved Procedures on the understanding that (i) this version was “as close as possible to” a version of the Interim Procedures made available for public comment on 28 November 2016 (the “**Public Comment Draft**”); and (ii) that the IRP Implementation Oversight Team (“**IRP-IOT**”), the group tasked with developing the new procedures, had “take[n] no action that would ... represent a significant change from what was posted for comment and would therefore require further public consultation prior to changing the supplemental rules to reflect those expansions or changes.”¹ The IRP-IOT was presided over by David McAuley, VeriSign’s Senior International Policy and Business Development Manager.

A review of the Interim Procedures’ drafting history, however, reveals that Section 7 of the Board-Approved Procedures—which addresses third parties’ rights of participation in an IRP—is materially different from the version of that section contained in the Public Comment Draft. A redline comparison of the two versions is attached hereto.² The drafting history shows that Section 7’s language was amended at Mr. McAuley’s insistence at the 11th hour, when full discussion within the IRP-IOT (let alone a further public consultation) would not have been possible, and that this was likely intentionally done for the specific purpose of enabling VeriSign to argue that VeriSign

¹ Adopted Board Resolutions | Regular Meeting of the ICANN Board (25 Oct. 2018), 2(e), *available at* <https://www.icann.org/resources/board-material/resolutions-2018-10-25-en>. The IRP-IOT also applied a third principle, which is not relevant to Afilias’ concerns about the Interim Procedures.

² *See* Annex A hereto.

and NDC have standing to intervene in the then-imminent IRP between ICANN and Afilias regarding the .WEB gTLD.³

Responses to the Public Comment Draft

As demonstrated by the attached redline, the Public Comment Draft did not contain any provisions for participation in an IRP by a so-called *amicus curiae* or “friend of the court,” which is precisely the status in which VeriSign and NDC are now seeking to participate the Afilias-ICANN IRP. The Public Comment Draft featured a new Section 7 (“Consolidation, Intervention, and Joinder”), which provided that multiple pending IRPs may be consolidated if based on “a sufficient common nucleus of common facts” and that any person or entity may intervene in an IRP, but only if they satisfied the standing criteria to be a claimant in that IRP, as set forth in ICANN’s Bylaws.⁴ In an accompanying report, the IRP-IOT noted that this new Section had been drafted to address recommendations by the ICANN working group that created the IRP-IOT.⁵

Several public comments addressed this new Section 7. Based on these public comments, the IRP-IOT resolved to amend Section 7 to provide limited intervention for parties that had participated in an underlying procedure before an ICANN expert panel pursuant to Section 4.3(b)(iii)(A)(3) of the Bylaws.⁶ This linkage between a third party’s participation in an IRP and the existence of an underlying expert panel remained part of the internal discussions of the IRP-IOT for many months, and can be seen in drafts of the Interim Procedures as late as May 2018. The concept of *amicus curiae* standing was developed to allow those parties who had participated in such an underlying proceeding, but who lacked claimant standing under the Bylaws, the opportunity to participate in an IRP, thus avoiding any collateral broadening of IRPs.

³ See *Afilias Domains No. 3 Limited v. ICANN*, ICDR Case No. 01-18-0004-2702, Request for Independent Review (14 Nov. 2018), available at <https://www.icann.org/en/system/files/files/irp-afili-as-request-redacted-26nov18-en.pdf>.

⁴ Updated Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (31 Oct. 2016), p. 8, available at <https://www.icann.org/en/system/files/files/draft-irp-supp-procedures-31oct16-en.pdf>.

⁵ Draft Updated Supplementary Procedures: Report of the IRP IOT (31 Oct. 2016), p. 4, available at <https://www.icann.org/en/system/files/files/draft-irp-supp-procedures-iot-report-31oct16-en.pdf>. ICANN’s Cross Community Working Group on Enhancing ICANN Accountability (“**CCWG-Accountability**”) created the IRP-IOT in March 2016 to draft detailed rules of procedure for IRP enhancements described in the CCWG-Accountability Supplemental Final Proposal Work Stream 1 Recommendations. Those Recommendations only discussed providing a right of intervention to those entities that also satisfied the tests for claimant standing set forth in the Bylaws. No recommendations were made to provide participation rights in an ICANN Accountability Mechanism to *amicus curiae*, let alone any entity that could be significantly affected by a panel’s decision.

⁶ Section 4.3(b)(iii)(A)(3) of the ICANN Bylaws defines a category of Disputes that “resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws.”

VeriSign Undermines ICANN’s Rulemaking Processes for Its Own Benefit

On 18 June 2018, Afilias submitted its Notice Invoking the Cooperative Engagement Process to ICANN. ICANN publicly posted the Notice on 20 June 2018.⁷ On 30 August 2018, counsel to VeriSign (copying counsel to NU DOTCO LLC) wrote to the undersigned, *inter alia*, stating that “[we] are advised that Afilias has engaged a Cooperative Engagement Process” and threatening damages claims against Afilias in the “tens of millions of dollars.”

In September 2018, McAuley drafted a new set of Interim Procedures, which he circulated to the IRP-IOT on 5 October 2018 (the “**5 October 2018 Draft**”). In relevant part, this new draft of Section 7 now contained a new subsection for “Participation as an *amicus curiae*”:

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)) shall be deemed to have a material interest relevant to the DISPUTE and may participate as an *amicus* before the IRP PANEL.

All requests to participate as an *amicus* must contain the same information as the Written Statement (set out at Section 6), specify the interest of the *amicus curiae*, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*. Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion. The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an *amicus curiae*.⁸

⁷ CEP and IRP Status Update – 20 June 2018 (20 June 2018), p. 1, *available at* <https://www.icann.org/en/system/files/files/irp-cep-status-20jun18-en.pdf>.

⁸ UPDATED Draft Interim ICDR Supplementary Procedures (25 Sep. 2018), p. 10, *available at* <http://mm.icann.org/pipermail/iot/attachments/20181005/f5a478db/25Sept2018UPDATEDraftInterimSupplementaryProceduresforICANN-0001.doc>.

The 5 October 2018 Draft made two critical changes to the possibility of third-party participation in an IRP reflected in the Public Comment Draft and indeed in any draft prior to Afiliias' invocation of CEP. First, *amicus curiae* standing was greatly expanded to include any entity with a "material interest" in the IRP. Second, entities that had participated in an underlying procedure before an expert panel—heretofore, the *sine qua non* for standing as third-party participant—were deemed to have a "material interest" and were thus granted a mandatory right to participate in the IRP.

At a subsequent meeting of the IRP-IOT on 9 October 2018, McAuley informed the group that he wanted to further revise Section 7, not as the IRP-IOT leader, but "as a participant here":

I do have concern about this and what I believe is that on joinder intervention, whatever we are going [to] call it[,] it's essential that a person or entity have a right to join an IRP if they feel that a significant—if they claim that a significant interest they have relates to the subject of an IRP. And that adjudicating the IRP in their absence would impair or impede their ability to protect that.⁹

On 10 October 2018, Afiliias provided a confidential draft of its IRP Request to ICANN's legal department in the context of its ongoing Cooperative Engagement Process with ICANN over the rights to the .WEB gTLD.

On 11 October McAuley proposed a further revision to Section 7 that significantly expanded the right of a third party to involve itself in an IRP:

In addition, any person, group or entity shall have a right to intervene as a CLAIMANT where (1) that person, group, or entity claims a significant interest relating to the subject(s) of the INDEPENDENT REVIEW PROCESS and adjudicating the INDEPENDENT REVIEW PROCESS in that person, group, or entity's absence might impair or impede that person, group, or entity's ability to protect such interest, and/or (2) where any question of law or fact that is common to all who are similarly situated as that person, group or entity is likely to arise in the INDEPENDENT REVIEW PROCESS.¹⁰

Later on 11 October 2018, the IRP-IOT met again and discussed Section 7 specifically, including McAuley's new language. A member of ICANN's legal department, noted that McAuley's

⁹ IRP-IOT Meeting Transcript (9 Oct. 2018), p. 15, available at https://community.icann.org/download/attachments/90770283/Transcript_FINAL_IORP-IOT_9Oct2018.pdf?version=1&modificationDate=1539188244000&api=v2.

¹⁰ Email from D. McAuley to Members of the IRP-IOT (11 Oct. 2018), pp. 1-3, available at <https://community.icann.org/download/attachments/95094963/DMc.IRPrules.Joinder%20etc%5B1%5D.pdf?version=1&modificationDate=1539288995000&api=v2>.

proposed language greatly expanded the scope of claimant beyond the narrow definition provided in ICANN's Bylaws and offered to work with McAuley to draft alternative language.

McAuley emailed revised *amicus* rules to members of the IRP-IOT late in the day on Friday 19 October 2018.¹¹ Specifically, he proposed two additional categories of mandatory *amicus curiae*: (1) members of a contention set, and (2) entities that are significantly referred to in IRP filings. The first mandatory category was designed to cover NDC—a member of the .WEB contention set; the second mandatory category was drafted to cover VeriSign—referred to multiple times in Afilias' draft IRP Request, now in the possession of ICANN's legal department.

McAuley then ensured that the IRP-IOT would not have a meaningful opportunity to consider or debate this new language:

As mentioned by Sam, we have an opportunity to have the board accept and approve 'interim rules of procedure' at ICANN 63 but we must move quickly to do so. . . .

I would like to note one particular area—that of Joinder, etc. (Rule 7). As you may recall that I, wearing my *participant* (not leader) hat, had suggested certain text and with Malcom's help we seemed to have achieved compromise.

As Sam attempted to draft the compromise in this respect she encountered difficulty in capturing appropriate language that she felt would be consistent with bylaws. Sam reached out to me in my participant capacity and we discussed over the ensuing days and so the language you will see there is not exactly as discussed on the calls. The language is acceptable to me in my participant capacity. I felt these discussions were appropriate inasmuch as I had raised the issue as participant and knew I would forward the resulting language to the list—a way to try to take advantage of board action at next week's meeting.

Could you please review these rules and if you have any concern please post to the list by 23:59 UTC on October 21.¹²

The events of 19 October were extraordinary. Despite the IRP-IOT's commitment to propose rules to the Board that remained as close as possible to the Public Comment Draft, the leader of the IRP-IOT ("wearing [his] participant (not leader) hat") was now proposing late in the day on a Friday that:

¹¹ Email from B. Turcotte to Members of the IRP-IOT (19 Oct. 2018), available at <https://mm.icann.org/pipermail/iot/2018-October/000451.html>.

¹² *Id.*

- The IRP-IOT consider and adopt a substantial expansion of intervention rights that were not reflected in the Public Comment Draft and which were not reflected in the recommendations of the ICANN working group that the IRP-IOT was tasked to draft into rules of procedure;
- That the IRP-IOP consider and adopt a substantial expansion of intervention rights proposed by its leader, acting in his capacity not as the head of the committee but as a VeriSign participant;
- That the IRP-IOT consider and adopt this substantial expansion of intervention rights without any group discussion and without any disclosure that the amendments were likely drafted to benefit the drafter's employer—VeriSign—in a specific IRP; and
- That despite having worked on the Interim Procedures for over two and a half years, members of the IRP-IOT now needed to review and comment on “language [that was] . . . not exactly as discussed on the calls” and that was **first provided to the IRP-IOT late in the day on Friday by midnight on Sunday**.

Unsurprisingly, given the time of disclosure and the weekend deadline, no comments were received. McAuley thus presented a draft of the Interim Procedures to the Board, containing his 11th hour edits to Section 7 still in redline, the next day.

In its Resolutions adopting the Interim Procedures, the Board noted:

The IOT began consideration of a set of Interim Supplementary Procedures in May 2018. The version considered by the Board today was the subject of intensive focus by the IOT in two meetings on 9 and 11 October 2018, convened with the intention of delivering a set to the Board for our consideration at ICANN63. There were modifications to four sections identified through those meetings, and a set reflecting those changes was proposed to the IOT on 19 October 2018. With no further comment, on 22 October 2018 the IOT process on the Interim Supplementary Procedures concluded and it was sent to the Board for consideration.¹³

The Resolutions do not reveal whether the Board was aware of the substantial departure these “modifications” represented from the Public Comment Version of Section 7, nor do the Resolutions explain why modifications to Section 4 did require a second public consultation, while the substantial changes to Section 7 did not. The Resolutions do not explain whether the Board was aware that the VeriSign “modifications” to Section 7 were not made in response to the public comments, but rather at the 11th hour, by the IRP-IOT leader, acting in his “participant” capacity as an employee of VeriSign.

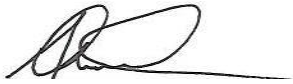
¹³ Adopted Board Resolutions | Regular Meeting of the ICANN Board (25 Oct. 2018), 2(e), *available at* <https://www.icann.org/resources/board-material/resolutions-2018-10-25-en>.

It is also not clear whether the Board was aware that the two “modifications” proposed by VeriSign were likely drafted in anticipation of VeriSign’s and NDC’s imminent applications to intervene in the .WEB IRP. Indeed, what other explanation could there be for providing *amici* standing for members of a “contention set” where an IRP relates to an application in the New gTLD Program? In the two and half years the IRP-IOT had been considering and debating joinder issues, the concept of providing specific standing for contention set members had never been mentioned prior to 19 October 2018. The VeriSign language appears to have been precisely drafted to provide textual support for VeriSign’s and NDC’s eventual plans to seek intervention in Afilias’ IRP.

Rather than propose specific language that would enable his employer to intervene in an imminent IRP, McAuley should have recused himself from all discussions concerning the joinder provisions given his serious conflict of interest between his duty to ICANN and his obligations to his employer VeriSign. Moreover, given the substantial departure from the Public Comment Draft, the proposed Section 7 should have been the subject of a further public consultation before being adopted by the Board.

Afilias’ review of the process by which the Interim Procedures were developed is ongoing and Afilias reserves the right to supplement this submission. But based on what it has discovered to date, Afilias respectfully submits that the Board must, consistent with its commitment to a “bottom-up, multistakeholder policy development process,” suspend the validity of the Interim Procedures subject to a complete and thorough investigation of the process by which they were developed. At a minimum, the Board should declare the entirety of Section 7 ineffective pending a second public comment period.

Sincerely,



Arif Hyder Ali

Annex A

7. Consolidation, Intervention, and ~~Joinder~~²⁴. Participation as an Amicus

~~At the request of a party, a~~ A PROCEDURES OFFICER ~~may~~shall be appointed from the STANDING PANEL to consider any request for consolidation, intervention, and/or participation as an amicus. Except as otherwise expressly stated herein, requests for consolidation, intervention, and ~~joinder. Requests for consolidation, intervention, and joinder~~/or participation as an amicus are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for ~~interim relief~~consolidation.

In the event that requests for consolidation or intervention are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion consistent with the PURPOSES OF THE IRP.

Consolidation

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact among multiple IRPs such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. If DISPUTES are consolidated, each existing DISPUTE shall no longer be subject to further separate consideration. The PROCEDURES OFFICER may in its discretion order briefing to consider the propriety of consolidation of DISPUTES.

Intervention

Any person or entity qualified to be a CLAIMANT pursuant to the standing requirement set forth in the Bylaws may intervene in an IRP with the permission of the PROCEDURES OFFICER. ~~CLAIMANT'S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE, but such claims may be asserted as independent or alternative claims.~~²⁵, as provided below. This applies whether or not the person, group or entity participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)).

²⁴ There is no existing Supplemental Rule. The CCWG Final Proposal and May 2016 ICANN Bylaws recommend that these issue be considered by IOT. See May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(B); CCWG Accountability Supplemental Final Proposal on Work Stream 1 Recommendations, 23 February 2016, Annex 07—Recommendation #7, at § 20.

²⁵ See May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(B).

~~In the event that requests for consolidation, intervention, and joinder are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion.~~

Intervention is appropriate to be sought when the prospective participant does not already have a pending related DISPUTE, and the potential claims of the prospective participant stem from a common nucleus of operative facts based on such briefing as the PROCEDURES OFFICER may order in its discretion.

In addition, the Supporting Organization(s) which developed a Consensus Policy involved when a DISPUTE challenges a material provision(s) of an existing Consensus Policy in whole or in part shall have a right to intervene as a CLAIMANT to the extent of such challenge. Supporting Organization rights in this respect shall be exercisable through the chair of the Supporting Organization.

Any person, group or entity who intervenes as a CLAIMANT pursuant to this section will become a CLAIMANT in the existing INDEPENDENT REVIEW PROCESS and have all of the rights and responsibilities of other CLAIMANTS in that matter and be bound by the outcome to the same extent as any other CLAIMANT. All motions to intervene or for consolidation shall be directed to the IRP PANEL within 15 days of the initiation of the INDEPENDENT REVIEW PROCESS. All requests to intervene or for consolidation must contain the same information as a ~~written statement of a DISPUTE~~ and must be accompanied by the appropriate filing fee. The IRP PANEL may accept for review by the PROCEDURES OFFICER any motion to intervene or for consolidation after 15 days in cases where it deems that the PURPOSES OF THE IRP are furthered by accepting such a motion.

Excluding materials exempted from production under Rule 8 (Exchange of Information) below, the IRP PANEL shall direct that all materials related to the DISPUTE be made available to entities that have intervened or had their claim consolidated unless a CLAIMANT or ICANN objects that such disclosure will harm commercial confidentiality, personal data, or trade secrets; in which case the IRP PANEL shall rule on objection and provide such information as is consistent with the PURPOSES OF THE IRP and the appropriate preservation of confidentiality as recognized in Article 4 of the Bylaws.

Participation as an Amicus Curiae

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an amicus curiae before an IRP PANEL, subject to the limitations set forth below. Without limitation to the persons, groups, or entities that may have such a material interest, the following persons, groups, or entities shall be deemed to have a material interest relevant to the DISPUTE and, upon request of person, group, or entity seeking to so participate, shall be permitted to participate as an amicus before the IRP PANEL:

- i. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3));
- ii. If the IRP relates to an application arising out of ICANN's New gTLD Program, a person, group or entity that was part of a contention set for the string at issue in the IRP; and
- iii. If the briefings before the IRP PANEL significantly refer to actions taken by a person, group or entity that is external to the DISPUTE, such external person, group or entity.

All requests to participate as an amicus must contain the same information as the Written Statement (set out at Section 6), specify the interest of the amicus curiae, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion, subject to the conditions set forth above, that the proposed amicus curiae has a material interest relevant to the DISPUTE, he or she shall allow participation by the amicus curiae. Any person participating as an amicus curiae may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion. The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an amicus curiae.

⁴ During the pendency of these Interim Supplementary Rules, in exercising its discretion in allowing the participation of amicus curiae and in then considering the scope of participation from amicus curiae, the IRP PANEL shall lean in favor of allowing broad participation of an amicus curiae as needed to further the purposes of the IRP set forth at Section 4.3 of the ICANN Bylaws.

Summary report:
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Changes:

Add

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EXHIBIT 261

Dashboard / Independent Review Process - Implementation Oversight Team (IRP-IOT) Home

Off-list Correspondences

Created by Brenda Brewer last modified on Jan 19 2019

Date	PDF
19 October 2018	Email from D McAuley to S Eisner re: Note to OT
18 October 2018	Email from S Eisner to D McAuley re: Note to OT
18 October 2018	Email from D McAuley to S Eisner re: Note to OT
18 October 2018	Email from S Eisner to D McAuley re: Note to OT
17 October 2018	Email from D McAuley to S Eisner re: Note to OT
16 October 2018	Email from S Eisner to D McAuley re Added Language to the Amicus Section

EXHIBIT 262

[IOT] IOT - Interim Supplementary Rules

Bernard Turcotte Contact Information Redacted

Fri Oct 19 14:53:45 UTC 2018

- Previous message: [\[IOT\] IOT - Meeting - 201081011 - DAIRs and raw captioning](#)
- Next message: [\[IOT\] IOT - Interim Supplementary Rules](#)
- **Messages sorted by:** [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)

Dear members of the IRP IOT:

First, a word of thanks to those who participated in two productive calls during the week of October 8th.

As mentioned by Sam, we have an opportunity to have the board accept and approve 'interim rules of procedure' at ICANN 63 but we must move quickly to do so. In my opinion, establishing interim rules is timely (considering all the work we have done since October 2016) and appropriate.

Attached is the draft of the interim rules meant to capture what we discussed on the phone in the recent calls. Please take a good look.

I would like to note one particular area - that of Joinder etc. (Rule 7). You may recall that I, wearing my *participant *(not leader) hat, had suggested certain text and with Malcom's help we seemed to have achieved compromise.

As Sam attempted to draft the compromise in this respect she encountered difficulty in capturing appropriate language that she felt would be consistent with bylaws. Sam reached out to me in my participant capacity and we discussed over the ensuing days and so the language you will see there is not exactly as discussed on the calls. The language is acceptable to me in my participant capacity. I felt these discussions were appropriate inasmuch as I had raised the issue as participant and knew I would forward the resulting language to the list - a way to try to take advantage of board action at next week's meeting.

Could you please review these rules and if you have any concern please post to the list by 23:59 UTC on October 21. If we are agreed I will forward for board action.

And then, of course, we will turn to the very few remaining items for final rules - they should be able to follow in pretty quick order.

Best regards to all,

David (sent by Bernard)

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URL: <<http://mm.icann.org/pipermail/iot/attachments/20181019/e2470a4a/attachment-0001.html>>

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Name: 10-19- DRAFT Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers.doc

Type: application/msword

Size: 99328 bytes

Desc: not available

URL: <<http://mm.icann.org/pipermail/iot/attachments/20181019/e2470a4a/10-19-DRAFTInterimSupplementaryProceduresforInternetCorporationforAssignedNamesandNumbers-0001.doc>>

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- Previous message: [\[IOT\] IOT - Meeting - 201081011 - DAIRs and raw captioning](#)
 - Next message: [\[IOT\] IOT - Interim Supplementary Rules](#)
 - Messages sorted by: [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)

[More information about the IOT mailing list](#)

EXHIBIT 263

Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP)¹

Revised as of [Day, Month], 2018

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These interim procedures (Interim Supplementary Procedures) supplement the International Centre for Dispute Resolution’s international arbitration rules in accordance with the independent review process set forth in Article 4, Section 4.3 of ICANN’s Bylaws. These procedures apply to all independent review process proceedings filed after 1 May 2018.

In drafting these Interim Supplementary Procedures, the IRP Implementation Oversight Team (IOT) applied the following principles: (1) remain as close as possible to the current Supplementary Procedures or the Updated Supplementary Procedures (USP) posted for public comment on 28 November 2016²; (2) to the extent public comments received in response to the

¹ CONTEXTUAL NOTE: These Interim Supplementary Procedures are intended to supplement the ICDR RULES. Therefore, when the ICDR RULES appropriately address an item, there is no need to re-state that Rule within the Supplemental Procedures. The IOT, through its work, may identify additional places where variance from the ICDR RULES is recommended, and that would result in addition or modification to the Supplemental Procedures.

² See <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>.

USP reflected clear movement away from either the current Supplementary Procedures or the USP, to reflect that movement unless doing so would require significant drafting that should be properly deferred for broader consideration; (3) take no action that would materially expand any part of the Supplementary Procedures that the IOT has not clearly agreed upon, or that represent a significant change from what was posted for comment and would therefore require further public consultation prior to changing the supplemental rules to reflect those expansions or changes.

1. Definitions

In these Interim Supplementary Procedures:

A CLAIMANT is any legal or natural person, group, or entity including, but not limited to the Empowered Community, a Supporting Organization, or an Advisory Committee, that has been materially affected by a Dispute. To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.

COVERED ACTIONS are any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a DISPUTE.

DISPUTES are defined as:

(A) Claims that COVERED ACTIONS violated ICANN’s Articles of Incorporation or Bylaws, including, but not limited to, any action or inaction that:

- 1) exceeded the scope of the Mission;
- 2) resulted from action taken in response to advice or input from any Advisory Committee or Supporting Organization that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
- 3) resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
- 4) resulted from a response to a DIDP (as defined in Section 22.7(d)) request that is claimed to be inconsistent with the Articles of Incorporation or Bylaws; or
- 5) arose from claims involving rights of the EC as set forth in the Articles of Incorporation or Bylaws;

(B) Claims that ICANN, the Board, individual Directors, Officers or Staff members have not enforced ICANN’s contractual rights with respect to the IANA Naming Function Contract; and

(C) Claims regarding the Post-Transition IANA entity service complaints by direct customers of the IANA naming functions that are not resolved through mediation.

EMERGENCY PANELIST refers to a single member of the STANDING PANEL designated to adjudicate requests for interim relief or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for emergency relief (ICDR RULES Article 6).

IANA refers to the Internet Assigned Numbers Authority.

ICDR refers to the International Centre for Dispute Resolution, which has been designated and approved by ICANN’s Board of Directors as the IRP Provider (IRPP) under Article 4, Section 4.3 of ICANN’s Bylaws.

ICANN refers to the Internet Corporation for Assigned Names and Numbers.

INDEPENDENT REVIEW PROCESS or IRP refers to the procedure that takes place upon the Claimant’s filing of a written statement of a DISPUTE with the ICDR.

IRP PANEL refers to the panel of three neutral members appointed to decide the relevant DISPUTE.

IRP PANEL DECISION refers to the final written decision of the IRP PANEL that reflects the reasoned analysis of how the DISPUTE was resolved in compliance with ICANN’s Articles and Bylaws.

ICDR RULES refers to the ICDR’s International Arbitration rules in effect at the time the relevant request for independent review is submitted.

PROCEDURES OFFICER refers to a single member of the STANDING PANEL designated to adjudicate requests for consolidation, intervention, and/or participation as an *amicus*, or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to its International Arbitration Rules relating to appointment of panelists for consolidation (ICDR Rules Article 8)

PURPOSES OF THE IRP are to hear and resolve Disputes for the reasons specified in the ICANN Bylaws, Article 4, Section 4.3(a).

STANDING PANEL refers to an omnibus standing panel of at least seven members from which three-member IRP PANELS are selected to hear and resolve DISPUTES consistent with the purposes of the IRP.

2. Scope

The ICDR will apply these Interim Supplementary Procedures, in addition to the ICDR RULES, in all cases submitted to the ICDR in connection with Article 4, Section 4.3 of the ICANN Bylaws after the date these Interim Supplementary Procedures go into effect. In the event there is any inconsistency between these Interim Supplementary Procedures and the ICDR RULES, these Interim Supplementary Procedures will govern. These Interim Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is commenced. IRPs commenced prior to the adoption of these Interim Supplementary Procedures shall be governed by the Supplementary Procedures in effect at the time such IRPs were commenced.

In the event that any of these Interim Supplementary Procedures are subsequently amended, the rules surrounding the application of those amendments will be defined therein.

3. Composition of Independent Review Panel

The IRP PANEL will comprise three panelists selected from the STANDING PANEL, unless a STANDING PANEL is not in place when the IRP is initiated. The CLAIMANT and ICANN shall each select one panelist from the STANDING PANEL, and the two panelists selected by the parties will select the third panelist from the STANDING PANEL. A STANDING PANEL member's appointment will not take effect unless and until the STANDING PANEL member signs a Notice of STANDING PANEL Appointment affirming that the member is available to serve and is Independent and Impartial pursuant to the ICDR RULES. In addition to disclosing relationships with parties to the DISPUTE, IRP PANEL members must also disclose the existence of any material relationships with ICANN, and/or an ICANN Supporting Organization or Advisory Committee. In the event that a STANDING PANEL is not in place when the relevant IRP is initiated or is in place but does not have capacity due to other IRP commitments, the CLAIMANT and ICANN shall each select a qualified panelist from outside the STANDING PANEL, and the two panelists selected by the parties shall select the third panelist. In the event that the two party-selected panelists cannot agree on the third panelist, the ICDR RULES shall apply to selection of the third panelist. In the event that a panelist resigns, is incapable of performing the duties of a panelist, or is removed and the position becomes vacant, a substitute arbitrator shall be appointed pursuant to the provisions of this Section [3] of these Interim Supplementary Procedures.

4. Time for Filing³

An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.

In order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.

5. Conduct of the Independent Review

It is in the best interests of ICANN and of the ICANN community for IRP matters to be resolved expeditiously and at a reasonably low cost while ensuring fundamental fairness and due process consistent with the PURPOSES OF THE IRP. The IRP PANEL shall consider accessibility, fairness, and efficiency (both as to time and cost) in its conduct of the IRP.

In the event that an EMERGENCY PANELIST has been designated to adjudicate a request for interim relief pursuant to the Bylaws, Article 4, Section 4.3(p), the EMERGENCY PANELIST shall comply with the rules applicable to an IRP PANEL, with such modifications as appropriate.

5A. Nature of IRP Proceedings

The IRP PANEL should conduct its proceedings by electronic means to the extent feasible.

Hearings shall be permitted as set forth in these Interim Supplementary Procedures. Where necessary, the IRP PANEL may conduct hearings via telephone, video conference or similar technologies). The IRP PANEL should conduct its proceedings with the presumption that in-person hearings shall not be permitted. For purposes of these Interim Supplementary Procedures, an “in-person hearing” refers to any IRP proceeding held face-to-face, with participants physically present in the same location. The presumption against in-person hearings may be rebutted only under extraordinary circumstances, where, upon motion by a Party, the IRP PANEL determines that the party seeking an in-person hearing has demonstrated that: (1) an in-

³ The IOT recently sought additional public comment to consider the Time for Filing rule that will be recommended for inclusion in the final set of Supplementary Procedures. In the event that the final Time for Filing procedure allows additional time to file than this interim Supplementary Procedure allows, ICANN committed to the IOT that the final Supplementary Procedures will include transition language that provides potential claimants the benefit of that additional time, so as not to prejudice those potential claimants.

person hearing is necessary for a fair resolution of the claim; (2) an in-person hearing is necessary to further the PURPOSES OF THE IRP; *and* (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of an in-person hearing. In no circumstances shall in-person hearings be permitted for the purpose of introducing new arguments or evidence that could have been previously presented, but were not previously presented, to the IRP PANEL.

All hearings shall be limited to argument only unless the IRP Panel determines that a the party seeking to present witness testimony has demonstrated that such testimony is: (1) necessary for a fair resolution of the claim; (2) necessary to further the PURPOSES OF THE IRP; *and* (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of witness testimony and cross examination.

All evidence, including witness statements, must be submitted in writing 15 days in advance of any hearing.

With due regard to ICANN Bylaws, Article 4, Section 4.3(s), the IRP PANEL retains responsibility for determining the timetable for the IRP proceeding. Any violation of the IRP PANEL's timetable may result in the assessment of costs pursuant to Section 10 of these Interim Supplementary Procedures.

5B. Translation

As required by ICANN Bylaws, Article 4, Section 4.3(1), “All IRP proceedings shall be administered in English as the primary working language, with provision of translation services for CLAIMANTS if needed.” Translation may include both translation of written documents/transcripts as well as interpretation of oral proceedings.

The IRP PANEL shall have discretion to determine (i) whether the CLAIMANT has a need for translation services, (ii) what documents and/or hearing that need relates to, and (iii) what language the document, hearing or other matter or event shall be translated into. A CLAIMANT not determined to have a need for translation services must submit all materials in English (with the exception of the request for translation services if the request includes CLAIMANT's certification to the IRP PANEL that submitting the request in English would be unduly burdensome).

In determining whether a CLAIMANT needs translation, the IRP PANEL shall consider the CLAIMANT's proficiency in spoken and written English and, to the extent that the CLAIMANT is represented in the proceedings by an attorney or other agent, that representative's proficiency

in spoken and written English. The IRP PANEL shall only consider requests for translations from/to English and the other five official languages of the United Nations (i.e., Arabic, Chinese, French, Russian, or Spanish).

In determining whether translation of a document, hearing or other matter or event shall be ordered, the IRP PANEL shall consider the CLAIMANT's proficiency in English as well as in the requested other language (from among Arabic, Chinese, French, Russian or Spanish). The IRP PANEL shall confirm that all material portions of the record of the proceeding are available in English.

In considering requests for translation, the IRP PANEL shall consider the materiality of the particular document, hearing or other matter or event requested to be translated, as well as the cost and delay incurred by translation, pursuant to ICDR Article 18 on Translation, and the need to ensure fundamental fairness and due process under ICANN Bylaws, Article 4, Section 4.3(n)(iv).

Unless otherwise ordered by the IRP PANEL, costs of need-based translation (as determined by the IRP PANEL) shall be covered by ICANN as administrative costs and shall be coordinated through ICANN's language services providers. Even with a determination of need-based translation, if ICANN or the CLAIMANT coordinates the translation of any document through its legal representative, such translation shall be considered part of the legal costs and not an administrative cost to be born by ICANN. Additionally, in the event that either the CLAIMANT or ICANN retains a translator for the purpose of translating any document, hearing or other matter or event, and such retention is not pursuant to a determination of need-based translation by the IRP PANEL, the costs of such translation shall not be charged as administrative costs to be covered by ICANN.

6. Written Statements

A CLAIMANT'S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE, but such claims may be asserted as independent or alternative claims.

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font. All necessary and available evidence in support of the CLAIMANT'S claim(s) should be part of the initial written submission. Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence. The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.

In addition, the IRP PANEL may grant a request for additional written submissions from any person or entity who is intervening as a CLAIMANT or who is participating as an amicus upon the showing of a compelling basis for such request. In the event the IRP PANEL grants a request for additional written submissions, any such additional written submission shall not exceed 15 pages, double-spaced and in 12-point font.

For any DISPUTE resulting from a decision of a process-specific expert panel that is claimed to be inconsistent with ICANN's Articles of Incorporation or Bylaws, as specified at Bylaw Section 4.3(b)(iii)(A)(3), any person, group or entity that was previously identified as within a contention set with the CLAIMANT regarding the issue under consideration within such expert panel proceeding shall reasonably receive notice from ICANN that the INDEPENDENT REVIEW PROCESS has commenced. ICANN shall undertake reasonable efforts to provide notice by electronic message within two business days (calculated at ICANN's principal place of business) of receiving notification from the ICDR that the IRP has commenced.

7. Consolidation, Intervention and Participation as an *Amicus*

A PROCEDURES OFFICER shall be appointed from the STANDING PANEL to consider any request for consolidation, intervention, and/or participation as an *amicus*. Requests Except as otherwise expressly stated herein, requests for consolidation, intervention, and/or participation as an *amicus* are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for consolidation.

In the event that requests for consolidation or intervention, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion consistent with the PURPOSES OF THE IRP.

Consolidation

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact among multiple IRPs such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. If DISPUTES are consolidated, each existing DISPUTE shall no longer be subject to further separate consideration. The

PROCEDURES OFFICER may in its discretion order briefing to consider the propriety of consolidation of DISPUTES.

Intervention

Any person or entity qualified to be a CLAIMANT pursuant to the standing requirement set forth in the Bylaws may intervene in an IRP with the permission of the PROCEDURES OFFICER, as provided below. This applies whether or not the person, group or entity participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)).

Intervention is appropriate to be sought when the prospective participant does not already have a pending related DISPUTE, and the potential claims of the prospective participant stem from a common nucleus of operative facts based on such briefing as the PROCEDURES OFFICER may order in its discretion.

In addition, the Supporting Organization(s) which developed a Consensus Policy involved when a DISPUTE challenges a material provision(s) of an existing Consensus Policy in whole or in part shall have a right to intervene as a CLAIMANT to the extent of such challenge. Supporting Organization rights in this respect shall be exercisable through the chair of the Supporting Organization.

Any person, group or entity who intervenes as a CLAIMANT pursuant to this section will become a CLAIMANT in the existing INDEPENDENT REVIEW PROCESS and have all of the rights and responsibilities of other CLAIMANTS in that matter and be bound by the outcome to the same extent as any other CLAIMANT. All motions to intervene or for consolidation shall be directed to the IRP PANEL within 15 days of the initiation of the INDEPENDENT REVIEW PROCESS. All requests to intervene or for consolidation must contain the same information as a written statement of a DISPUTE and must be accompanied by the appropriate filing fee. The IRP PANEL may accept for review by the PROCEDURES OFFICER any motion to intervene or for consolidation after 15 days in cases where it deems that the PURPOSES OF THE IRP are furthered by accepting such a motion.

The~~Excluding~~ materials exempted from production under Rule 8 (Exchange of Information) below, the IRP PANEL shall direct that all materials related to the DISPUTE be made available to entities that have intervened or had their claim consolidated unless a CLAIMANT or ICANN objects that such disclosure will harm commercial confidentiality, personal data, or trade secrets; in which case the IRP PANEL shall rule on objection and provide such information as is

consistent with the PURPOSES OF THE IRP and the appropriate preservation of confidentiality as recognized in Article 4 of the Bylaws.

Participation as an *Amicus Curiae*

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an *amicus curiae* before an IRP PANEL, subject to the limitations set forth below. Without limitation to the persons, groups, or entities that may have such a material interest, the following persons, groups, or entities shall be deemed to have a material interest relevant to the DISPUTE and, upon request of person, group, or entity seeking to so participate, shall be permitted to participate as an *amicus* before the IRP PANEL:

- i. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3) ~~shall be deemed~~);
- ii. If the IRP relates to ~~have an application arising out of ICANN's New gTLD Program, a material interest relevant to the DISPUTE~~ person, group or entity that was part of a contention set for the string at issue in the IRP; ~~and may participate as an *amicus*~~
- iii. If the briefings before the IRP PANEL ~~significantly refer to actions taken by a person, group or entity that is external to the DISPUTE, such external person, group or entity.~~

All requests to participate as an *amicus* must contain the same information as the Written Statement (set out at Section 6), specify the interest of the *amicus curiae*, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion, subject to the conditions set forth above, that the proposed *amicus curiae* has a material interest relevant to the DISPUTE, he or she shall allow participation by the *amicus curiae*. Any person participating as an *amicus curiae* may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion.⁴ The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an *amicus curiae*.

⁴ During the pendency of these Interim Supplementary Rules, in exercising its discretion in allowing the participation of *amicus curiae* and in then considering the scope of participation

8. Exchange of Information

The IRP PANEL shall be guided by considerations of accessibility, fairness, and efficiency (both as to time and cost) in its consideration of requests for exchange of information.

On the motion of either Party and upon finding by the IRP PANEL that such exchange of information is necessary to further the PURPOSES OF THE IRP, the IRP PANEL may order a Party to produce to the other Party, and to the IRP PANEL if the moving Party requests, documents or electronically stored information in the other Party's possession, custody, or control that the Panel determines are reasonably likely to be relevant and material to the resolution of the CLAIMS and/or defenses in the DISPUTE and are not subject to the attorney-client privilege, the work product doctrine or otherwise protected from disclosure by applicable law: (including, without limitation, disclosures to competitors of the disclosing person, group or entity, of any competition-sensitive information of any kind). Where such method(s) for exchange of information are allowed, all Parties shall be granted the equivalent rights for exchange of information.

A motion for exchange of documents shall contain a description of the specific documents, classes of documents or other information sought that relate to the subject matter of the Dispute along with an explanation of why such documents or other information are likely to be relevant and material to resolution of the Dispute.

Depositions, interrogatories, and requests for admission will not be permitted.

In the event that a Party submits what the IRP PANEL deems to be an expert opinion, such opinion must be provided in writing and the other Party must have a right of reply to such an opinion with an expert opinion of its own.

9. Summary Dismissal

An IRP PANEL may summarily dismiss any request for INDEPENDENT REVIEW where the Claimant has not demonstrated that it has been materially affected by a DISPUTE. To be materially affected by a DISPUTE, a Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.

from *amicus curiae*, the IRP PANEL shall lean in favor of allowing broad participation of an *amicus curiae* as needed to further the purposes of the IRP set forth at Section 4.3 of the ICANN Bylaws.

An IRP PANEL may also summarily dismiss a request for INDEPENDENT REVIEW that lacks substance or is frivolous or vexatious.

10. Interim Measures of Protection

A Claimant may request interim relief from the IRP PANEL, or if an IRP PANEL is not yet in place, from the STANDING PANEL. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN action or decision in order to maintain the status quo until such time as the opinion of the IRP PANEL is considered by ICANN as described in ICANN Bylaws, Article 4, Section 4.3(o)(iv).

An EMERGENCY PANELIST shall be selected from the STANDING PANEL to adjudicate requests for interim relief. In the event that no STANDING PANEL is in place when an EMERGENCY PANELIST must be selected, a panelist may be appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for emergency relief. Interim relief may only be provided if the EMERGENCY PANELIST determines that the Claimant has established all of the following factors:

- (i) A harm for which there will be no adequate remedy in the absence of such relief;
- (ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and
- (iii) A balance of hardships tipping decidedly toward the party seeking relief.

Interim relief may be granted on an ex parte basis in circumstances that the EMERGENCY PANELIST deems exigent, but any Party whose arguments were not considered prior to the granting of such interim relief may submit any opposition to such interim relief, and the EMERGENCY PANELIST must consider such arguments, as soon as reasonably possible. The EMERGENCY PANELIST may modify or terminate the interim relief if the EMERGENCY PANELIST deems it appropriate to do so in light of such further arguments.

11. Standard of Review

Each IRP PANEL shall conduct an objective, de novo examination of the DISPUTE.

- a. With respect to COVERED ACTIONS, the IRP PANEL shall make findings of fact to determine whether the COVERED ACTION constituted an action or inaction that violated ICANN'S Articles or Bylaws.

- b. All DISPUTES shall be decided in compliance with ICANN’s Articles and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.
- c. For Claims arising out of the Board’s exercise of its fiduciary duties, the IRP PANEL shall not replace the Board’s reasonable judgment with its own so long as the Board’s action or inaction is within the realm of reasonable business judgment.
- d. With respect to claims that ICANN has not enforced its contractual rights with respect to the IANA Naming Function Contract, the standard of review shall be whether there was a material breach of ICANN’s obligations under the IANA Naming Function Contract, where the alleged breach has resulted in material harm to the Claimant.
- e. IRPs initiated through the mechanism contemplated at Article 4, Section 4.3(a)(iv) of ICANN’s Bylaws shall be subject to a separate standard of review as defined in the IANA Naming Function Contract.

12. IRP PANEL Decisions

IRP PANEL DECISIONS shall be made by a simple majority of the IRP PANEL. If any IRP PANEL member fails to sign the IRP PANEL DECISION, the IRP PANEL member shall endeavor to provide a written statement of the reason for the absence of such signature.

13. Form and Effect of an IRP PANEL DECISION

- a. IRP PANEL DECISIONS shall be made in writing, promptly by the IRP PANEL, based on the documentation, supporting materials and arguments submitted by the parties. [IRP PANEL DECISIONS shall be issued in English, and the English version will be authoritative over any translations.](#)
- b. The IRP PANEL DECISION shall specifically designate the prevailing party as to each Claim.
- c. Subject to Article 4, Section 4.3 of ICANN’s Bylaws, all IRP PANEL DECISIONS shall be made public, and shall reflect a well-reasoned application of how the DISPUTE was resolved in compliance with ICANN’s Articles and Bylaws, as understood in light of prior IRP PANEL DECISIONS decided under

the same (or an equivalent prior) version of the provision of the Articles and Bylaws at issue, and norms of applicable law.

14. Appeal of IRP PANEL Decisions

An IRP PANEL DECISION may be appealed to the full STANDING PANEL sitting en banc within 60 days of the issuance of such decision. The en banc STANDING PANEL will review such appealed IRP PANEL DECISION based on a clear error of judgment or the application of an incorrect legal standard. The en banc STANDING PANEL may also resolve any disputes between panelists on an IRP PANEL or the PROCEDURES OFFICER with respect to consolidation of CLAIMS or intervention.

15. Costs

The IRP PANEL shall fix costs in its IRP PANEL DECISION. Except as otherwise provided in Article 4, Section 4.3(e)(ii) of ICANN's Bylaws, each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, as defined in Article 4, Section 4.3(d) of ICANN's Bylaws, including the costs of all legal counsel and technical experts.

Except with respect to a Community IRP, the IRP PANEL may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party's Claim or defense as frivolous or abusive.

EXHIBIT 264

 KeyCite to Yeow Fag Negative Treatment
Decided to Extend by *In re Napster, Inc. Copyright Litigation*,
N.D.Ca., October 25, 2006

269 F.3d 1369

United States Court of Appeals,
Federal Circuit.

APTIX CORPORATION, Plaintiff/
Counterclaim Defendant–Appellant,
and

Meta Systems, Inc., Plaintiff/
Counterclaim Defendant–Appellant,
and

Mentor Graphics Corporation,
Counterclaim Defendant,

v.

QUICKTURN DESIGN SYSTEMS, INC.,
Defendant/Counterclaimant–Appellee.

Nos. 00–1468, 00–1469.

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DECIDED: Nov. 5, 2001.

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Rehearing Denied Dec. 11, 2001.

Synopsis

Patentee and non-exclusive licensee brought action against alleged infringer relating to patent on field programmable circuit boards. The United States District Court for the Northern District of California, *William H. Alsup, J.*, dismissed action, [2000 WL 852813](#). Patentee and non-exclusive licensee appealed. The Court of Appeals, *Rader*, Circuit Judge, held that: (1) dismissal of patentee was warranted; (2) alleged patent infringer was entitled to costs and attorney fees; (3) non-exclusive licensee lacked standing to maintain lawsuit; and (4) patent could not be invalidated by patentee's misconduct in infringement lawsuit.

Affirmed in part and vacated in part.

Mayer, Chief Circuit Judge, filed an opinion dissenting in part.

West Headnotes (16)

[1] Federal Courts

 Dismissal or nonsuit in general

Court of Appeals reviews a court's dismissal of a complaint for litigation misconduct for abuse of discretion; Court of Appeals will not disturb such a determination absent a showing that it was based upon erroneous findings of fact, a misapplication or misinterpretation of applicable law, or a clear error of judgment.

[Cases that cite this headnote](#)

[2] Patents

 Failure to respond; sanctions in general

Dismissal of patentee as plaintiff, in infringement lawsuit relating to patent on field programmable circuit boards, on basis of unclean hands doctrine was warranted, where patentee committed litigation misconduct by submitting falsified engineering notebooks to the court. [35 U.S.C.A. § 281](#).

[15 Cases that cite this headnote](#)

[3] Patents

 Awards to competitors

Alleged patent infringer was entitled to costs and attorney fees for having to defend against infringement lawsuit relating to patent on field programmable circuit boards, where case was exceptional due to the extent of the fraud and misconduct exhibited by patentee before the court in the falsification of his engineering notebooks. [35 U.S.C.A. § 285](#).

[12 Cases that cite this headnote](#)

[4] Patents

 Patent owner

Patents

 Licensee in general

Only a patentee may bring an action for patent infringement; unless a licensee holds all

substantial rights under the patent, a licensee may not enforce a patent without the patentee. 35 U.S.C.A. § 281.

[1 Cases that cite this headnote](#)

[5] Patents

[Bare or nonexclusive licensee](#)

Non-exclusive licensee, who had only limited rights under patent relating to patent on field programmable circuit boards, lacked standing to maintain lawsuit against alleged infringer, where patentee was dismissed from suit due to litigation misconduct. 35 U.S.C.A. § 281.

[1 Cases that cite this headnote](#)

[6] Patents

[Public policy, fraud, and illegality](#)

Patent could not be invalidated by patentee's misconduct, as plaintiff, during infringement lawsuit; although patentee was dismissed from lawsuit under doctrine of unclean hands, patent right was not affected by litigation misconduct because record did not disclose any misconduct in acquisition of the patent right and because equitable doctrine was not a source of power to punish, and licensees of patent did not participate in any wrongful conduct during litigation or before the Patent and Trademark Office (PTO). 35 U.S.C.A. §§ 261, 281.

[3 Cases that cite this headnote](#)

[7] Patents

[Public policy, fraud, and illegality](#)

Litigation misconduct, while serving as a basis to dismiss the wrongful litigant, does not infect, or even affect, the original grant of a patent property right; doctrine of unclean hands does not reach out to extinguish a property right based on misconduct during litigation to enforce the right.

[13 Cases that cite this headnote](#)

[8] Patents

[Patent Found Unenforceable for Inequitable Conduct](#)

Inequitable conduct in the process of procuring a patent taints the property right itself, and in such a situation, application of the doctrine of inequitable conduct to invalidate a patent furthers the paramount interest of ensuring that patents issue from backgrounds free from fraud or other inequitable conduct.

[3 Cases that cite this headnote](#)

[9] Patents

[Patent Found Unenforceable for Inequitable Conduct](#)

The process creating a patent right demands that all facts relevant to patentability be submitted formally or informally to the Patent and Trademark Office (PTO), which can then pass upon the sufficiency of the evidence; upon a showing of inequitable conduct during acquisition of the patent, courts declare the patent unenforceable because the property right is tainted ab initio.

[4 Cases that cite this headnote](#)

[10] Patents

[Public policy, fraud, and illegality](#)

Patents

[Patent Found Unenforceable for Inequitable Conduct](#)

Remedies for litigation misconduct differ from the remedies for misconduct in acquisition of a property right; while inequitable conduct before the Patent and Trademark Office (PTO) renders a patent unenforceable by any party, the unclean hands doctrine bars only the offending party.

[24 Cases that cite this headnote](#)

[11] Equity

[He Who Comes Into Equity Must Come with Clean Hands](#)

A finding of unclean hands generally does not prejudice the offending party in subsequent

cases, but only provides a bar to relief in the case at hand.

[4 Cases that cite this headnote](#)

[12] Equity

🔑 [He Who Comes Into Equity Must Come with Clean Hands](#)

The relief for unclean hands targets specifically the misconduct, without reference to the property right that is the subject of the litigation.

[11 Cases that cite this headnote](#)

[13] Federal Civil Procedure

🔑 [Inherent authority](#)

Federal Civil Procedure

🔑 [Reasonableness or bad faith in general; objective or subjective standard](#)

Courts are free to sanction bad faith conduct that arises during the course of litigation; a court's inherent power to punish bad faith conduct during litigation is necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.

[4 Cases that cite this headnote](#)

[14] Contempt

🔑 [Nature and grounds of power](#)

The power to punish for contempts is inherent in all courts.

[Cases that cite this headnote](#)

[15] Federal Civil Procedure

🔑 [Computation; items and services compensable](#)

Federal Civil Procedure

🔑 [Non-monetary sanctions](#)

Although a particularly severe sanction, outright dismissal of a lawsuit is within a court's discretion, and the less severe sanction of an assessment of attorney fees is within a court's inherent power as well.

[1 Cases that cite this headnote](#)

[16] Patents

🔑 [In general; utility](#)

US Patent 5,544,069. Cited.

[Cases that cite this headnote](#)

Attorneys and Law Firms

***1371** [Raphael V. Lupo](#), McDermott, Will & Emery, of Washington, DC, argued for plaintiff/counterclaim defendant-appellant Aptix Corporation. With him on the brief were [Donna M. Tanguay](#), Mark G. Davis, and M. Miller Baker. Of counsel on the brief were [Robert P. Taylor](#), [Edwin H. Wheeler](#), and [Erik K. Moller](#), Howrey Simon Arnold & White, LLP, of Menlo Park, CA.

[Charles S. Crompton](#), Latham & Watkins, of Menlo Park, California, argued for plaintiff/counterclaim defendant-appellant Meta Systems, Inc. With him on the brief were [David A. York](#), [Rita A. Hao](#), and James L. Day.

[J. Donald McCarthy](#), Lyon & Lyon LLP, of Los Angeles, California argued for defendant/counterclaimant-appellee Quickturn Design Systems, Inc. With him on the brief was [James C. Brooks](#). Of counsel on the brief were [James W. Geriak](#), Lyon & Lyon LLP, of Irvine, California; and Jeffrey A. Miller, Lyon & Lyon LLP, of San Jose, CA.

Before [MAYER](#), Chief Judge, [RADER](#), and [LINN](#), Circuit Judges.

Opinion

[RADER](#), Circuit Judge.

On June 14, 2000, the United States District Court for the Northern District of California dismissed the patent infringement complaint of Aptix Corporation and Meta Systems, Inc., after ruling that Aptix's [United States Patent No. 5,544,069 \(#069 patent\)](#) is unenforceable. The trial court refused to enforce the [#069 patent](#) because Aptix submitted falsified engineering notebooks to the court.

Because substantial evidence supports the district court's finding of unclean hands, this court affirms the district court's dismissal of Aptix from the suit. Furthermore, because Meta, as Aptix's non-exclusive licensee, lacks standing to enforce the patent without Aptix, this court also affirms the district court's dismissal of Meta's complaint. However, because the district court exceeded its discretion by declaring the #069 patent unenforceable due to litigation misconduct, this court vacates that judgment.

***1372 I.**

Dr. Amr Mohsen, the founder, chairman, and chief executive officer of Aptix, is the sole inventor of the #069 patent. The #069 patent discloses and claims "field programmable" circuit boards that permit computer programmers to reconfigure the electronic components of an integrated circuit. Dr. Mohsen filed a patent application on September 20, 1989. The United States Patent Office issued the #069 patent on August 6, 1996.

Aptix licensed the #069 patent to Meta and Mentor Graphics Corporation, granting Meta the right to sue to enforce the patent in San Jose, California, where Quickturn Design Systems, Inc. is located. Under the agreement, Mentor agreed to advance Aptix the cost of enforcing the #069 patent against Quickturn. On February 26, 1998, Aptix and Meta jointly sued Quickturn for infringement of the #069 patent. Quickturn asserted counterclaims and added Mentor as a counterclaim defendant.

The local rules for the Northern District of California require patentees to disclose a date of conception for each asserted claim. N.D. Cal. Civ. L.R. 16 7(b)(3) (1998). On April 13, 1998, Aptix submitted to the court seventeen pages of Dr. Mohsen's alleged 1989 notebook as an initial proffer of a conception date. On April 18, 1998, Dr. Mohsen advised Aptix's counsel that he found another of his engineering notebooks, allegedly started in 1988. Relying on the 1988 notebook, Aptix and Meta listed July 31, 1988, as the date of conception for all asserted claims. Without this earlier notebook, Aptix later conceded, it would "have a hard row to hoe to avoid invalidating prior art." *Aptix Corp. v. Quickturn Design Sys.*, No. 98 00762, 2000 WL 852813, at *23 (N.D. Cal. June 14, 2000).

During discovery, Quickturn obtained a copy of a number of pages from a 1989 notebook that Dr. Mohsen had provided to Skjerven, Morrill, MacPherson, Franklin & Friel, patent counsel during prosecution of the #069 patent. Quickturn noticed substantial differences between this copy and the purported 1989 notebook Dr. Mohsen first supplied the court. The submission to the court contained extensive text and diagram additions not found in the version of the 1989 notebook obtained from Skjerven. When asked about these discrepancies in his deposition, Dr. Mohsen conceded that he added material to his notebooks after they had been signed.

During discovery, Aptix produced still another notebook, the "Ink On Photocopy" version of the 1989 notebook. This version of the 1989 notebook contained Dr. Mohsen's handwritten additions to the photocopied entries of an earlier version of the 1989 notebook. The trial court determined that the Ink On Photocopy version was a "dry run" for Dr. Mohsen's fabrications. *Id.* at *24. Once Dr. Mohsen had inked new material onto the rudimentary photocopied version, according to the district court, he inserted pages of the Ink On Photocopy version underneath the corresponding pages of the 1989 notebook to assist as a copying template. *Id.* Forensic evidence showed that the Ink On Photocopy version retained the impressions of Dr. Mohsen's pen as he copied the newly inked material into the evolving 1989 notebook. The Ink On Photocopy version was the source for the seventeen-page production to the court.

Thus, the record before the district court included four different notebook submissions: the seventeen pages originally submitted to the court from Mohsen's purported 1989 notebook, another notebook allegedly started in 1988, an original copy of the 1989 notebook that was used to prosecute the #069 patent (containing discrepancies from the seventeen-page *1373 submission), and the Ink On Photocopy version of the 1989 notebook, which apparently served as the template for Dr. Mohsen's elaborations.

On November 24, 1998, Quickturn moved to compel production of the original notebooks for forensic testing. Dr. Mohsen had been insistent upon personally keeping the notebooks, locking them in a safe in his house. However, on December 14, 1998, Dr. Mohsen took the notebooks to work and left them in his car the entire day. That night, he purportedly found his car window broken

and the notebooks gone. The trial court found that the “circumstances of the ‘theft’ strongly suggest that Amr Mohsen staged the incident.” *Id.* at *26.

After the disappearance of the notebooks, Dr. Mohsen produced additional evidence to corroborate his asserted conception date. His 1989 Daytimer, for example, included various entries referring to the engineering notebooks. However, forensic evidence showed that these entries were written with an ink that was not manufactured until 1994, five years after the supposed entries.

Shortly before the scheduled date of an evidentiary hearing on spoliation of the notebooks (at which time Aptix would have had to demonstrate under *Fed.R.Evid. 1004* that the original notebooks were not destroyed in bad faith), Dr. Mohsen purportedly received a priority mail package containing fragments of the missing notebooks. The package, which bore Dr. Mohsen's correct mailing address, had no return address but contained an anonymous note from “FL” stating: “These were discovered lately in our backyard. These look like important documents for you.” The package contained invoices with Dr. Mohsen's address, which apparently provided the basis for “FL” to address the envelope. Significantly, however, those invoices had either the wrong zip code, or no zip code at all, even though the address on the package from “FL” included the proper zip code. The trial court found that “[i]t seems plain that Amr Mohsen addressed the envelope, or instructed someone else to address it, and simply slipped up in using the correct zip code.” *Id.* at *27.

Referring to the 1988 notebook, the trial court noted that in five instances, Dr. Mohsen had first written “1998,” and then overwritten the date to read “1988.” Moreover, although Dr. Mohsen's brother, Aly Mohsen, had witnessed many pages of the notebook by writing “read and understood,” the court noted that many of these pages were blank with nothing but a large “X,” suggesting that Aly had witnessed a blank notebook, and that his brother later filled in text and diagrams. Indeed, all of Aly's signatures were written in the same ink, despite their purported dates on occasions 22 days apart. Furthermore, the court noted that none of Dr. Mohsen's colleagues, including his trial attorneys, patent prosecutors, and fellow executives, knew about the 1988 notebook until 1998. The trial court concluded that the

1988 notebook was a “complete fraud from bark to core, a notebook without a single genuine entry.” *Id.* at *24.

On May 9 10, 2000, the trial court held an evidentiary hearing concerning the authenticity of the notebooks. Dr. Mohsen took the stand and asserted his Fifth Amendment privilege against self-incrimination in response to all questions. Thereafter, the trial court concluded that Aptix had attempted “to defraud the Court and to strengthen its patent through a premeditated and sustained campaign of lies and forgery.” *Id.* at *27. The trial court determined that the #069 patent was unenforceable and dismissed the complaint, invoking the unclean hands doctrine as set forth in *Keystone Driller Co. v. General *1374 Excavator Co.*, 290 U.S. 240, 54 S.Ct. 146, 78 L.Ed. 293, 19 USPQ 228 (1933) (“*Keystone I*”). After finding this case exceptional under 35 U.S.C. § 285 (1994), the trial court ordered Aptix to pay Quickturn's reasonable attorney fees and costs.

On appeal to this court, Aptix challenges the finding of litigation misconduct and the award of attorney fees. Aptix contends that “the record ... does [not] reveal that Aptix submitted false information to the court, material or otherwise.” Arguing that the record does not support findings of fraud, Aptix seeks reversal of the court's finding of unclean hands. Moreover, Aptix and Meta challenge the determination that misconduct during the enforcement of a patent can render the patent unenforceable. This court has jurisdiction under 28 U.S.C. § 1295(a)(1) (1994).

II.

[1] Both this court and the Ninth Circuit review a court's dismissal of a complaint for litigation misconduct for abuse of discretion. *Gen. Electro Music Corp. v. Samick Music Corp.*, 19 F.3d 1405, 1408, 30 USPQ2d 1149, 1151 (Fed.Cir.1994); *Halaco Eng'g Co. v. Costle*, 843 F.2d 376, 379 (9th Cir.1988) (reviewing sanctions imposed by a district court, such as dismissal of a complaint for misconduct, for abuse of discretion). Both courts will not disturb such a determination absent a showing that it was based upon erroneous findings of fact, a misapplication or misinterpretation of applicable law, or a clear error of judgment. *Id.*

[2] The record amply supports the district court's finding that Dr. Mohsen submitted the seventeen pages of his 1989 notebook to the court after adding new material to the signed and dated pages. Indeed, the Ink On Photocopy version retained the impressions of his pen as he added material to his purported 1989 notebook. Moreover, after Dr. Mohsen invoked his Fifth Amendment privilege and refused to testify about the forgery, disappearance, and reappearance of the notebooks, the trial court was free to make adverse inferences against him. *Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976) (“[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.”). Even Aptix does not seem to dispute that the only straight-faced explanation for the theft of the notebooks and their subsequent mysterious return is that Dr. Mohsen himself staged the incidents an inference that the trial court was free to draw.

Aptix nonetheless urges that the evidence of falsification of the 1988 notebook (its primary evidence to corroborate its asserted conception date) is not so utterly compelling as with the 1989 notebook. Therefore, Aptix seeks a determination that the trial court lacked clear and convincing evidence to find unclean hands. Contrary to Aptix's assertions, however, rarely, if ever, will litigation misconduct be so thoroughly documented. The record clearly and convincingly supports the district court's conclusion of extreme litigation misconduct.

The district court's finding of litigation misconduct fully justified its decision to invoke the unclean hands doctrine and dismiss Aptix from suit. This case is reminiscent of *Keystone I*, 290 U.S. at 240, 54 S.Ct. 146, in which the Supreme Court affirmed the dismissal of a patentee that engaged in fraud during litigation. In *Keystone I*, the patentee, in a prior proceeding, had purchased the silence of another inventor whose testimony would have provided grounds to invalidate the asserted patents. After successfully suppressing this testimony and obtaining an *1375 injunction in the earlier action, the patentee relied on its earlier victory in support of another suit against General Excavator. In this later litigation, the earlier fraud emerged. By invoking against General Excavator a decree obtained by fraud, the patentee came to the court with unclean hands. Therefore, the Supreme Court denied all relief. *Id.* at 245, 54 S.Ct. 146 (quoting *Deweese v. Reinhard*, 165 U.S. 386, 390, 17 S.Ct. 340, 41 L.Ed.

757 (1897) (“A court of equity acts only when and as conscience commands; and, if the conduct of the plaintiff be offensive to the dictates of natural justice, then, whatever may be the rights he possesses, and whatever use he may make of them in a court of law, he will be held remediless in a court of equity.”)). As in *Keystone I*, the district court in the present case had wide discretion to find Aptix remediless, and to dismiss its claim for want of equity.

[3] Moreover, the district court possessed ample discretion to award Quickturn attorney fees and costs. Without question, fraud and misconduct make this case exceptional under 35 U.S.C. § 285 (1994) and warrant a full compensation of Quickturn's reasonable attorney fees and costs.

[4] [5] Upon dismissal of Aptix, Meta lost standing to sue in its own right. Only a patentee may bring an action for patent infringement. 35 U.S.C. § 281 (1994). Unless it holds “all substantial rights” under the patent, a licensee may not enforce a patent without the patentee. *Textile Prods., Inc. v. Mead Corp.*, 134 F.3d 1481, 1484, 45 USPQ2d 1633, 1635 (Fed.Cir.1998). Meta is a non-exclusive licensee with only limited rights under the patent. Therefore, it lacks standing to sue without Aptix. The district court correctly dismissed Meta's complaint upon dismissal of Aptix.

III.

[6] [7] As further relief, the trial court declared the #069 patent unenforceable. Litigation misconduct, while serving as a basis to dismiss the wrongful litigant, does not infect, or even affect, the original grant of the property right. The doctrine of unclean hands does not reach out to extinguish a property right based on misconduct during litigation to enforce the right. Indeed neither the Supreme Court nor this court has ever declared a patent unenforceable due to litigation misbehavior. The Supreme Court's decision in *Keystone I*, upon which the district court primarily relied, illustrates that litigation misconduct does not affect the viability of the property right itself: “The governing principle is ‘that whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against

him in limine; the court will refuse to interfere on *his* behalf, to acknowledge *his* right, or to award *him* any remedy.’ ” 290 U.S. at 244 45, 54 S.Ct. 146 (quoting Pomeroy, Equity Jurisprudence (4th ed.) § 397 (emphasis added)). Leaving the patent right intact, the Supreme Court repeatedly stressed that litigation misconduct bars the litigant. Again in *Hazel Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250, 61 USPQ 241 (1944), overruled on other grounds by *Standard Oil Co. v. United States*, 429 U.S. 17, 18, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976), another instance of extreme litigation misconduct, the Supreme Court “require[d] that Hartford be denied relief,” but left the patent right intact. *Id.* at 251, 64 S.Ct. 997. Thus, the remedies for litigation misconduct bar the malfasant who committed the misconduct. The property right itself remains independent of the conduct of a litigant.

*1376 [8] [9] This court’s doctrines of inequitable conduct render the patent itself unenforceable to prevent “the enforcement of patents secured by fraud.” *Smith Int’l, Inc. v. Hughes Tool Co.*, 759 F.2d 1572, 1578, 225 USPQ 889, 893 (Fed.Cir.1985). Inequitable conduct in the process of procuring a patent taints the property right itself. Thus, inequitable conduct furthers the “paramount interest” of ensuring that patents issue from “backgrounds free from fraud or other inequitable conduct.” *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 816, 65 S.Ct. 993, 89 L.Ed. 1381, 65 USPQ 133, 138 (1945). The process creating the patent right “demands that all facts relevant to [patentability] ... be submitted formally or informally to the Patent Office, which can then pass upon the sufficiency of the evidence.” *Id.* Upon a showing of inequitable conduct during acquisition of the patent, courts declare the patent unenforceable because the property right is tainted *ab initio*. See *Hazel Atlas*, 322 U.S. at 251, 64 S.Ct. 997.

[10] [11] Thus, the remedies for litigation misconduct differ from the remedies for misconduct in acquisition of a property right. While inequitable conduct before the PTO renders the patent unenforceable by any party, the unclean hands doctrine bars only the offending party. See *Keystone I*, 290 U.S. at 244 45, 54 S.Ct. 146. Moreover, a finding of unclean hands generally does not prejudice the offending party in subsequent cases, but only provides a bar to relief in the case at hand. See McClintock on Equity (2d ed. 1948) § 26 (“The general principle is that equity will not lend its aid to enable a party to reap the benefit

of his misconduct, or to enable him to continue it, but, where the misconduct has ceased and the right claimed in the suit did not accrue because of it, the misconduct will be held to be collateral and not to defeat the right to affirmative relief.”); *Keystone I*, 290 U.S. at 245, 54 S.Ct. 146 (“[Courts of equity] apply the maxim requiring clean hands only where some unconscionable act of one coming for relief has immediate and necessary relation to the equity that he seeks in respect of the matter in litigation.”); see also Pomeroy on Equity (3d ed.1905) § 399.

[12] The entire chain of *Keystone* cases also shows that the relief for unclean hands targets specifically the misconduct, without reference to the property right that is the subject of the litigation. The United States Court of Appeals for the Sixth Circuit, whose judgment the Supreme Court reviewed in *Keystone I*, directed the district court to dismiss *Keystone*’s complaint without prejudice. *Gen. Excavator Co. v. Keystone Driller Co.*, 62 F.2d 48, 51, 16 USPQ 269, 271 72 (6th Cir.1932) (“The decrees of the District Court are reversed, and the causes are remanded, with instructions to dismiss the bills of complaint without prejudice to the prosecution of suits at law, or, indeed, to subsequent actions in equity upon the other patents in suit.”). On motion for rehearing, the Sixth Circuit emphasized that it had not invalidated the patents, or adjudicated any of the rights of the parties *inter sese*, but rather that it had simply closed its doors against *Keystone* in this suit:

The plaintiff is repelled as of the date of the filing of the bill and in respect of the maintenance of the action then instituted.... The fact that delay is thereby occasioned, or that the plaintiff has thereby suffered a loss of time and expense, is immaterial. The court has simply said: We will not hear you in this action although, not being a general avenger of the wrongs of humanity, it may be that you will not be in the future, and would not have been in the *1377 past, repelled on account of your conduct.

Gen. Excavator v. Keystone Driller Co., 64 F.2d 39, 40, 17 USPQ 517, 518 (6th Cir.1933). On certiorari, the Supreme Court expressly recognized that the Sixth Circuit had directed dismissal “without prejudice,” and affirmed. *Keystone I*, 290 U.S. at 244, 54 S.Ct. 146.

Only two years after issuing *Keystone I*, the Court again heard an infringement suit by Keystone asserting many of the same patents against other defendants. *Keystone Driller Co. v. Northwest Eng'g Corp.*, 294 U.S. 42, 55 S.Ct. 262, 79 L.Ed. 747, 24 USPQ 35 (1935) (“*Keystone II*”). While acknowledging the earlier unclean hands litigation, *id.* at 44 n. 2, 55 S.Ct. 262, the Court nonetheless adjudicated *Keystone II* on the merits, with no indication that the prior fraud tainted the later case. Thus, the entire history of the *Keystone* litigation underscores that the patent right is not affected by litigation misconduct.

This court notes its own characterization of *Keystone I* in previous dictum: “In *Keystone Driller*, the Supreme Court affirmed the Sixth Circuit's ruling that all five patents-in-suit were unenforceable due to unclean hands.” *Consolidated Aluminum Corp. v. Foseco Int'l Ltd.*, 910 F.2d 804, 810, 15 USPQ2d 1481, 1485 (Fed.Cir.1990). In *Consolidated Aluminum*, the inventor of Consolidated Aluminum's patents had committed fraud before the PTO. Thus, unenforceability of the property right itself was properly at issue in that case based on inequitable conduct. This court's broad characterization of *Keystone I* in *Consolidated Aluminum*, however, does not contradict a careful reading of the Supreme Court's reasoning and its action in affirming the Sixth Circuit.

IV.

For reasons discussed above, if Aptix had procured its patent by inequitable conduct before the PTO, the trial court would have full discretion to declare the #069 patent unenforceable. *Hazel Atlas*, 322 U.S. at 251, 64 S.Ct. 997; *see also, e.g., Molins PLC v. Textron, Inc.*, 48 F.3d 1172, 1178, 33 USPQ2d 1823, 1827 (Fed.Cir.1995); *Kingsdown Med. Consultants, Ltd. v. Hollister Inc.*, 863 F.2d 867, 877, 9 USPQ2d 1384, 1392 (Fed.Cir.1988) (en banc); *Smith*, 759 F.2d at 1578; *cf. J.P. Stevens & Co. v. Lex Tex Ltd.*, 747 F.2d 1553, 1559, 223 USPQ 1089, 1092 (Fed.Cir.1984) (“Conduct before the PTO that may render a patent unenforceable is broader than ‘common law

fraud.’” (Citation omitted.)). Even presumably innocent licensees like Meta and Mentor would be properly barred from enforcing the patent, had the rights thereunder accrued through inequitable conduct. *See McClintock on Equity* (2d ed.1948) § 26.

In the present case, however, the record discloses no misconduct in acquisition of the patent right. Moreover, Meta and Mentor licensed the # 069 patent from Aptix before the present litigation. The record does not show that either company participated in any wrongful conduct during litigation or before the PTO. Indeed, the trial court noted: “Meta may be a victim.”

In the absence of any showing of misconduct before the PTO, the #069 patent remains a presumptively valid grant of personal property. *See 35 U.S.C. § 261* (1994) (“Subject to the provisions of this title, patents shall have the attributes of personal property.”). No case law from the Supreme Court or this court provides a basis for nullifying property rights granted by the United States when such property rights did not themselves accrue through inequitable conduct.

Despite this lack of authority, however, the trial court declared the #069 patent unenforceable as a form of relief. The *1378 court called this relief a “penalty,” necessary for deterring Aptix and other parties from engaging in future misconduct. *Aptix*, 2000 WL 852813, at *30. The court based its decision on *Keystone I* and the doctrine of unclean hands. As discussed above, however, the trial court's reliance on *Keystone I* was not fully justified, as the Supreme Court did not declare Keystone's patents unenforceable to the contrary, it resolved yet another suit by Keystone on several of the same patents on the merits only two years later. *Keystone II*, 294 U.S. at 42, 55 S.Ct. 262. Nor does the doctrine of unclean hands provide a suitable basis for the trial court's judgment, as this equitable doctrine is not a source of power to punish. *Feltner*, 523 U.S. at 352 53, 118 S.Ct. 1279; *Mertens*, 508 U.S. at 270, 113 S.Ct. 2063 (White, J., dissenting); *Livingston*, 56 U.S. at 559. In declaring the #069 patent unenforceable based solely on misconduct during litigation, the trial court clearly exceeded the bounds of *Keystone I* and the doctrine of unclean hands.

V.

[13] [14] [15] Within the limits discussed above, courts are free to sanction bad faith conduct that arises during the course of litigation. These “inherent powers” to punish bad faith conduct during litigation are “necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). “The power to punish for contempts is inherent in all courts.” *Chambers*, 501 U.S. at 44, 111 S.Ct. 2123 (quoting *Ex parte Robinson*, 19 Wall. 505, 510, 22 L.Ed. 205 (1874)). Although a particularly severe sanction, outright dismissal of a lawsuit is within the court’s discretion. *Id.* (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980)). And, the “‘less severe sanction’ of an assessment of attorney’s fees is undoubtedly within a court’s inherent power as well.” *Id.* at 45, 111 S.Ct. 2123 (citing *Hutto v. Finney*, 437 U.S. 678, 689 n. 14, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978)). Thus, the trial court did not abuse its discretion by denying relief to Aptix, or by ordering Aptix to pay attorney fees and costs.

CONCLUSION

The trial court had broad discretionary power to fashion appropriate relief in this case, including denying any and all relief to Aptix, and ordering Aptix to compensate Quickturn for its reasonable attorney fees and costs. Indeed, this relief was entirely fitting. However, the record does not support a judgment rendering the #069 patent unenforceable. *Keystone I* and the doctrine of unclean hands do not provide a basis for punishing Aptix by nullifying the grant of a property right. Accordingly, this court affirms the district court’s dismissal of the complaint and its award of attorney fees, and vacates the judgment of unenforceability.

COSTS

Each party shall bear its own costs.

AFFIRMED IN PART and VACATED IN PART

MAYER, Chief Judge, dissenting-in-part.

Because a fraud upon the court is no less grave than a fraud on the Patent and Trademark Office, I would affirm the district court’s holding that the #069 patent is unenforceable.

The maxim of unclean hands is applied broadly, giving substantial discretion to the officer of the court in its application. See *1379 *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 815, 65 S.Ct. 993, 89 L.Ed. 1381, 65 USPQ 133, 138 (1945) (“This maxim necessarily gives wide range to the equity court’s use of discretion in refusing to aid the unclean litigant.”). It is “not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion.” *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 245 46, 54 S.Ct. 146, 78 L.Ed. 293, 19 USPQ 228, 230 (1933) (“*Keystone I*”). The maxim itself is predicated upon the need to protect the integrity of the judicial system. “[The] doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be ‘the abettor of iniquity.’” *Precision Instrument*, 324 U.S. at 814, 65 S.Ct. 993, 89 L.Ed. 1381, 65 USPQ at 138 (citing *Bein v. Heath*, 47 U.S. (6 How.) 228, 247, 12 L.Ed. 416 (1848)).

Had Mohsen’s deception occurred in the Patent and Trademark Office (“PTO”) rather than before the court, everyone agrees that the #069 patent would be unenforceable. There is no reason to reach a different result here. The duty of candor to the court is entitled to at least as much honor as that to the PTO. The courts have no greater resources to uncover fraud than the PTO. Although patent prosecutions are ex parte and judicial proceedings are adversarial, the PTO has the benefit of hundreds of experts in the relevant arts to make independent inquiries. The rationale of *Hazel Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 246, 64 S.Ct. 997, 88 L.Ed. 1250, 61 USPQ 241, 245 (1944), applies: “[T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated ... The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.”

There is no limit inherent in the doctrine of unclean hands that prevents declaring a patent unenforceable based on the post-issuance conduct of the party seeking relief. The governing principle of the doctrine is that “ ‘whenever a party who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy.’ ” *Keystone I*, 290 U.S. at 244 45, 54 S.Ct. 146, 78 L.Ed. 293, 19 USPQ at 230 (quoting Pomeroy, *Equity Jurisprudence* § 397 (4th ed.)). Rendering the patent unenforceable for Mohsen's forgery of engineering notebooks purporting to establish the conception and reduction to practice of his invention is entirely consistent with this language. The district court properly refused to “ ‘acknowledge [the patentee's] right’ ” in that patent. *Id.*

Indeed, the unclean hands doctrine is the source of our ability to declare a patent unenforceable, for the well-recognized defense of inequitable conduct in the PTO. See *Hazel Atlas*, 322 U.S. at 250 51, 64 S.Ct. 997, 88 L.Ed. 1250, 61 USPQ at 247; see also *Consolidated Aluminum Corp. v. Foseco Int'l Ltd.*, 910 F.2d 804, 812, 15 USPQ2d 1481, 1487 (Fed.Cir.1990) (“[W]e reject ... [the] invitation to limit a flexible doctrine of equity to conduct occurring before a court.... [W]hat we have termed ‘inequitable conduct’ is no more than the unclean hands doctrine applied to particular conduct before the PTO.” (citations omitted)); see also *J.P. Stevens & Co. v. Lex Tex Ltd.*, 747 F.2d 1553, 1561, 223 USPQ 1089, 1093 (Fed.Cir.1984) (“[A]t the *1380 time the Patent Act was enacted Supreme Court cases had treated inequitable conduct as an ‘unclean hands’ type defense.”) (superseded, but adopted in relevant part, by *Kingsdown Med. Consultants, Ltd. v. Hollister Inc.*, 863 F.2d 867, 877, 9 USPQ2d 1384, 1392 (Fed.Cir.1988) (en banc)).

The Supreme Court's development of the doctrine makes this flexibility clear. *Keystone I* first permitted an accused infringer to assert unclean hands as a defense to infringement. 290 U.S. at 243 44, 54 S.Ct. 146, 19 USPQ at 230 31. The patentee's post-issuance conduct of obtaining the agreement of a third party not to disclose a possible prior use of the invention, and the patentee's reliance on this deception to obtain a favorable judgment in an infringement action and to commence a second infringement suit, constituted unclean hands requiring the

dismissal of the claims in the subsequent infringement case. *Id.*

At the time *Keystone I* was decided, the Court was limited by the rule that only the government had the ability to move to vacate a patent for fraud in its inception; private parties could not. See *Hazel Atlas*, 322 U.S. at 251, 64 S.Ct. 997, 88 L.Ed. 1250, 61 USPQ at 247 (“It has previously been decided that such a remedy is not available in infringement proceedings, but can only be accomplished in a direct proceeding brought by the government.” (citing *United States v. Am. Bell Tel. Co.*, 128 U.S. 315, 9 S.Ct. 90, 32 L.Ed. 450 (1888))). Private parties were permitted to assert only invalidity defenses in infringement actions. See *Am. Bell Tel. Co.*, 128 U.S. at 370 72, 9 S.Ct. 90. As *Keystone Driller Co. v. Northwest Engineering Corp.*, 294 U.S. 42, 43 n. 2, 55 S.Ct. 262, 79 L.Ed. 747, 24 USPQ 35, 35 36 n. 2 (1935) (“*Keystone II*”), shows, the Court had not yet recognized its ability in an action between private parties to hold a patent unenforceable for a patentee's deceptive conduct falling outside the scope of the enumerated invalidity defenses, regardless of whether the inequitable behavior was committed in the prosecution of the patent or in court. See *Hazel Atlas*, 322 U.S. at 251, 64 S.Ct. 997, 88 L.Ed. 1250, 61 USPQ at 247; *Am. Bell Tel. Co.*, 128 U.S. at 370 72, 9 S.Ct. 90; *Mowry v. Whitney*, 81 U.S. (14 Wall) 434, 439, 20 L.Ed. 858 (1871) (dismissing action equivalent to a declaratory judgment of invalidity on the grounds that only the government “can institute judicial proceedings for ... vacating or rescinding the patent ...”); see also Donald S. Chisum, *Chisum on Patents*, § 19.03[1] [a] at 19 150 (2000).

However, *Hazel Atlas*, 322 U.S. at 250 51, 64 S.Ct. 997, 88 L.Ed. 1250, 61 USPQ at 247, subsequently confirmed that a court may declare a patent unenforceable in a private action under the unclean hands doctrine. The Court relied on *Keystone I* to hold that when deceptive conduct was practiced before both the PTO and then before the court, “nothing less than a complete denial of relief” to the patentee would suffice. *Id.* at 250, 64 S.Ct. 997, 61 USPQ at 247. *Hazel Atlas* thus derived its conclusion that a patent may be held unenforceable for deception in the PTO from *Keystone I*'s refusal to enforce a patent for deception before the court. Unenforceability may be a remedy for either in the appropriate circumstances. See *Fraige v. Am.-Nat'l Watermattress Corp.*, 996 F.2d 295, 298 n. 3, 27 USPQ2d

1149, 1151 n. 3 (Fed.Cir.1993) (“Although *Hazel Atlas* was not based on fraud arising during the course of an infringement action, the principles laid down by the Supreme Court are equally applicable here [to fraud committed in an infringement action.]”); cf. *Precision Instrument*, 324 U.S. at 819, 65 S.Ct. 993, 89 L.Ed. 1381, 65 USPQ at 139 (dismissing the action for deception before the PTO *1381 and the court based on the “public policy against the assertion and enforcement of patent claims infected with fraud and perjury.”).

Here, the district court held that the only way to protect the judicial proceedings from Mohsen's deceptions was to declare the #069 patent unenforceable. His forgery was pervasive, long-standing, and wanton. It was committed in the context of a series of inter-related patent litigations among the parties concerning related technology in courts in many jurisdictions, as well as an antitrust action and a takeover attempt. Closing the door to one courtroom would merely lead to prompt refile in another, and would be of little deterrence to subsequent attempts to undermine the integrity of the judicial process.

That Mohsen's forged documents infected the evidence of the conception and reduction to practice of the invention bolsters the conclusion that the patent should not be enforced. Although the record does not fully develop the issue, it appears that he was seeking to avoid potentially invalidating prior art with his forgery, intending to swear behind the date of his patent application. Thus, the fraud concerns the validity of an issued patent, a matter of public concern. See *Fraige*, 996 F.2d at 298, 27 USPQ2d at 1152; *Mercoïd Corp. v. Mid Continent Inv. Co.*, 320 U.S. 661, 666, 64 S.Ct. 268, 88 L.Ed. 376, 60 USPQ 21, 24 (1944); *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488, 492, 62 S.Ct. 402, 86 L.Ed. 363 (1942); *Precision Instrument*, 324 U.S. at 816, 65 S.Ct. 993, 89 L.Ed. 1381, 65 USPQ at 138 (“The far-reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies ... are kept within their legitimate scope.”).

Had Mohsen succeeded, he might unjustly have retained or enlarged the scope of his property right, avoided a finding of obviousness or anticipation, and thus remained the owner of valid patent claims where he should have none. As the district court observed, the patent would be strengthened through its testing in litigation and in reliance upon the fraudulent documentation and

testimony. Aptix would likely be able to command a higher price for it (in license or assignment), and would more readily be able to obtain settlements from potential infringers than if it had not survived a challenge to its validity. This strengthened patent could be helpful in obtaining infringement verdicts in subsequent litigation, resulting in a chain of judgments based on the same fraud. See Donald S. Chisum, *Chisum on Patents*, § 19.02[2][a] at 19-51 (2000) (“A prior judgment of validity cannot bind non-parties to a suit. Nevertheless, under the doctrine of comity, a court will give some weight to prior adjudications ... based on the same evidence.”). Permitting the possibility of such a chain of judgments tainted with deception is precisely what the Supreme Court sought to avoid in *Keystone I*, *Hazel Atlas*, and *Precision Instrument*.

This type of deception taints the patent itself. The documentary record of the invention has been permanently blotched. The forgery is sufficiently pervasive that it is difficult to tell if any of the purported engineering notebooks and supporting documents are authentic. Thus, the effects of Mohsen's conduct before the court would not necessarily be eradicated in an action brought by another party. If the patent is not held unenforceable, a subsequent owner may attempt in litigation to establish a date of conception and reasonable diligence in reduction to practice before the date of the patent's application. To permit this possibility is to countenance the continued involvement of the courts in sorting through the muddy morass of Mohsen's forgeries and dishonest testimony. The unclean hands doctrine does not permit *1382 this boon to the forger and stain on the courts. See *Precision Instrument*, 324 U.S. at 814, 65 S.Ct. 993, 89 L.Ed. 1381, 65 USPQ at 138. Therefore, we do not exceed the limits of equity in refusing to enforce the patent. *Mercoïd*, 320 U.S. at 666, 64 S.Ct. 268, 88 L.Ed. 376, 60 USPQ at 24 (“The patent is a privilege.”).

In other contexts, we have not been so quick to confine the consequences of a patentee's fraud. For example, even if inequitable conduct in a patent's prosecution only directly concerns one of the claims, we hold that it is fatal to the entire patent. See *Kingsdown Med. Consultants*, 863 F.2d at 877, 9 USPQ2d at 1392 (en banc) (“When a court has finally determined that inequitable conduct occurred in relation to one or more claims during prosecution of the patent application, the entire patent is

rendered unenforceable.”). There is no reason to become parsimonious with equity here.

With respect to Meta, as the patent's licensee, it derives its rights in the # 069 patent entirely through Aptix and has no standing to sue in its own right. See 35 U.S.C. § 281 (1994). To the extent that Meta would be harmed by our refusal to recognize Aptix's right to the patent, its action is against Aptix. Had Aptix's deception initially been before the PTO, the patent would be unenforceable, and Meta would lose all its rights in the patent even if it had no knowledge of the misconduct. Besides, as the

driving force behind the Aptix patent litigation, Meta had ample notice of the alleged fraud and ample opportunity to require the testing of the veracity of the documents that it and Aptix continued to rely on. The district court made no findings about whether Meta itself had clean hands. However, willful blindness to another's wrongful acts and continued reliance upon them could rise to the level of intentional or unconscionable conduct.

All Citations

269 F.3d 1369, 60 U.S.P.Q.2d 1705

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EXHIBIT 265

 KeyC te Ye ow F ag Negat ve Treatment
Cr t c zed as Stated n *Avco Corp. v. PPG Industr es, Inc.*, D.Mass.,
November 9, 994

65 S.Ct. 993

Supreme Court of the United States

PRECISION INSTRUMENT MFG. CO. et al.

v.

AUTOMOTIVE MAINTENANCE MACHINERY CO.

No. 377.

|
Argued Jan. 31 and Feb. 1, 1945.|
Decided April 23, 1945.|
Rehearing Denied May 21, 1945.|
Petition for Clarification of
Opinion Denied June 18, 1945.

See 325 U.S. 893, 65 S.Ct. 1189.

See 325 U.S. 843, 65 S.Ct. 1561.

Synopsis

Suit by the Automotive Maintenance Machinery Company against the Precision Instrument Manufacturing Company, Kenneth R. Larson, and Snap-On Tools Corporation for breach of contracts and for infringement of three patents relating to torque wrenches, which was consolidated with a suit by Snap-On Tools Corporation for a declaratory decree with respect to the same controversy, wherein the Automotive Maintenance Machinery Company filed a counterclaim seeking substantially the same relief as in the original action. To review a judgment of the Circuit Court of Appeals, 143 F.2d 332, affirming in part and reversing in part a judgment of the District Court dismissing the various complaints and counterclaims for want of equity, the defendants bring certiorari.

Judgment of the Circuit Court of Appeals reversed.

Mr. Justice ROBERTS and Mr. Justice JACKSON dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

West Headnotes (13)

[1] Equity Nature of unconscionable conduct

The equitable maxim that he who comes into equity must come with clean hands is a self-imposed ordinance closing doors of equity court to one tainted with inequity or bad faith relative to matter in which he seeks relief, however improper may have been the defendant's behavior.

[459 Cases that cite this headnote](#)**[2] Equity** Nature of unconscionable conduct

Although equity does not demand that its suitors shall have led blameless lives, it requires that they shall have acted fairly and without fraud or deceit as to controversy in issue.

[78 Cases that cite this headnote](#)**[3] Equity** He Who Comes Into Equity Must Come with Clean Hands

An equity court may exercise wide range of discretion in refusing to aid litigant coming into court with unclean hands.

[84 Cases that cite this headnote](#)**[4] Equity** Nature of unconscionable conduct

Misconduct justifying equity court in refusing relief because of unclean hands need not necessarily be of such nature as to be punishable as a crime or as to justify legal proceedings, but any wilful act concerning cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for refusing relief.

[130 Cases that cite this headnote](#)

[5] Equity

🔑 Nature of unconscionable conduct

The equitable doctrine that he who comes into equity must come with clean hands is of greater importance where suit concerns public interests as well as private interests of litigants.

[116 Cases that cite this headnote](#)

[6] Patents

🔑 Patents

A “patent” is a special privilege designed to serve public purpose of promoting progress of science and useful arts, it is affected with a public interest, and is an exception to general rule against monopolies.

[54 Cases that cite this headnote](#)

[7] Patents

🔑 Misconduct by patentee in general

A patent infringement case must be measured by both public and private standards of equity in view of public's paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct.

[145 Cases that cite this headnote](#)

[8] Equity

🔑 Nature of unconscionable conduct

Where in prior interference proceeding, plaintiff had become cognizant of facts indicating perjury in connection with the other application, failure of plaintiff to reveal such fraud to Patent Office and its action in entering into outside settlement whereby it secured perjured application, on which it eventually obtained patents, and whereby other parties agreed not to question validity of any patent that might be issued, justified denial, on ground of unclean hands, of relief sought by plaintiff in patent infringement and breach of contract suit.

[141 Cases that cite this headnote](#)

[9] Equity

🔑 Nature of unconscionable conduct

Where information obtained by plaintiff indicated perjury in connection with other application involved in interference proceedings, fact that information might not have seemed sufficiently trustworthy to warrant submission of case to District Attorney or to Patent Office during pendency of interference proceedings did not preclude dismissal, on ground of unclean hands, of subsequent suit for breach of contract and infringement of patents based in part on perjured application obtained by plaintiff in settlement of interference proceedings.

[119 Cases that cite this headnote](#)

[10] Equity

🔑 Nature of unconscionable conduct

Those who have application pending with Patent Office or who are parties to Patent Office proceedings have duty to report to it all facts concerning possible fraud or inequitable conduct underlying the application in issue, notwithstanding doubt as to sufficiency of proof thereof or nature of independent legal advice.

[152 Cases that cite this headnote](#)

[11] Equity

🔑 Nature of unconscionable conduct

Although outside settlements of interference proceedings are not ordinarily illegal, clean hands doctrine precluded enforcement in equity of settlement entered into without revealing to Patent Office knowledge or reasonable belief of perjury in connection with other application.

[19 Cases that cite this headnote](#)

[12] Equity

🔑 Nature of unconscionable conduct

Where information indicating perjury in connection with other application involved in interference proceedings was not revealed to Patent Office, but plaintiff entered into settlement whereby parties agreed not to question validity of any patent that might be issued, fact that action of other parties in seeking to obtain fraudulent patent may have been more reprehensible than that of plaintiff did not preclude denial of relief to plaintiff in patent infringement and breach of contract suit on ground of unclean hands.

[121 Cases that cite this headnote](#)

[13] Patents



Patents



Reissue

US Patent 2,269,503, US Patent 2,279,792, US Patent 2,283,888. Cited.

US Patent RE22,219. Cited.

[7 Cases that cite this headnote](#)

Attorneys and Law Firms

****994 *807** Mr. Casper W. Ooms, of Chicago, Ill., for petitioners.

Mr. Frank Parker Davis, of Chicago, Ill., for respondent.

Opinion

Mr. Justice MURPHY, delivered the opinion of the Court.

The respondent, Automotive Maintenance Machinery Company, charged in two suits that the various petitioners had infringed three patents owned by it relating to torque wrenches. It was further asserted that the allegedly infringing acts also breached several contracts related to the patents. In defense, the petitioners claimed inter alia that Automotive possessed such 'unclean hands' ***808** as to foreclose its right to enforce the patents and the contracts.

¹ The three patents involved are No. 2,279,792, issued on April 14, 1942, to Kenneth R. Larson; No.

2,283,888, issued on May 19, 1942, to H. W. Zimmerman; and reissue No. 22,219, issued on November 3, 1942, to H. W. Zimmerman, based on original No. 2,269,503.

The District Court, at the close of a consolidated trial on the sole issue of Automotive's alleged inequitable conduct, delivered an oral opinion holding that Automotive's hands were soiled to such an extent that all relief which it requested should be denied. This opinion was subsequently withdrawn at the request of one of the witnesses and is not a part of the record. At the same time, however, the court entered written findings of fact and conclusions of law, forming the basis for a judgment dismissing the various complaints and counterclaims 'for want of equity.' On appeal, the Circuit Court of Appeals reviewed the facts at length and concluded that the District Court's findings of fact were not supported by substantial evidence and that its conclusions of law were not supported by its findings. The judgment was accordingly reversed. *7 Cir.*, *143 F.2d 332*. We brought the case here because of the public importance of the issues involved.

****995** The basic facts necessary to a determination of the vital issues are clear and without material dispute. In chronological order they may be summarized as follows:

In 1937 and prior thereto Automotive manufactured and sold torque wrenches developed by one of its employees, Herman W. Zimmerman. During this period Snap-On Tools Corporation was one of its customers for these wrenches. Automotive also had in its employ at this time one George B. Thomsma, who worked with Zimmerman and who was well acquainted with his ideas on torque wrenches. In November, 1937, Thomsma secretly gave information to an outsider, Kenneth R. Larson, concerning torque wrenches. Together they worked out plans for a new wrench, although Thomsma claimed that it was entirely his own idea.

After unsuccessfully trying to interest other distributors, Larson made arrangements to supply Snap-On with ***809** the new torque wrench. On October 1, 1938, Larson filed an application for a patent on the newly-developed wrench, which application had been assigned to Snap-On several days prior thereto.² Then in December, 1938, Larson, Thomsma and one Walter A. Carlsen organized the Precision Instrument Manufacturing Company to make the wrenches to supply Snap-On's requirements. All

three received stock and were elected officers and directors of the new company. Manufacture of the wrenches began in January, 1939, and Precision succeeded in taking away from Automotive all of Snap-On's business. Thomasma continued to work for Automotive until the latter discovered his connection with Precision and discharged him in June, 1939. Thomasma's connection with Precision was also concealed from Snap-On during most of this period.

² Snap On agreed to file the patent application for Larson, who was without funds, and took an assignment of the Larson application as security for performance of the agreement to supply wrenches.

Subsequently on October 11, 1939, the Patent Office declared an interference between certain claims in Larson's pending patent application and those in one filed by Zimmerman. Automotive was the owner of Zimmerman's application. Shortly after the interference was declared, R. E. Fidler, Automotive's attorney, wrote to the president of the company that the 'whole situation confronting your opponents in this interference is quite messy, and I will be somewhat surprised if they fight the matter.' He further wrote that if there was a contest 'they surely will have a lot of explaining to do.'

In August, 1940, Larson filed his preliminary statement in the Patent Office proceedings. In it he gave false dates as to the conception, disclosure, drawing, description and reduction to practice of his claimed invention. These dates were designed to antedate those in Zimmerman's ***810** application by one to three years. Larson also claimed that he was the sole inventor of his wrench. When Fidler learned of this preliminary statement he immediately suspected that 'there must be something wrong with this picture' and suggested to Automotive's president that a 'very careful and thorough investigation' be made of the situation. The president agreed. Fidler then employed several investigators who made oral reports to him from time to time. According to Fidler's memoranda of these reports, Fidler learned in great detail in August and September, 1940, the part that Thomasma played in the development of the Larson wrench and in the organization of Precision. He discovered that Thomasma claimed to have invented the wrench and that Larson 'was now trying to freeze him out.'

From October 24 to November 4, 1940, Larson and eight witnesses testified in the interference proceedings in support of his claims, corroborating his statements

as to dates despite cross examination. The day before this testimony ended Thomasma met with Fidler and Automotive's president and stated that he had developed Larson's wrench and that Larson's patent application was a 'frame-up.' Fidler then procured from Thomasma an eighty-three page statement concerning these matters, which Thomasma swore to on November 15. As the District Court found, this statement or affidavit 'related in extensive detail the statements of Thomasma with respect to Larson's early work and disclosed such intimate knowledge thereof as to leave little doubt of the author's knowledge of the facts.'

With these facts before him, Fidler admitted ****996** that he 'personally was inclined to take the position that I should do something drastic' in the form of taking the matter up with the Patent Office or the District Attorney. He resolved his problem, however, by submitting it to an outside ***811** attorney. The latter advised him that his evidence was insufficient to establish Larson's perjury, that the Patent Office would not consider the matter until all proofs in the interference proceedings were in and that the District Attorney probably would not touch the situation while the interference proceedings were pending. Fidler followed his advise.

A few days later Fidler informed Larson's patent attorney, Harry C. Alberts, of the information disclosed in the Thomasma affidavit. Alberts admitted that 'it looked very much like Larson had given false testimony' and asked that further examination of Thomasma be made in his presence. Accordingly, on November 28, Thomasma was examined orally before Alberts, Fidler and officials of Automotive and Snap-On. Thomasma repeated substantially the same story as in his affidavit. Snap-On's president said that if the story were true 'the whole thing smells to the high heavens.' And Alberts remarked that under the circumstances he felt he would have to withdraw as Larson's attorney.

On the same day, Alberts and Snap-On's president confronted Larson and Carlsen with the Thomasma story and demanded an explanation. Larson refused to commit himself on the truth of Thomasma's account but finally admitted that 'my testimony is false and the whole case is false.' Alberts then withdrew as their attorney,³ giving them the names of three other lawyers, including M. K. Hobbs. The fact that Alberts withdrew was communicated by him to Fidler.

³ Alberts apparently never withdrew formally as Larson's attorney in the interference proceedings by filing a document to that effect in the Patent Office.

Larson and Carlsen called on Hobbs the next day, November 29. They told him they were willing to concede ***812** priority in Zimmerman and wanted Hobbs to settle the interference proceedings.⁴ Hobbs took the case on that basis, making no effort to inquire into the reasons for the concession since he considered that matter immaterial. Even when Fidler tried to tell him later about the perjury, Hobbs stopped him for he 'didn't want to hear the conflict in testimony.'

⁴ Both Larson and Carlsen testified that they told Hobbs of the perjury and of the predicament they were in, stating to him that they did not want to be turned over to the District Attorney. Hobbs, however, denied that they informed him of these matters. It was at the request of Hobbs that the District Court's oral opinion was withdrawn in order that, in the words of the District Court, it would not be 'construed as implying that Mr. Hobbs had willfully given false testimony or had been guilty of professional misconduct. The court further said that the record demonstrated 'that the witness Hobbs did not testify falsely. Assuming that Hobbs gave no false testimony, however, we do not consider that fact to be of controlling significance in this case.

Hobbs immediately undertook to settle the interference proceedings. On December 2 he proposed a settlement which included a concession of priority by Larson, but this proposal was apparently not satisfactory to all those concerned. Meanwhile Fidler presented the facts to another disinterested lawyer and asked him whether he thought there was enough evidence to bring a conspiracy suit for damages or a criminal action. The lawyer, after admitting that he did not have the slightest doubt but that Thomasma was telling the truth, replied in the negative.

On December 13 Fidler submitted a draft agreement that he had prepared. This draft contained a recital that 'it has been determined by the parties hereto and their respective counsel that the party Zimmerman is the prior inventor of the subject matter involved in said Interference No. 77,565, as well as all other subject matter commonly disclosed in said Zimmerman and Larson applications.' But this draft was likewise unacceptable.

813** For a time negotiations were broken off and resumption of the interference proceedings seemed imminent. One of the other attorneys for Automotive wrote a letter on December 19 to Alberts, who was still acting as attorney for Snap-On, stating that 'you must recognize that a large part of the *997** testimony taken on behalf of Snap-On and Larson is, to put it mildly, not the whole truth' and that 'you are holding up the issuance of the Zimmerman patent without the slightest justification.' Fidler, who had approved this letter, justified these remarks on the ground that 'they had told us Zimmerman was the prior inventor and we hadn't yet received a concession of priority.' In reply to this letter, Alberts charged that Automotive's attorneys were using 'threatening accusations' and 'duress' and that they were threatening to 'unloose the dogs' unless they got everything they requested in the settlement.

Suddenly on the next day, December 20, negotiations were resumed and the parties quickly entered into three contracts, the first two of which are involved in this suit. These contracts, in the relevant parts, provided as follows:

(1) Under the Automotive and Precision-Larson agreement, Larson conceded priority in Zimmerman and Larson's application was to be assigned to Automotive. Automotive agreed to license Larson and Precision to complete their unfilled order from Snap-On to the extent of about 6,000 wrenches, with a royalty to be paid on the excess. Automotive released Precision, Larson and their customers from liability for any past infringement and gave Precision and Larson a general release as to all civil damages. Finally, Precision and Larson acknowledged the validity of the claims of the patents to issue on the Larson and Zimmerman applications.

(2) Under the Automotive and Snap-On agreement, Snap-On agreed to reassign the Larson application to Precision ***814** and acknowledged the validity of the claims of the patents to issue on the Larson and Zimmerman applications. Automotive also gave Snap-On the right to sell the 6,000 wrenches then on order from Precision and released Snap-On from any past liability or damages.

(3) Under the Snap-On and Precision-Larson agreement, Snap-On reassigned to Larson and Precision whatever title Snap-On had to the Larson application. Precision agreed to manufacture and deliver to Snap-On the 6,000 wrenches then on order. Snap-On also assented to the Automotive and Precision-Larson agreement.

The Larson application was accordingly assigned to Automotive on December 20, 1940. Automotive subsequently received patents on both the Larson and Zimmerman applications after making certain changes. Then Precision began to manufacture and Snap-On began to sell a new wrench. Automotive claimed that this was an infringement of its patents and a breach of the contracts of December 20, 1940. Thus the suit arose which is now before us.

[1] [2] The guiding doctrine in this case is the equitable maxim that 'he who comes into equity must come with clean hands.' This maxim is far more than a mere banality. It is a self-imposed ordinance that closes the doors of a court of equity to one tainted with inequity or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant. That doctrine is rooted in the historical concept of court of equity as a vehicle for affirmatively enforcing the requirements of conscience and good faith. This presupposes a refusal on its part to be 'the abettor of iniquity.' *Bein v. Heath*, 6 How. 228, 247, 12 L.Ed. 416. Thus while 'equity does not demand that its suitors shall have led blameless lives,' *Loughran v. Loughran*, 292 U.S. 216, 229, 54 S.Ct. 684, 689, 78 L.Ed. 1219, as to other matters, it does require that they shall have acted fairly and *815 without fraud or deceit as to the controversy in issue. *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245, 54 S.Ct. 146, 147, 78 L.Ed. 293; *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 387, 64 S.Ct. 622, 624, 88 L.Ed. 814; 2 Pomeroy, *Equity Jurisprudence* (5th Ed.) ss 397-399.

[3] [4] This maxim necessarily gives wide range to the equity court's use of discretion in refusing to aid the unclean litigant. It is 'not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion.' *Keystone Driller Co. v. General Excavator Co.*, supra, 290 U.S. 245, 246, 54 S.Ct. 147, 148, 78 L.Ed. 293. Accordingly one's misconduct need not necessarily have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character. Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of **998 conduct is sufficient cause for the invocation of the maxim by the chancellor.

[5] Moreover, where a suit in equity concerns the public interest as well as the private interests of the litigants this doctrine assumes even wider and more significant

proportions. For if an equity court properly uses the maxim to withhold its assistance in such a case it not only prevents a wrongdoer from enjoying the fruits of his transgression but averts an injury to the public. The determination of when the maxim should be applied to bar this type of suit thus becomes of vital significance. See *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488, 492-494, 788, 62 S.Ct. 402, 405, 406, 86 L.Ed. 363.

[6] [7] In the instant case Automotive has sought to enforce several patents and related contracts. Clearly these are matters concerning far more than the interests of the adverse parties. The possession and assertion of patent rights are 'issues of great moment to the public.' *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246, 64 S.Ct. 997, 1001, 88 L.Ed. 1250. See also *Mercoid Corporation v. Mid-Continent Investment Co.*, 320 U.S. 661, 665, 64 S.Ct. 268, 271, 88 L.Ed. 376; *Morton Salt Co. v. Suppiger Co.*, supra; *816 *United States v. Masonite Corp.*, 316 U.S. 265, 278, 62 S.Ct. 1070, 1077, 86 L.Ed. 1461. A patent by its very nature is affected with a public interest. As recognized by the Constitution, it is a special privilege designed to serve the public purpose of promoting the 'Progress of Science and useful Arts.' At the same time, a patent is an exception to the general rule against monopolies and to the right to access to a free and open market. The far-reaching social and economic consequences of a patent, therefore, give the public a paramount interest in seeing that patent monopolies spring from backgrounds free from fraud or other inequitable conduct and that such monopolies are kept within their legitimate scope. The facts of this case must accordingly be measured by both public and private standards of equity. And when such measurements are made, it becomes clear that the District Court's action in dismissing the complaints and counterclaims 'for want of equity' was more than justified.

[8] The history of the patents and contracts in issue is steeped in perjury and undisclosed knowledge of perjury. Larson's application was admittedly based upon false data which destroyed whatever just claim it might otherwise have had to the status of a patent. Yet Automotive, with at least moral and actual certainty if not absolute proof of the facts concerning the perjury, chose to act in disregard of the public interest. Instead of doing all within its power to reveal and expose the fraud, it procured an outside settlement of the interference proceedings, acquired the Larson application itself, turned it into a patent and

barred the other parties from ever questioning its validity. Such conduct does not conform to minimum ethical standards and does not justify Automotive's present attempt to assert and enforce these perjury-tainted patents and contracts.

Automotive contends that it did not have positive and conclusive knowledge of the perjury until the pleadings *817 in the instant proceedings were filed and until Larson admitted his perjury on pre-trial examination. It claims that prior thereto it only had Thomasma's affidavit and statements, which were uncorroborated and likely to carry little weight as against Larson and his eight witnesses. It is further pointed out that Fidler submitted what he knew of the facts to at least two independent attorneys, both of whom advised him that the evidence of perjury that he possessed was insufficient. From this it is argued, as the Circuit Court of Appeals held, that while Automotive was 'morally certain that Thomasma's story was true' there was no duty to report this uncorroborated information to either the District Attorney or the Patent Office.

[9] But Automotive's hands are not automatically cleansed by its alleged failure to possess sufficiently trustworthy evidence of perjury to warrant submission of the case to the District Attorney or to the Patent Office during the pendency of the interference proceedings. The important fact is that Automotive had every reason to believe and did believe that Larson's application was fraudulent and his statements perjured. Yet it acted in complete disregard of that belief. Never for a moment did Automotive or its representatives doubt the existence of this fraud. Fidler suspected it soon after he knew of Larson's claims. His suspicions were confirmed by his hired investigators. Then Thomasma revealed such intimate and detailed facts concerning the **999 perjury as to convince all who heard him, despite certain reservations entertained by some persons concerning his trustworthiness. Moreover, Fidler was well aware that Alberts threatened to withdraw as Larson's counsel if he discovered from Larson that Thomasma's story was true and that Alberts in fact did so withdraw. The suspected perjury was further confirmed by Larson's sudden willingness to concede priority after he learned of *818 Thomasma's story and by the admissions by Alberts and Snap-On that Zimmerman 'was the prior inventor.' And the very fact that Fidler saw fit to submit his proof to outside attorneys for advice is an indication of the substantiality of his belief as to Larson's perjury. With all

this evidence before it, however, Automotive pursued the following course of action:

[10] 1. It chose to keep secret its belief and allegedly unsubstantial proof of the facts concerning Larson's perjury. We need not speculate as to whether there was sufficient proof to present the matter to the District Attorney. But it is clear that Automotive knew and suppressed facts that, at the very least, should have been brought in some way to the attention of the Patent Office, especially when it became evident that the interference proceedings would continue no longer. Those who have applications pending with the Patent Office or who are parties to Patent Office proceedings have an uncompromising duty to report to it all facts concerning possible fraud or inequity underlying the applications in issue. Cf. *Crites, Inc. v. Prudential Ins. Co.*, 322 U.S. 408, 415, 64 S.Ct. 1075, 1079, 88 L.Ed. 1356. This duty is not excused by reasonable doubts as to the sufficiency of the proof of the inequitable conduct nor by resort to independent legal advice. Public interest demands that all facts relevant to such matters be submitted formally or informally to the Patent Office, which can then pass upon the sufficiency of the evidence. Only in this way can that agency act to safeguard the public in the first instance against fraudulent patent monopolies. Only in that way can the Patent Office and the public escape from being classed among the 'mute and helpless victims of deception and fraud.' *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, supra, 322 U.S. 246, 64 S.Ct. 1001, 88 L.Ed. 1250.

[11] 2. Instead of pursuing the interference proceedings and proving the fact that Zimmerman's claims had priority *819 over those asserted by Larson, Automotive chose to enter into an outside settlement with Larson, Precision and Snap-On, whereby Larson conceded priority. Outside settlements of interference proceedings are not ordinarily illegal. But where, as here, the settlement is grounded upon knowledge or reasonable belief of perjury which is not revealed to the Patent Office or to any other public representative, the settlement lacks that equitable nature which entitles it to be enforced and protected in a court of equity.

[12] 3. By the terms of the settlement, Automotive secured the perjured Larson application and exacted promises from the other parties never to question the validity of any patent that might be issued on that

application. Automotive then made numerous changes and expansions as to the claims in the application and eventually secured a patent on it without ever attempting to reveal to the Patent Office or to anyone else the facts it possessed concerning the application's fraudulent ancestry. Automotive thus acted to compound and accentuate the effects of Larson's perjury.

These facts all add up to the inescapable conclusion that Automotive has not displayed that standard of conduct requisite to the maintenance of this suit in equity. That the actions of Larson and Precision may have been more reprehensible is immaterial. The public policy against the assertion and enforcement of patent claims infected with fraud and perjury is too great to be overridden by such a consideration. Automotive knew of and suspected the perjury and failed to act so as to uproot it and destroy its effects. Instead, Automotive acted affirmatively to magnify and increase those effects. Such inequitable conduct impregnated Automotive's entire cause of action and justified dismissal by resort to the unclean hands doctrine. *Keystone Driller Co. v. General Excavator Co.*, *supra*.

***820** We conclude, therefore, that the evidence clearly supported the District Court's findings of fact and that

these findings justified its conclusions of law. The court below erred in reversing its judgment.

Reversed.

****1000** Mr. Justice ROBERTS.

I think the writ should be dismissed or the judgment of the Circuit Court of Appeals affirmed. The case ought not to have been taken by this Court. It involves merely the application of acknowledged principles of law to the facts disclosed by the record. Decision here settles nothing save the merits or demerits of the conduct of the respective parties. In my view it is not the function of this court to weigh the facts for the third time in order to choose between litigants, where appraisal of the conduct of each must affect the result.

Mr. Justice JACKSON is of the opinion that the judgment should be affirmed, as he takes the view of the facts set forth in the opinion of the court below. *143 F.2d 332*, *supra*.

All Citations

324 U.S. 806, 65 S.Ct. 993, 89 L.Ed. 1381, 65 U.S.P.Q. 133

EXHIBIT 266

792 F.Supp. 969
United States District Court,
S.D. New York.

ARIS-ISOTONER GLOVES, INC., Plaintiff,
v.
BERKSHIRE FASHIONS, INC., Defendant.

83 Civ. 8764.
|
June 5, 1992.

Synopsis

After remand, [924 F.2d 465](#), the parties objected to the report and recommendation of the Magistrate Judge. The District Court, [Conboy, J.](#), held that unclean hands of defendant in trademark dispute removed the case from equity and prevented application of the defense of laches to the defendant's production of infringing gloves bearing a double diamond design; evidence showed that defendant's president fabricated testimony in order to create impression that defendant detrimentally relied on acquiescence of plaintiff in creating the double diamond line of gloves and that, once the line became established, plaintiff sued defendant in bad faith in order to topple the defendant's established line of gloves.

Order in accordance with opinion.

West Headnotes (3)

[1] Equity

🔑 [He Who Comes Into Equity Must Come with Clean Hands](#)

A court may decline to exercise its equitable powers in favor of a party whose unconscionable act has immediate and necessary relation to the matter that he seeks in respect of the matter in litigation.

[10 Cases that cite this headnote](#)

[2] Equity

🔑 [He Who Comes Into Equity Must Come with Clean Hands](#)

Application of “unclean hands” doctrine rests with discretion of the court, which is not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion.

[15 Cases that cite this headnote](#)

[3] Equity

🔑 [Nature of unconscionable conduct](#)

Trademarks

🔑 [Laches and estoppel](#)

Unclean hands of defendant in trademark dispute removed the case from equity and prevented application of the defense of laches to the defendant's production of infringing gloves bearing a double diamond design; evidence showed that defendant's president fabricated testimony in order to create impression that defendant detrimentally relied on acquiescence of plaintiff in creating the double diamond line of gloves and that, once the line became established, plaintiff sued defendant in bad faith in order to topple the defendant's established line of gloves.

[10 Cases that cite this headnote](#)

Attorneys and Law Firms

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ORDER

[CONBOY](#), District Judge:

The Court has before it the parties' objections to the Report and Recommendation of United States Magistrate Judge Naomi Reice Buchwald, dated November 1, 1991 (“Remand Report”). Pursuant to [28 U.S.C. § 636\(b\)\(1\)](#), the Court has conducted a *de novo* review of the record. Our sole point of departure from the Remand Report is our finding that the unclean hands of defendant Berkshire

Fashions, Inc. (“Berkshire”) removes this case from equity and so prevents application of the defense of laches to Berkshire’s production of infringing gloves bearing the double diamond design.

I. *Unclean Hands*

[1] [2] A court may decline to exercise its equitable powers in favor of a party whose “unconscionable act ... has immediate and necessary relation to the matter that he seeks in respect of the matter in litigation.” *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245, 54 S.Ct. 146, 147, 78 L.Ed. 293 (1933). Application of the “unclean hands” doctrine rests with the discretion of the court, which is “not bound by formula or restrained by any limitation that tends to trammel the *970 free and just exercise of discretion.” *Id.* at 245, 54 S.Ct. at 148.

[3] Upon questioning at the remand proceedings, Berkshire President Issac R. Dweck made sworn statements relating to a matter in issue that directly and inexplicably contradicted his testimony in the original contempt proceedings. No other conclusion can exist but that Dweck fabricated his testimony either in the instant proceedings or in the original contempt proceedings, when the information upon which his later testimony was based was readily available to him. Such behavior is unconscionable and thus warrants a finding of unclean hands.

In the initial contempt hearing, Dweck engaged in the following colloquy with counsel:

Q. Can you describe for the court the pattern of your sales of the interlocking diamond gloves since you introduced them in early '87?

A. We started initially in a very small quantity.

Q. Why is that?

A. There was some question about what might happen. Mr. Swire had indicated, “Put the goods on the market and then we’ll see what happens. If we see it’s a problem then we’ll take action. If we don’t take, you know, we’ll see what happens.”

So we started in a small way, built the production up greater in 1988 and still nothing happened. And then in 1989 we went full scale and all of a sudden we were being sued.

Transcript of Hearing Before Hon. Naomi R. Buchwald, Dated November 30, 1989 at 163 164 (included in Joint Appendix Before United States Court of Appeals for the Second Circuit, Action No. 90 7394 (“JA”) at 442 43).

In Berkshire’s papers in opposition to the original finding of contempt, Berkshire argued that (1) its use of the double diamond design was in good faith and (2) Berkshire detrimentally relied upon Aris’ delay in suing Berkshire. Defendant’s Memorandum of Law in Opposition to Plaintiff’s Contempt Motion at 15, 19 20 (JA at 238, 242 243). Although the Magistrate Judge’s first Report and Recommendation made a threshold finding against laches on other grounds, the first Report adopted Dweck’s above statements in its factual findings. Report and Recommendation Dated January 26, 1990 (“First Report”) at pages 7, 14 15. The Court of Appeals in turn incorporated these findings in its opinion. *See Aris Isotoner Inc. v. Berkshire Fashions, Inc.*, 924 F.2d 465, 466 (2d Cir.1991).

In the remand hearing before Magistrate Judge Buchwald, counsel for plaintiff, Aris Isotoner Gloves, Inc. (“Aris”), confronted Dweck with Berkshire’s answers to interrogatories to the effect that Berkshire sold over 50,000 dozen gloves bearing the double diamond design in 1987, and that such sales decreased in 1988. Tr. 122 125. Upon further questioning, Dweck admitted the his prior testimony had been incorrect, *i.e.*, that Berkshire’s sales of the gloves bearing the double diamond design were not insignificant in 1987, Tr. 126 127, and that Berkshire had not increased its production of gloves bearing the double diamond symbol in 1988. Tr. 127. He further admitted that the relevant figures that were available to him at the remand hearing had also been available to him at the previous hearing. Tr. 124. In light of the inadequately explained and obvious contradictions as to testimony of direct relevance to the issue of laches, we must conclude that Dweck fabricated testimony.²

¹ “Tr. refers to the remand hearing transcript before Magistrate Judge Buchwald dated June 24, 1991.

² We reject Berkshire’s original explanation not repeated in its reply papers that Dweck corrected his testimony in the hearing on laches, because he allegedly realized that in the initial hearing he had confused sales of the double diamond glove with sales of the inverted chevron glove. This

explanation is wholly inconsistent with Dweck's original, confident story of Berkshire's detrimental reliance as to production of the double diamond gloves, which gloves were, after all, the subject of the contempt proceedings. Moreover, Berkshire cites no portion of the record in which Dweck offers the above mentioned confusion as an excuse for the numerical discrepancy.

We further reject Berkshire's half hearted explanation raised in its reply papers for the first time that the discrepancy between Dweck's testimony in the original contempt hearing and that of the remand hearing may be due to the questioners' dividing sales by calendar years rather than by seasons at the hearings. Defendant's Memorandum Responding to Plaintiff's "Response to Magistrate's Report" at 5-6 n. 5. Berkshire fails to show how the division of the calendar affected Dweck's testimony in either hearing as to the trend of Berkshire's sales over the two and a half year period in question. More to the point, Dweck himself initially and without prompting spoke of the year "1987" as a shorthand for "'87/'88" at the hearing. Tr. 70. We find that Dweck's sophistication on a matter such as his own business' sales cycle precludes the possibility that he was confused on this issue at either hearing. Because Dweck himself stated that Berkshire gloves are first sold in late August or early September, and that glove sales peak between Thanksgiving and Christmas, Tr. 84-85, the increased sales for the "1989" sales period under either the calendar year or glove season terminology could only refer to sales in the period *after* June 12, 1989, the date that Aris filed its petition for contempt. Thus, Dweck's statement that he was sued by Aris after going "full scale" in 1989, JA 443, is manifestly false.

Finally, we reject Berkshire's implication that the Magistrate Judge deemed Dweck's fabrication a "molehill." The Magistrate Judge did not make a factual finding in the Remand Report as to the truthfulness of Dweck's statements. Rather, her decision in the Remand Report that the doctrine of unclean hands did not apply rested solely on a threshold legal determination that Dweck's statements could not be related to the issue of laches because his statements occurred during litigation rather than during the accrual of the action. As we will explain below, we do not adopt this legal conclusion.

***971** We disagree with the positions suggested in the Remand Report and advanced in Berkshire's reply papers before the Court that (1) Dweck's fabrications

do not directly relate to or affect the issue of laches and (2) because Dweck's fabrications occurred after the instigation of the lawsuit, they cannot be invoked to bar the defense of laches. Based on Dweck's false testimony itself, we find that Dweck made such testimony in order to create the impression that Berkshire detrimentally relied on the acquiescence of Aris in creating the double diamond line of gloves and that, once such a line became established in 1989, Aris sued Berkshire in bad faith in order to topple Berkshire's now-established line of gloves. A plaintiff's acquiescence and a defendant's consequential detrimental reliance constitute the very essence of laches,³ and thus Dweck's fabrications directly relate to the issue before the Court. Moreover, Dweck's false testimony gives the impression that Berkshire in good faith tailored its behavior to the initial demands of Aris. Were such testimony true, it would tend to defeat a finding of willfulness, which prevents the application of laches. *Harlequin Enterprises, Ltd. v. Gulf & Western Corp.*, 644 F.2d 946, 949 (2d Cir.1981).

³ See J. Thomas McCarthy, *Trademarks and Unfair Competition* § 31.5(B).

We disagree with Berkshire's argument that the discrepancy between the two testimonies is immaterial because they both assertedly support a finding of laches. Besides lacking any cited authority, this argument misses the point. The Court lacks complete confidence as to which if either of the two testimonies is correct. Even assuming that only Dweck's initial testimony is false, a finding of Berkshire's unclean hands on an issue for which it has sought and continues to seek equitable relief is sufficient to bar the prospect of such relief once unclean hands are discovered.⁴ Dweck's testimony provided a basis for a ruling in Berkshire's favor on the issue of detrimental reliance, which issue Berkshire pressed both in the initial contempt proceedings and in the instant proceeding.⁵ Certain elements of Dweck's testimony—Aris' allegedly feigned acquiescence and turncoat behavior—are directly supported and were intended to be supported by Dweck's fabricated numbers. Because of Berkshire's unclean hands, we find that it is immaterial that Dweck's revised testimony may support a finding of laches.

⁴ See *Keystone*, 290 U.S. at 244-245, 54 S.Ct. at 147 ("The governing principle is 'that whenever a party who, as actor, seeks to set the judicial machinery

in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of this court will be shut against him in limine. (citation omitted)).

5 Defendant's Memorandum Responding to Plaintiff's "Response to Magistrate's Report" at 10 n. 7.

*972 Berkshire's arguments notwithstanding, we are not here limited by a purported requirement that forces us to separate wrongdoing that occurs prior to the instigation of legal proceedings from that which occurs during legal proceedings. See *American Ins. Co. v. Lucas*, 38 F.Supp. 896, 921 922 (W.D.Mo.1940), *aff'd*, 129 F.2d 143 (8th Cir.), *cert. denied*, 317 U.S. 687, 63 S.Ct. 257, 87 L.Ed. 551 (1942) ("[I]t would be strange if a court of equity had power because of public policy for its own protection to throw out a case because it *entered* with unclean hands and yet would have no power to act if the unconscionable conduct occurred while the case was in court.") (emphasis in original); *C.C.S. Communication Control v. Sklar*, 1987 WL 12085, 1987 U.S. Dist. Lexis 4280 (S.D.N.Y.1987) (Conner, J.) (perjured testimony in instant proceedings precludes equitable relief); *cf. Smith v. Cessna Aircraft Co.*, 124 F.R.D. 103, 106 107 (D.Md.1989) (dismissing certain claims in non-equity context because of perjured testimony in the instant proceedings; collecting cases).⁶ We disagree with the premise of Berkshire's argument that unclean hands can only bar laches if the party asserting laches was either responsible for or fostered the plaintiff's delay. Moreover, cases cited by Berkshire in this regard themselves imply or expressly state that numerous kinds of misconduct can bar a finding of laches.⁷

6 The cases relied on by Berkshire to the contrary do not involve matters similar to the case at hand, in which a party has fabricated testimony directly related to the equitable issue in dispute before the Court. See *S.E.C. v. Electronics Warehouse, Inc.*, 689 F.Supp. 53, 73 (D.Conn.1988); *aff'd sub nom. S.E.C. v. Calvo*, 891 F.2d 457 (2d Cir.1989), *cert. denied*, 496 U.S. 942, 110 S.Ct. 3228, 110 L.Ed.2d 674 (1990) (court notes that the allegation of "inequitable conduct purportedly constituting unclean hands was conclusory and vague, that defendant did not claim that the SEC had gathered tainted evidence against him, and that equitable defenses against government agencies are strictly limited; accordingly, investigation by SEC that may incidentally harm defendant's business may not be plead as equitable defense to SEC injunctive action);

Cleveland Newspaper Guild v. Plain Dealer Pub. Co., 839 F.2d 1147, 1155 (6th Cir.1988) (court notes that there was no indication that the defendant's assertion of a legal defense against administrative process was raised in bad faith). Although *Electronics Warehouse* stated, as one reason against a finding of a relation between the alleged misconduct and the issue at hand, that courts cannot consider unclean hands that occur during the conduct of a lawsuit, we find the instant case to be broadly distinguishable on its facts and note above the existence of authorities that have considered situations that resemble the instant one.

7 See *Coleman v. Corning Glass Works*, 619 F.Supp. 950, 955 (W.D.N.Y.1985), *aff'd without op.*, 818 F.2d 874 (2d Cir.1987) (unclean hands may be found in cases of exceptional character, "such as where a defendant causes or fosters delay"); *Intertech Licensing v. Brown & Sharpe Mfg. Co.*, 708 F.Supp. 1423, 1439 (D.Del.1989) (cites *Coleman* and adds instances in which there is evidence of defendant's willful misconduct or fraud). *Potash Co. of America v. International Minerals & Chemical Corp.*, 213 F.2d 153, 155 (10th Cir.1954) is not to the contrary. We further disagree with Berkshire's argument that the doctrine of unclean hands especially applies to plaintiffs, as opposed to defendants. The cases that Berkshire cites do not state that a distinction exists as to the application of the unclean hands doctrine to equitable causes of action on the one hand and to equitable defenses on the other, and such a distinction is needlessly artificial and unwarranted under these circumstances.

In sum, we find that the above-cited fabricated testimony of Dweck, whose testimony has been deemed suspect in previous proceedings both in the instant lawsuit and in a prior matter before this Court,⁸ bars a finding of laches at the outset. "No court of equity ought to be required to listen to a man whose very presence suggests danger to the administration of justice and whose past conduct affecting the matter in litigation would cast doubt upon the ability of the court to ascertain from him the truth with respect thereto." *Mas v. Coca Cola Co.*, 163 F.2d 505, 511 (4th Cir.1947).

8 *Berkshire Fashions, Inc. v. Sara Lee Corp.*, 729 F.Supp. 21, 22 (S.D.N.Y.1990). Furthermore, we note that in a prior proceeding in the instant matter, Dweck adopted the statements of counsel that "the Court, presumably Judge Weinfeld, had found that Dweck had given false answers to interrogatories

and that he had difficulty being candid during his deposition. JA at 473 475.

II. The Remaining Objections to the Remand Report

The above finding of unclean hands precludes the necessity for further findings *973 regarding laches as to Berkshire's production of gloves bearing the double diamond design. However, even if such findings were necessary, we agree with and hereby adopt Magistrate Judge's Buchwald's conclusions as to the remainder of the Remand Report, including the finding that Berkshire's willful violation of the consent decree's prohibition of the production of the wrist strip in issue prevents the application of laches as a defense to Berkshire's production of gloves bearing a violative wrist strip.

Accordingly, Berkshire is enjoined from any further advertising, distribution, or sale of gloves bearing the

double diamond design or any other gloves bearing a violative wrist strip.

Berkshire is further enjoined to choose a distinctive mark on any future gloves sold.


Discovery shall be conducted before the Magistrate Judge in accordance with the findings and conclusions on damages set forth on pages 18 and 19 at ¶ 30 of the First Report. Aris shall have an award of its reasonable attorneys' fees and disbursements in accordance with the terms set forth on page 19 at ¶ 31 of the First Report.

SO ORDERED.

All Citations

792 F.Supp. 969

EXHIBIT 267

 KeyCite: *Yelow Fag Negative Treatment*
 Distinguished by *Stewart v. International Ass'n of Machinists and
 Aerospace Workers*, S.D.Tex., Apr. 28, 2014

149 F.3d 85

United States Court of Appeals,
 Second Circuit

James DUNLOP–McCULLEN, Plaintiff–Appellant,
 v.

LOCAL 1–S, AFL–CIO–CLC; Joseph
 Pascarella; Margaret Samuels; Gail Rogers;
 Gus Selino; Charles Diggs; William Malysko;
 Dina Pizzingrillo, Defendants–Appellees.

Docket No. 97–7850.

|
 Argued Feb. 27, 1998.

|
 Decided May 7, 1998.

Synopsis

Union member filed verified application pursuant to Labor-Management Reporting And Disclosure Act (LMRDA), seeking leave to file complaint against Union and seven union officials, alleging that officials violated their fiduciary duties by wastefully and improperly spending union's money, and seeking an accounting. The United States District Court for the Southern District of New York, *Peter K. Leisure, J.*, 1997 WL 272396, adopting report and recommendation of *Douglas F. Eaton*, United States Magistrate Judge, denied application. Union member appealed. The Court of Appeals, Parker, Circuit Judge, held that: (1) unclean hands may be a basis for determining plaintiff's "reasonable likelihood of success" under LMRDA section requiring good cause to file suit against union officials for breach of fiduciary duties; but (2) outcome of union member's bankruptcy proceeding, which resulted in discharge of his debt to union for costs of his campaign for union office election, did not provide evidence of member's unclean hands; and (3) member's failure to pay assessment of costs awarded to union in previous LMRDA case did not demonstrate unclean hands as would prevent member from being granted leave to file suit under LMRDA.

Vacated and remanded.

West Headnotes (9)

[1] Federal Courts

Labor and Employment

Court of Appeals would review de novo the district court's denial of leave to file complaint under Labor-Management Reporting And Disclosure Act (LMRDA) as matter of law. Labor Management Reporting and Disclosure Act of 1959, § 501(b), 29 U.S.C.A. § 501(b).

1 Cases that cite this headnote

[2] Labor and Employment

Judicial review or intervention

Unclean hands may be a basis for determining plaintiff's "reasonable likelihood of success" under LMRDA section requiring good cause to file suit against union officials for breach of fiduciary duties; determination of plaintiff's unclean hands is appropriate factor, though not necessarily a dispositive one, to be used when deciding whether to grant plaintiff leave to file complaint. Labor Management Reporting and Disclosure Act of 1959, § 501(b), 29 U.S.C.A. § 501(b).

15 Cases that cite this headnote

[3] Equity

He Who Comes Into Equity Must Come with Clean Hands

Doctrine of unclean hands is based on principle that, since equity tries to enforce good faith in defendants, it no less stringently demands the same good faith from plaintiff.

17 Cases that cite this headnote

[4] Equity

He Who Comes Into Equity Must Come with Clean Hands

Equity

🔑 [Conduct with respect to different transactions](#)

While equity does not demand that its suitors shall have led blameless lives, as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue.

[6 Cases that cite this headnote](#)

[5] **Labor and Employment**

🔑 [Judicial review or intervention](#)

Outcome of union member's bankruptcy proceeding, which resulted in discharge of his debt to union for costs of his campaign for union office election, did not provide evidence of member's unclean hands which would prevent his "reasonable likelihood of success" in breach of fiduciary duties action against union officials under LMRDA, and thus prior bankruptcy case did not bar member from obtaining leave to file complaint under LMRDA; after full trial, bankruptcy court found that member was guilty of no wrongdoing that might disentitle him to discharge of debt. Labor Management Reporting and Disclosure Act of 1959, § 501(b), 29 U.S.C.A. § 501(b).

[Cases that cite this headnote](#)

[6] **Labor and Employment**

🔑 [Judicial review or intervention](#)

Plaintiff's failure to pay assessment of costs awarded to union by court order in previous case may be evidence of unclean hands, precluding LMRDA proceeding for breach of fiduciary duties, where plaintiff alleges that officers of same union wasted its assets in violation of LMRDA. Labor Management Reporting and Disclosure Act of 1959, § 501(a), 29 U.S.C.A. § 501(a).

[Cases that cite this headnote](#)

[7] **Labor and Employment**

🔑 [Judicial review or intervention](#)

Union member's failure to pay assessment of costs awarded to union in previous LMRDA case did not demonstrate unclean hands as would prevent member from being granted leave to file suit against union officials under LMRDA, since union had outstanding debts to member in form of punitive damages and attorney fees from member's bankruptcy proceeding that roughly equaled what member owed union in costs from appellate proceeding in previous LMRDA case, and he received his bankruptcy judgment against union more than a year before union received its judgment for costs against him. Labor Management Reporting and Disclosure Act of 1959, § 501(a), 29 U.S.C.A. § 501(a).

[1 Cases that cite this headnote](#)

[8] **Labor and Employment**

🔑 [Judicial review or intervention](#)

Because international union was not party to current LMRDA proceeding, any costs awarded to it in previous LMRDA case had little bearing on determination of union member's unclean hands vis-a-vis new action against local union. Labor Management Reporting and Disclosure Act of 1959, § 501(a), 29 U.S.C.A. § 501(a).

[Cases that cite this headnote](#)

[9] **Equity**

🔑 [He Who Comes Into Equity Must Come with Clean Hands](#)

In determining whether doctrine of unclean hands bars equitable remedy, courts are permitted to weigh wrongdoing of plaintiff against wrongdoing of defendant, and, where wrongful conduct of both plaintiff and defendants are remarkably similar in quality and extent, equity requires court to look to whether defendants' wrongdoing alleged in complaint is of greater magnitude than plaintiff's wrongdoing.

[20 Cases that cite this headnote](#)

Attorneys and Law Firms

*86 James Dunlop McCullen, Pro Se, New York City.

(Malcolm A. Goldstein, O'Donnell, Schwartz, Glanstein & Rosen, L.L.P., New York City, of counsel and on the brief, for Defendants Appellees.)

Before WINTER, Chief Judge, PARKER, Circuit Judge, and SCHWARZER, * District Judge.

* The Honorable William W Schwarzer, of the United States District Court of the Northern District of California, sitting by designation.

Opinion

PARKER, Circuit Judge.

James Dunlop McCullen, *pro se*, appeals from a judgment of the United States District Court for the Southern District of New York (Peter K. Leisure, *Judge*) denying him leave to file a verified complaint pursuant to 29 U.S.C. § 501(b). We vacate the judgment and remand to the district court for proceedings consistent with this opinion.

I. BACKGROUND

On January 13, 1997, Dunlop McCullen sought leave to file verified complaint pursuant to § 501(b) of the Labor Management Reporting and Disclosure Act (“LMRDA”) of 1959, 29 U.S.C. § 501(b), against Local 1 S, AFL CIO CLC (the “Union” or the “Local”) and seven union officials: Joseph Pascarella, President; Margaret Samuels, Executive Vice President; Gail Rogers, Administrator; Gus Selino, Trustee; Charles Diggs, Trustee; William Malysko, Sergeant at Arms; and Dina Pizzingrillo, member and Associate Shop Steward (collectively “Defendants”). In his application to the district court, Dunlop McCullen, chairperson of the Union's Executive Board, contended that defendants had breached their fiduciary duties by wastefully and improperly spending the Union's *87 money, and that his formal complaint within the Union about these breaches had remained unresolved after four months.

Plaintiff sought an accounting, compensatory damages and various other equitable relief.

On March 7, 1997, Magistrate Judge Douglas F. Eaton, to whom the case had been referred, issued a Report and Recommendation (“Report”) advising that Dunlop McCullen be denied leave to file the verified complaint because “the plaintiff himself has wasted union funds, and therefore lacks the clean hands necessary for a plaintiff to pursue an equitable action” of an accounting. Report at 1. Judge Eaton pointed to the fact that Dunlop McCullen had brought a prior *pro se* action against the union and two of the same officials sued in the instant action (Pascarella and Samuels), which the district court dismissed by summary judgment in favor of the defendants. Judge Eaton stated that in the prior case “the union mailed [Dunlop McCullen's] campaign literature at a cost of \$1,601.50” and after his unsuccessful campaign for union officer he “avoided paying this [campaign] debt [to the Union] by filing [for] personal bankruptcy.” Report at 2. Furthermore, Judge Eaton noted that this Court had affirmed the grant of summary judgment in the previous case and taxed appellate costs in favor of the union in the amount of \$1,037.76, which “[a]s far as [he could] tell, plaintiff ha[d] not paid.” Report at 2. As a result, Judge Eaton found:

[P]laintiff has not shown a reasonable likelihood of success, because he lacks the clean hands which a court of equity requires for a plaintiff to pursue an action for an accounting. As noted above, he has cost the union \$1,601.50, plus \$1,037.76, plus thousands of dollars in legal fees. If his allegations had any merit, there should be a plaintiff who could come to the court of equity with clean hands, and whose past conduct would give some assurance that he or she truly represented the interests of the union members.

Report at 3. In support of his contention that plaintiff requires “clean hands” to proceed, Judge Eaton analogized a section 501(b) action against a union to a

“derivative action against a corporation,” in which similar equitable considerations have been applied to a plaintiff seeking to sue. Report at 3.

On March 28, 1997, Dunlop McCullen filed a verified objection to the Report, essentially alleging that: (1) the Report unfairly “prejudged” his case without any relevant evidence; (2) as an officer of the Union, he was obliged to bring the instant action or violate his duty to the Union members; (3) the prior case concerned different allegations and should not have been relied upon by Judge Eaton to determine likelihood of success in the instant case; and (4) defendants, not plaintiff, have unclean hands because “Plaintiff has not refused to pay the judgment [of costs] but there are mitigating circumstances concerning what the defendants, Local 1 S[,] owes the plaintiff.” As to the last objection, plaintiff explained that a Bankruptcy court ordered Local 1 S to pay him \$800 in damages “because of their wanton and willful violations of the Automatic Stay Provision” and he indicated that he would be willing to pay the difference in the two judgments.

In response to Dunlop McCullen's objections, the Union contended that Dunlop McCullen's application should have been denied because the Union's internal Trial Committee was already conducting an investigation into the same issues he raised in his verified complaint. The Union also addressed Dunlop McCullen's allegations of its officials' financial impropriety in some detail. In reply to the Union's response, Dunlop McCullen argued that the Union's attorney could not represent the Union officers based on a conflict of interest. Further, he contended that the Trial Committee was an inadequate forum to pursue his claims under the LMRDA and the Union's constitution and he countered the Union's arguments dismissing Dunlop McCullen's allegations.

In a memorandum order, Judge Leisure made a *de novo* determination, as required by 28 U.S.C. § 636(b) (1). He determined that the Report was “legally correct and proper.” *Dunlop McCullen v. Local 1 S, AFL CIO CLC*, No. 97 Civ. 0195, 1997 WL 272396, at *1 (S.D.N.Y. May 21, 1997). The district court held that Dunlop McCullen's *88 objections to the Report were “not relevant to the question whether leave should be granted to file the instant action.” *Id.* The court found that the Report permissibly relied upon the decision in Dunlop McCullen's previous case “only to the extent of its finding that plaintiff had filed for personal bankruptcy in order

to avoid paying a debt to the Union and that plaintiff had caused the Union to incur legal fees (including the costs of an appeal ... which he apparently never paid).” *Id.* Further, the district court found that the defendants' unclean hands were “not relevant to the question whether plaintiff lacks unclean hands.” *Id.* The district court quoted the Report in calling for a plaintiff in this case (as opposed to Dunlop McCullen) whose “past conduct would give some assurance that he or she truly represented the interests of the union members.” *Id.* (quoting Report at 3). Moreover, the district court found that the Report did not unfairly “prejudge” plaintiff's case because the district court was “statutorily required to render an evaluation of the case” and “in light of the equitable doctrine of unclean hands and its effect on plaintiff's likelihood of success’ plaintiff's objections [were] not persuasive.” *Id.* at *2. Finally, the district court refused to reach the issue of the Union attorney's conflict of interest finding that the issue was moot because Dunlop McCullen was denied leave to serve his complaint. *Id.* On June 24, 1997, judgment was entered pursuant to the district court's order. Dunlop McCullen filed a timely notice of appeal.

II. DISCUSSION

On appeal, Dunlop McCullen contends that the district court erred in determining that he had unclean hands barring him from suing under § 501(b). Principally, he argues that: (a) the district court improperly relied on costs taxed against him in favor of the Retail and Wholesale Department Store Union, a defendant in his prior litigation that is not party to the instant litigation; (b) the district court wrongfully relied on the nature of Dunlop McCullen's bankruptcy proceedings in determining whether he had unclean hands; (c) the district court should have considered defendants' unclean hands; (d) the district court and the magistrate judge improperly relied on his prior lawsuit. Finally, Dunlop McCullen contends that he satisfied the “good cause” requirement of § 501(b) by alleging misuse of Union property, questionable accounting procedures, manipulation of financial affairs, non-reporting of the Union's financial affairs, the misappropriation of funds, destruction of union records, “fraudulent” holding of a shop steward position, and non-reporting of the status of “Local 1 S Realty.”

Defendants counter that the district court was correct in finding that Dunlop McCullen has unclean hands precluding his suit under § 501(b). Further, they contend that, even if Dunlop McCullen's past conduct were not found to be suspect, the allegations in his complaint were conclusory, meritless, or barred by the doctrine of res judicata. Finally, Defendants allege that the Union's internal Trial Committee, which is currently responding to Dunlop McCullen's charges, will "moot" the need to receive his complaints in federal court. We need not address these arguments because the district court did not reach these issues in making its decision.

A. Unclean Hands and Section 501(b) of the LMRDA

[1] We review *de novo* the district court's denial of leave to file a complaint under section 501(b) as a matter of law. See *Lopresti v. Terwilliger*, 126 F.3d 34, 39 (2d Cir.1997) (finding, generally, that questions of law are reviewed *de novo*). Section 501(b) provides in relevant part:

When any officer, agent, shop steward, or representative of any labor organization is alleged to have violated the duties declared in subsection (a) of this section and the labor organization or its governing board or officers refuse or fail to sue or recover damages or secure an accounting or other appropriate relief within a reasonable time after being requested to do so by any member of the labor organization, such member may sue such officer, agent, shop steward, or representative in any district court of the United States or in any State court of competent jurisdiction to recover *89 damages or secure an accounting or other appropriate relief for the benefit of the labor organization. No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown, which application may be made *ex parte*.

29 U.S.C. 501(b). Subsection (a) provides that union officials have a general fiduciary duty to the union.

¹ Section 501(a) provides that union officials have a duty to the labor organization:

to hold its money and property solely for the benefit of the organization and its members and to manage, invest, and expend the same in accordance with its constitution and bylaws and any resolutions ..., to refrain from dealing with such organization as an adverse party or in behalf of an adverse party in any matter connected with their] duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization, and to account to the organization for any profit received by him in whatever capacity in connection with transactions conducted by him or under his direction on behalf of the organization.

29 U.S.C. § 501(a).

This Court has found that the "good cause" required for leave to sue under § 501(b) serves two policies: "[1] supervision of union officials in the exercise of their fiduciary obligations and [2] protection, through a preliminary screening mechanism, of the internal operation of unions against unjustified interference or harassment." *Dinko v. Wall*, 531 F.2d 68, 75 (2d Cir.1976). Accordingly, we have construed "good cause" in § 501(b) "to mean that plaintiff must show a reasonable likelihood of success and, with regard to any material facts he alleges, must have a reasonable ground for belief in their existence." *Id.*²

² We note that other Circuits have declined to adopt such a heightened standard for "good cause" in § 501(b). See *Loretangeli v. Critelli*, 853 F.2d 186, 191 (3d Cir.1988); *Horner v. Ferron*, 362 F.2d 224, 229 (9th Cir.1966); *George v. Local Union No. 639*, 98 F.3d 1419, 1422 (D.C.Cir.1996); *Erkins v. Bryan*, 663 F.2d 1048, 1053 (11th Cir.1981).

[2] In this case, we must determine whether the district court, in determining plaintiff's "reasonable likelihood of success," properly anticipated the equitable defense of "unclean hands" based on costs that defendants incurred in defending a prior lawsuit brought by the same plaintiff. As a preliminary matter, we agree with the district court that unclean hands may be a basis for determining a plaintiff's "reasonable likelihood of success" under section

501(b). The district court, however, cited no case in which the unclean hands doctrine has barred a filing under section 501(b). Instead, the Report analogized Dunlop McCullen to a plaintiff in a derivative action against a corporation, whose case was dismissed because of plaintiff's unclean hands. Report at 3.³ The comparison of a § 501(b) action to a shareholder derivative action is apt. See *Phillips v. Osborne*, 403 F.2d 826, 831 (9th Cir.1968); *Nelson v. Johnson*, 212 F.Supp. 233 (D.Minn.), *aff'd*, 325 F.2d 646 (8th Cir.1963) (finding support for the analogy between shareholder derivative actions and union member actions under section 501(b) in the legislative history of the LMRDA). In our view, if a district court determines that a plaintiff seeking leave to file a complaint under § 501(b) will likely be faced with the equitable defense of unclean hands, then the district court may factor this determination into its decision upon the plaintiff's reasonable likelihood of success. Therefore, we think that a determination of a plaintiff's unclean hands is an *90 appropriate factor though not necessarily a dispositive one to be used when deciding whether to grant a plaintiff leave to file a complaint under section 501(b).

³ We note that the magistrate judge cited several cases in support of the proposition that federal courts will prevent shareholders from bringing derivative actions when they have had unclean hands. Report at 3 (citing *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 549, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949); *Recchion, Westinghouse Corp. v. Kirby*, 637 F.Supp. 1309, 1315-16 (W.D.Pa.1986); *Ryan v. Aetna Life Ins. Co.*, 765 F.Supp. 133, 135 (S.D.N.Y.1991) (Leisure, J.)). These cases are of questionable relevance to the instant case in determining whether the extent and type of Dunlop McCullen's prior conduct amounts to unclean hands which would cause the district court to deny him leave to file his complaint under § 501(b). In *Cohen*, the statute in issue required small shareholders seeking to litigate derivative actions to give security for a defendant's litigation expenses but did not completely bar access to the courts based on a failure to satisfy this posting. In *Recchion*, the plaintiff's unclean hands arose from his alleging in his complaint misconduct for which he had personally been responsible. 637 F.Supp. at 1315. And, *Ryan* only notes the importance of scrutinizing a shareholder plaintiff's conflicts of interest before permitting him or her to proceed with such litigation. 765 F.Supp. at 135.

[3] [4] Thus, we must determine whether Dunlop McCullen's failure to pay costs taxed against him in his prior action against the Union constitutes unclean hands. The doctrine of unclean hands is based on the principle that "since equity tries to enforce good faith in defendants, it no less stringently demands the same good faith from the plaintiff." 11A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 2946, at 108 (1995) (quotation marks and citation omitted). We have held, however, that "[m]isconduct ... unrelated to the claim to which it is asserted as a defense, does not constitute unclean hands." *A.H. Emery Co. v. Marcan Prods. Corp.*, 389 F.2d 11, 18 (2d Cir.1968) (quotations and citations omitted). Moreover, "while equity does not demand that its suitors shall have led blameless lives, as to other matters, it does require that they shall have acted fairly and without fraud or deceit as to the controversy in issue." *Precision Instrument Mfg. Co. v. Automotive Maint. Mach. Co.*, 324 U.S. 806, 814-15, 65 S.Ct. 993, 89 L.Ed. 1381 (1945) (quotation marks and citation omitted); see also *Warner Bros. Inc. v. Gay Toys, Inc.*, 724 F.2d 327, 334 (2d Cir.1983) ("[T]he defense of unclean hands applies only with respect to the right in suit."). Further, "[t]he unclean hands defense is not an automatic or absolute bar to relief; it is only one of the factors the court must consider when deciding whether to exercise its discretion and grant an injunction." 11A Wright, Miller, Kane, *Federal Practice and Procedure: Civil 2d* § 2946, at 111. "The doctrine of unclean hands also may be relaxed if defendant has been guilty of misconduct that is more unconscionable than that committed by plaintiff." *Id.* § 2946, at 112.

One district court has held that a § 501(b) plaintiff's involvement in prior litigation is an insufficient ground for finding absence of good cause. See *Woods v. Local No. 12 Sheet Metal Workers Int'l Ass'n*, 438 F.Supp. 578, 581 (W.D.Pa.1977). Without invoking the doctrine of unclean hands explicitly, the defendants in *Woods* asserted that a plaintiff's prior LMRDA litigation, which was found meritless, precluded a finding of good cause under section 501(b). Because the plaintiffs had alleged colorable claims that dealt with issues different from those in the prior litigation, however, the court "deem[ed] it appropriate to grant plaintiffs access to [the] court." *Id.* The outcome in *Woods*, however, while instructive, does not ultimately resolve the issues in this case because the court's conclusion in *Woods* did not employ this Court's heightened good cause requirements for § 501(b) cases. We

agree with the court in *Woods*, however, that a plaintiff may not be denied leave to file a complaint under § 501(b) where plaintiff alleges issues different from those raised in a prior similar action dismissed on the merits. Therefore, Dunlop McCullen's previous case against the Union that, as we discuss below, involved substantially different allegations, should not act as a bar to proceeding here under § 501(b).

B. *The Impact of Dunlop McCullen's Previous Cases*

On February 24, 1994, Dunlop McCullen filed a *pro se* complaint (the “1994 Complaint”) in the district court against the Union, two of the individual defendants in this action, and the Retail Wholesale and Department Store Union AFL CIO (the “International”). See *Dunlop McCullen v. Local 1 S RWDSU AFL CIO*, No. 94 Civ. 1254, 1994 WL 478495 (S.D.N.Y. Sept. 1, 1994) (finding that Dunlop McCullen's complaint survives defendants' Fed.R.Civ.P. 12(e) motion for a more definite statement); *Dunlop McCullen v. Local 1 S RWDSU AFL CIO*, No. 94 Civ. 1254, 1996 WL 3940 (S.D.N.Y. Jan. 3, 1996) (granting defendants' motion for summary judgment). His complaint contained several causes of action including violations of § 301 of the National Labor Relations Act, 29 U.S.C. § 185, and various sections of LMRDA, 29 U.S.C. §§ 411, 501(b), & 529. *Dunlop McCullen*, 1996 WL 3940, at *1.

The 1994 Complaint was based on the following facts. In September 1992, Dunlop McCullen became a candidate for Executive Vice President of the Union. *91 1996 WL 3940, at *1. Pursuant to Department of Labor rules, he was entitled, at his own expense, to have the union mail his campaign literature. *Id.* On December 21, 1992, he was billed \$1601.50, the amount the Union incurred from his election mailing. *Id.* Dunlop McCullen lost the election.

In April 1993, Dunlop McCullen filed for bankruptcy. On November 24, 1993, the Union commenced an adversary proceeding against Dunlop McCullen, under § 523(a) of the Bankruptcy Code (the “Code”), objecting to the discharge of the debt owed by him to the Union under §§ 727(a)(4)(A) and (D) of the Code. See *In re Dunlop McCullen*, No. 1 93 12859 352, at 1 (Bankr.E.D.N.Y. July 31, 1995) (hereinafter “Order Dismissing Adversary Proceeding”). Dunlop McCullen counterclaimed alleging that the Union violated the automatic stay provisions of § 362(a) of the Code and moved to dismiss the adversary proceeding. *Id.* at 1 2.

In September 1993, Dunlop McCullen was elected the Queens Chairperson, entitled to sit on the Executive Board (the “Board”) of the Union. *Dunlop McCullen*, 1996 WL 3940, at *1. On September 23, 1993, the Board voted to void Dunlop McCullen's election because, according to the Union Constitution, he was ineligible to be elected officer. *Id.* To be eligible for any Union office, members have to be in continuous good standing for twelve months prior to being nominated for elective office. *Id.* at *2. According to the Union, in January 1993, Dunlop McCullen ceased to be a member in good standing when he failed to pay the Union for mailing his 1992 campaign literature. *Id.*

In the 1994 Complaint, he alleged that when the Board voided his 1992 election and removed him from office in September 1993, he was “disciplined” without a hearing required under LMRDA, 29 U.S.C. § 411(a)(5), 529, and under the Local and International Unions' Constitutions. *Id.* at *2. Secondly, Dunlop McCullen alleged that the Union failed to process his grievances fairly, circumvented its obligations under collective bargaining agreements, committed fraud in persuading members to accept a new collective bargaining agreement, libeled him, and violated his rights to free speech and due process. Finally, similar to the instant action, Dunlop McCullen claimed that the Union breached its fiduciary duties by allowing the non-member daughter of Samuels, a union official, to make use of a car rented by Local 1 S for Samuels, in violation of 29 U.S.C. § 501(b).

Meanwhile, on July 26, 1994, the Bankruptcy Court held a trial to resolve the adversarial proceeding initiated by the Union and Dunlop McCullen's counterclaims; both parties were represented by counsel. Almost a year later, on July 31, 1995, the bankruptcy court found from the evidence that “there was no false oath or account or withheld information such as would bar discharge” of the debt and that “Local 1 S was not fraudulently induced to incur the Debtor's debt to it within Section 523(a)(2)(A).” Order Dismissing Adversary Proceeding, at 2. Furthermore, the bankruptcy court held that “Local 1 S had willfully violated the automatic stay” provisions. *Id.* As a result, the bankruptcy court ordered the Union to pay Dunlop McCullen \$800 in punitive damages and fees and disbursements to his attorney under Section 362(h) for willful violation of the automatic stay. *Id.* at 3. There

is no evidence that these sums have been paid to Dunlop McCullen by the Union.

In a separate order, the bankruptcy court ordered “that Local 1 S will treat the Debtor as though he had been in good standing continuously for purposes of seniority, advancement, elective office, and any similar purpose” and that “Local 1 S will restore Debtor to his elected office as Chairman of the Macy’s Queens Store for the remainder of the term for which he was elected” in 1992. *In re Dunlop McCullen*, No. 1 93 12859 352, at 2 (E.D.N.Y. July 31, 1995) (hereinafter “Order Directing Remedial Relief”). Further, the bankruptcy court determined that Dunlop McCullen “is now and has always been a member ... in good standing ... entitled to all the privileges ... attendant thereto, including his ... right to stand for future election.” *Id.* at 2. As a result, Dunlop McCullen regained his position on Local 1 S’s Executive Board a position he still holds.

*92 In the district court proceedings, also in late July 1995, defendants filed motions for summary judgment on all of Dunlop McCullen’s claims, which were granted on January 3, 1996. The district court held that under the LMRDA and the Union’s Constitution “removal from office did not constitute discipline” requiring due process and that the Union’s “good standing requirement” was not shown to be unreasonable or unevenly applied to Dunlop McCullen. *Dunlop McCullen*, 1996 WL 3940, at *2. In analyzing Dunlop McCullen’s second set of allegations individually, the district court found them each to be without merit. Lastly, the district court ruled that Dunlop McCullen failed to adduce evidence sufficient “to show that plaintiff formally requested the Executive Board of Local 1 S to institute legal proceedings against Samuels.” *Id.* at *4. On February 22, 1996, judgment was entered dismissing the complaint in favor of defendants.

Dunlop McCullen appealed to this Court, which affirmed the district court by summary order. *Dunlop McCullen v. Local 1 S RWDSU AFL CIO*, No. 96 7104, 1996 WL 614814 (2d Cir. Oct. 25, 1996). On November 8, 1996, the International and the Local each submitted a separate statement of costs in the amounts of \$1037.76 and \$1063.83, respectively, but only one was filed. On January 10, 1997, however, the Clerk of this Court filed an amended order for bills of costs for the International and the Local in the amounts of \$929.66 and \$946.65, respectively. According to the records of the Clerk of

the Court for the Southern District of New York, no satisfaction of judgment has been filed on either of these awards.

[5] After analyzing Dunlop McCullen’s previous cases involving the Union, we find that the plaintiff does not have unclean hands which would bar him from obtaining leave to file a complaint under section 501(b) of the LMRDA. First, the magistrate judge’s Report overstates the causal connection between Dunlop McCullen’s bankruptcy proceeding and his failure to pay his campaign debt to the Union. The district court in the previous case made no finding that Dunlop McCullen filed for bankruptcy with the express and sole purpose of avoiding his debt to the Union. On the contrary, after a full trial on that very issue, in which the Union’s interests were duly represented by counsel, the bankruptcy court found that Dunlop McCullen was guilty of no wrongdoing that might disentitle him to a discharge of the debt. The bankruptcy court even went so far as to order that Dunlop McCullen be reinstated to his elective office. We think that it would be inappropriate here to second-guess the bankruptcy court by reaching our own determination that Dunlop McCullen was bent on wasting the Union’s assets in declaring bankruptcy which discharged his debt to the Union. Therefore, we find that the outcome of Dunlop McCullen’s previous bankruptcy proceeding does not provide evidence of plaintiff’s unclean hands which would prevent his “reasonable likelihood of success” in the instant § 501(b) proceeding.

[6] [7] [8] In contrast, we think that a plaintiff’s failure to pay an assessment of costs awarded to the Union (by prior order of this Court) in a previous case may be evidence of unclean hands where the plaintiff alleges that officers of the same Union wasted its assets in violation of 29 U.S.C. § 501(a). Nonetheless, the Union has outstanding debts to Dunlop McCullen in the form of punitive damages and attorney’s fees from the bankruptcy proceeding that roughly equal what Dunlop McCullen owes the Union in costs from the appellate proceeding in the previous case. Plus, Dunlop McCullen received his bankruptcy judgment against the Union in July 1995, more than a year before the Union received its judgment for appellate costs against him in November 1996. Thus, any evidence that Dunlop McCullen “wasted the union’s funds” in the amount taxed in appellate court costs should be counterbalanced by bankruptcy court damages and fees due to him from the Union. Further, Dunlop

McCullen is correct that because the International Union is not a party to the instant proceeding any costs awarded to it in the previous case have little bearing on our determination of his unclean hands vis a vis a new action against the Local Union.

[9] As discussed above, in determining whether the doctrine of unclean hands bars an equitable remedy, courts are permitted to *93 weigh the wrongdoing of the plaintiff against the wrongdoing of the defendant. 11A Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, *Federal Practice and Procedure: Civil 2d* § 2946, at 112. Where, as here, the wrongful conduct of both the plaintiff and the defendants are remarkably similar in quality and extent, equity requires this Court to look to whether the defendants' wrongdoing alleged in the complaint is of a greater magnitude than the plaintiff's wrongdoing. Admittedly, more than a few of the claims that Dunlop McCullen alleged are not actionable under § 501(b). For example, § 501(b) provides no basis for his claims regarding the "sweetheart" deal with Macy's or the improper tenure of Pizzingrillo as shop steward. See *Gurton v. Arons*, 339 F.2d 371, 375 (2d Cir.1964) ("[Section 501] applies to fiduciary responsibility with respect to the money and property of the union and ... it is not a catch-all provision [permitting suit] on any ground of misconduct."). Dunlop McCullen, however, has alleged claims that "centrally challenge [the] misuse of union 'money and property.'" *Guzman v. Bevona*, 90 F.3d 641, 646 (2d Cir.1996) (quoting 29 U.S.C. § 501(a)). Especially in view of the fact that any wrongdoing attributable to the plaintiff is counter-balanced by that attributable to the defendants, the additional alleged misdeeds of defendants are sufficient to permit this litigation to proceed further. Therefore, Dunlop McCullen should not be prevented

from being granted leave to file suit under § 501(b) based on the unclean hands doctrine. Accordingly, we remand this case for further consideration by the district court consistent with this opinion.⁴

⁴ We note that at oral argument no attorney appeared for the defendants. While this non appearance has no bearing on our decision here, Dunlop McCullen represented to this Court it was attributable to the fact that the Executive Board had been dissolved as a result of internal inquiries initiated by Dunlop McCullen. If Dunlop McCullen's representations are accurate, then the board's dissolution may bolster Dunlop McCullen's § 501(b) case. We also note that Dunlop McCullen makes allegations of serious wrongdoing in his complaint that, based on their number and complexity, might be pursued with greater success with the assistance of an attorney, especially because § 501(b) provides for attorney's fees to be awarded to successful plaintiffs. We urge Dunlop McCullen and the district court to give consideration to appointment of counsel in the event that leave to file a complaint is not barred on some ground not discussed herein.


III. CONCLUSION

We order that the judgment of the district court be vacated, and this case be remanded for further consideration consistent with this opinion.

All Citations

149 F.3d 85

EXHIBIT 268

 KeyCite: *Yelow Fag Negative Treatment*
 Disputed by *Gdatex, S.r.L. v. Campanello Imports, Ltd.*,
 S.D.N.Y., October 6, 1999

939 F.Supp. 287

United States District Court,
 S.D. New York.

The ESTATE OF John LENNON,
 by its duly empowered Executrix,
 Yoko Ono LENNON, Plaintiff,

v.

SCREEN CREATIONS, LTD.
 and Leggoons, Inc., Defendants.
 BAG ONE ARTS, INC., Plaintiff,

v.

LEGGOONS, INC., Defendant.

Nos. 95 CIV 8872 (HB), 96 CIV 0020 (HB).

|
 Sept. 9, 1996.

Synopsis

Estate of famous musician and estate's licensee, which had contracted with clothing manufacturer to allow use of musician's name, signature, and license, brought action against manufacturer, and manufacturer asserted counterclaims. Estate and licensee moved for preliminary injunction against use of images and for summary judgment on issue of termination of agreement, and also moved to dismiss counterclaims. The District Court, *Baer, J.*, held that: (1) allegations by manufacturer failed to state claim for tortious interference with contract; (2) fraud claim of manufacturer would be dismissed by default; (3) motion for summary judgment as to termination of agreement would be dismissed as premature; and (4) doctrine of unclean hands barred grant of injunction to estate and licensee.

Motion to dismiss granted, and motion for summary judgment and preliminary injunction denied.

West Headnotes (12)

[1] Torts

 Particular cases

Agreement, under which clothing manufacturer was granted by estate of famous musician exclusive right and license in United States and Canada, Mexico, and the Caribbean to use signature of musician and artwork created by musician which was selected by manufacturer and approved by estate, and which provided in separate section that no right to use likeness of musician was granted with exception of photograph described in attachment to agreement, granted manufacturer exclusive right to use photograph on clothing.

Cases that cite this headnote

[2] Federal Civil Procedure

 Matters considered in general

Federal Civil Procedure

 Motion

Where matters outside of pleadings are presented in connection with motion to dismiss for failure to state claim, court may either exclude additional submissions and decide motion on pleadings only, or convert motion to one for summary judgment; in considering whether to convert motion, court considers if conversion is likely to facilitate disposition of action, and when extra pleading material is comprehensive and will enable rational determination of summary judgment motion, court is likely to accept it, but where it is scanty, incomplete, or inconclusive, court probably will reject it. *Fed.Rules Civ.Proc.Rules 12(b), 56, 28 U.S.C.A.*

3 Cases that cite this headnote

[3] Federal Civil Procedure

 Affidavits

Acceptance of affidavits submitted by estate of famous musician in connection with motion to dismiss claims asserted by clothing manufacturer which arose from agreement for use of likeness of musician on clothing was inappropriate, and motion was considered as motion to dismiss rather than as motion for summary judgment, where affidavits were

scanty and inconclusive and would not assist court in resolving motion as one for summary judgment. [Fed.Rules Civ.Proc.Rules 12\(b\), 56, 28 U.S.C.A.](#)

[2 Cases that cite this headnote](#)

[4] Federal Civil Procedure

🔑 [Clear or certain nature of insufficiency](#)

Federal Civil Procedure

🔑 [Matters deemed admitted; acceptance as true of allegations in complaint](#)

Court in judging legal sufficiency of complaint against motion to dismiss for failure to state claim must accept all factual allegations in complaint as true, and may only dismiss action where it appears beyond doubt that plaintiff can prove no set of facts in support of his claim for relief. [Fed.Rules Civ.Proc.Rule 12\(b\)\(6\), 28 U.S.C.A.](#)

[Cases that cite this headnote](#)

[5] Torts

🔑 [Contracts](#)

Under New York law, to state claim for tortious interference with contract, plaintiff must allege existence of valid contract, that defendant had knowledge of contract, that defendant intentionally procured breach of that contract, and that plaintiff was damaged by breach.

[Cases that cite this headnote](#)

[6] Torts

🔑 [Pleading](#)

Under New York law, allegations by clothing manufacturer, which had contracted with licensee of estate of famous musician for use of musician's signature, likeness, and artwork in manufacture of clothing, that estate had authorized third persons to use image, signature, and artwork on clothing in derogation of exclusive license were insufficient to state claim for tortious interference with contract; no allegation was made that estate acted with intent to procure

breach of contract between licensee and manufacturer.

[Cases that cite this headnote](#)

[7] Federal Civil Procedure

🔑 [Motion and proceedings thereon](#)

Motion to dismiss fraud claim asserted against estate of famous musician by clothing manufacturer which had contracted with licensee of estate for use of musician's signature, name, and likeness on clothing was granted by default where manufacturer did not respond to motion to dismiss on that point, as required by local rules, but rather acted as if motion had not been brought. [Fed.Rules Civ.Proc.Rule 9\(b\), 28 U.S.C.A.](#)

[Cases that cite this headnote](#)

[8] Federal Civil Procedure

🔑 [Time for consideration of motion](#)

Motion for summary judgment brought by estate of famous musician, and licensee of estate, which sought determination that agreement between licensee and clothing manufacturer for use of musician's signature, name, and likeness had terminated was denied to allow time for further discovery, with leave to renew motion. [Fed.Rules Civ.Proc.Rule 56\(f\), 28 U.S.C.A.](#)

[2 Cases that cite this headnote](#)

[9] Injunction

🔑 [Extraordinary or unusual nature of remedy](#)

Injunction

🔑 [Grounds in general; multiple factors](#)

Preliminary injunction is extraordinary and drastic remedy which should not be routinely granted, and to obtain preliminary injunction, moving party must establish irreparable injury and either likelihood of success on merits or sufficiently serious question going to merits and balance of hardships tipping decidedly in moving party's favor.

[Cases that cite this headnote](#)

[10] Equity

🔑 [Nature of unconscionable conduct](#)

Estate of famous musician and estate's licensee, which had contracted with clothing manufacturer to allow use of musician's name, likeness, and signature, were barred under doctrine of unclean hands from obtaining equitable remedy of preliminary injunction against infringement of estate's trademark and copyrights by manufacturer; consultant hired by manufacturer was in fact agent for licensee, licensee made several misrepresentations regarding exclusivity of agreement, and estate granted competing license during negotiations between licensee and manufacturer.

[2 Cases that cite this headnote](#)

[11] Injunction

🔑 [Equitable nature of remedy](#)

Injunctions are equitable remedy.

[Cases that cite this headnote](#)

[12] Equity

🔑 [He Who Comes Into Equity Must Come with Clean Hands](#)

Court may deny injunctive relief based on defense of unclean hands where party applying for such relief is guilty of conduct involving fraud, deceit, unconscionability, or bad faith related to matter at issue to detriment of other party.

[11 Cases that cite this headnote](#)

Attorneys and Law Firms

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OPINION AND ORDER

BAER, District Judge:

Plaintiffs Estate of John Lennon (the "Estate") and Bag One Arts, Inc. ("Bag One") move for a preliminary injunction and summary judgment on the issue of termination of a licensing agreement between Bag One and defendant Leggoons, Inc. The Estate also moves to dismiss two counterclaims brought by Leggoons. The Court held an evidentiary hearing on February 16, 1996 on the motion for a preliminary injunction and has taken the two additional motions on submissions. For the reasons discussed below, the motion to dismiss is granted and the motion for a preliminary injunction and summary judgment is denied.

Background

On July 30, 1993, Bag One, a licensee of the Estate, entered into a contract (the "Agreement") with Leggoons authorizing Leggoons to utilize copyrighted works and trademarks owned by the Estate on specified types of clothing. The negotiations that lead to the Agreement were facilitated by James Powers of JP/BK Limited. Powers was later hired as a consultant to Leggoons to assist it in developing products.

[1] The Agreement provides Leggoons with "the exclusive right and license in [the] United States and Canada, Mexico and the Caribbean ... to use the signature of John Lennon ... and artwork created by John Lennon selected by Licensee and approved by Licensor." Pl.Ex. 1, at ¶ 1(a). In addition, the Agreement provides that "[n]o right to use the likeness of John Lennon are granted hereby, with the exception of the likeness described in Exhibit B." *Id.* at ¶ 1(c). This photograph is credited to the *290 photographer MacMillan and was submitted as plaintiff's exhibit 2. Leggoons argues that paragraph 1(c) should be read in conjunction with paragraph 1(a) such that the Agreement is interpreted to grant Leggoons an exclusive right to use the MacMillan

photograph on clothing. *See* Leggoons' Memorandum of Law in Opposition to Plaintiffs' Motion for a Preliminary Injunction at 4 n. 2 (citing *L.G.B., Inc. v. Gitano Group, Inc.*, 769 F.Supp. 1243, 1248 (S.D.N.Y.1991)). Plaintiffs did not respond to this argument in their papers. However, their conduct indicates that they agree that the right to use the MacMillan photograph was exclusive. As plaintiffs' counsel informed the Court at oral argument, when Leggoons complained to Bag One that another firm, Winterland Productions, Inc. was using the image, a member of her law firm wrote a cease and desist letter to Winterland. *See* Tr. at 9; Pl.Ex. 3. In addition, plaintiffs' counsel stated that "it is Bag One's position that upon finding out that someone had breached their rights, they immediately took all necessary steps to stop that infringement." Tr. at 10. Based on the text of the Agreement and plaintiffs' counsel's representations, I conclude that the Agreement should be interpreted as Leggoons urges.

The Agreement required that all goods that Leggoons proposed to produce be approved by Bag One prior to production and outlined the following approval procedure:

4.(a) Prior to the manufacture of the Products, Licensee shall submit to Consultant [JP/BK Limited] and Licensor design boards with fabric standards and item description for each Product, for Licensor's prior written approval, which approval shall not be unreasonably withheld. In the event Licensor has not responded in writing within seven (7) days after receipt of a prototype for approval, the prototype shall be deemed disapproved. In the event no response is received from the Licensor in writing as to its approval or disapproval, within such (7) days, Licensee may thereafter provide Licensor with written notice of such failure to respond. Should Licensee provide such written notice and should Licensor thereafter fail to respond within five (5) days from receipt, Licensor's silence shall be

deemed to constitute approval for such prototype.

Pl.Ex. 1, at ¶ 4(a).

The Agreement also provided in paragraph seven that Leggoons would make periodic advance royalty payments on a semi-annual basis. *Id.* at ¶ 7(d). The Agreement specified that Bag One could terminate the Agreement for cause if Leggoons breached any of the material terms, including the obligation to pay advance royalties. As stated in paragraph 14(b):

If Licensee shall breach any of the material terms and conditions of this agreement, Licensor shall have the right to terminate the Term upon written notice to Licensee unless Licensee shall completely remedy the breach within fifteen (15) days from receipt of Licensor's notice of a breach of paragraph "7" and within forty-five (45) days from receipt of Licensor's notice of a breach of paragraphs "4", "8", or "13". For the purposes of this agreement, Licensee's breach of paragraphs "4", "7", "8" or "13" hereinabove are hereby acknowledged by both parties to be deemed material breaches.

Id., at ¶ 14(b).

At issue in this dispute are three images that the Estate claims were never approved and the "John Lennon" signature trademark. The first image is a photograph of John Lennon wearing sunglasses and a fedora, credited to the photographer Nishi. The Estate claims that use of this image was not authorized under the Agreement and was not subsequently approved.

¹ In a conference call on February 27, 1996, the plaintiffs informed the Court that the defendant's use of the Nishi photograph is challenged because it was

not included in the Agreement. The plaintiffs seek an injunction against the use of the Nishi photograph in conjunction with the John Lennon signature which is registered as a trademark. The Nishi photograph is apparently only used in conjunction with the signature mark.

The second image is a design called “Give Peace a Chance” featuring a hand holding a flower. This image is part of a larger John Lennon work that was cropped by Leggoons.

*291 Finally, the third image is a design called “Shine On” that features a compilation of song lyrics and artwork at least some of which were created by Lennon. All three of these images were included on design boards presented to Bag One in July 1994. *See Powers Decl.* ¶¶ 4–5; *Tamsky Aff. Ex. B.* The parties dispute whether these story boards were rejected and therefore whether use of the images was unauthorized.

Leggoons contends that its venture was unsuccessful because the Estate had granted licenses to Winterland which produced less expensive competing clothes.² In addition, Leggoons argues that James Powers of JP/BK Limited acted as an agent for Bag One and fraudulently induced it to enter into the Agreement by posing as an agent for Leggoons. For these reasons, Leggoons sued Yoko Ono and Bag One in March 1994 in the Eastern District of Missouri. This action was dismissed for lack of personal jurisdiction.³

² There were three licenses to Winterland. The first was a license granted by the photographer Bob Gruen to use five Gruen photographs of John Lennon dated March 15, 1991. This agreement was “accepted and agreed to by Yoko Ono and provided for payment of fifty percent of the royalties to Yoko Ono. *Def.Ex. H.* The second license was between Bag One and Winterland and authorized the use of the John Lennon name and a peace symbol on a t shirt. *Def.Ex. I.; Tr.* at 29. This license was dated July 15, 1991. The final agreement, which Leggoons contends was most damaging, was granted by Yoko Ono to Winterland. This agreement licensed the use of photographs and likenesses of John Lennon that were approved by Yoko Ono as well as John Lennon’s name in conjunction with the photographs. This agreement was dated December 20, 1991. One note about the record is appropriate. This third agreement was attached as exhibit D to the Affidavit of Yoko Ono sworn to on January 12, 1996 and submitted in support of the Estate’s motion to dismiss Leggoons’

counterclaims. As discussed below, the Court has decided not to accept this affidavit. At the hearing on February 16, 1996, Leggoons submitted the first two agreements but did not submit the third because it had been attached to the Yoko Ono affidavit. In addition, Leggoons indicated in its memorandum in opposition to the motion for a preliminary injunction, at page 4, that the agreement was “attached hereto. However, the agreement was not attached to the memorandum submitted to Chambers. I conclude that since the plaintiffs have submitted the agreement, and the defendant relied on this submission, it is preferable to consider exhibit D to the Yoko Ono affidavit as part of the record on this motion.

³ Hardly on substantive grounds as plaintiffs’ memorandum would lead the reader to believe.

Based on its belief that Bag One had breached the exclusivity clause in the Agreement, Leggoons stopped paying the advance royalties. Leggoons failed to pay the March 15, 1995 installment and has not made any advance royalty payments since then. It has, however, made the royalty payments due on those products actually manufactured. *See Def.’s Mem.* at 6 (citing Clinton Deposition at 51–53, 60).

On March 17, 1995, Bag One sent Leggoons a default notice demanding the March 15, 1995 payment and invoking ¶ 14(b) of the Agreement. *See Affidavit of Lynne Clifford Sworn to* on January 18, 1996, at Ex. E. As noted above, no advance payments have been made in response. In addition, on April 19, 1995, Dorothy Weber, Esq., counsel to plaintiffs sent Mitchell Margo, Esq., counsel to Leggoons, a letter demanding that Leggoons cease and desist from manufacturing new clothing. *See Def.Ex. P.* The Estate seeks summary judgment terminating the Agreement as of April 2, 1995, fifteen days after the March 17, 1995 letter was sent.

Discussion

I. Motion to Dismiss Counterclaims

Leggoons has asserted three counterclaims, two of which are challenged on this motion. The Estate moves to dismiss the second counterclaim for tortious interference with contract pursuant to [Fed.R.Civ.P. 12\(b\)\(6\)](#), and to dismiss the third counterclaim for fraud for failure to satisfy [Fed.R.Civ.P. 9\(b\)](#). In the alternative, the Estate moves for a more definite statement pursuant

to Fed.R.Civ.P. 12(e). In support of this motion, the Estate submitted affidavits of Peter S. Shukat, Esq., counsel to plaintiffs, and Yoko Ono Lennon as well as attached exhibits. Defendant argues that this motion should be converted to one for summary judgment and then adjourned pending further discovery.

[2] Rule 12(b) provides that:

*292 If, on a motion to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Under this Rule, the Court may either exclude the additional submissions and decide the motion on the pleadings only or convert the motion to one for summary judgment. See *Fonte v. Board of Managers of Continental Towers Condominium*, 848 F.2d 24, 25 (2d Cir.1988). In determining whether to convert the motion, the Court considers if conversion “is likely to facilitate the disposition of the action.” 5A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1366, at 493 (2d ed. 1990). “When the extra-pleading material is comprehensive and will enable a rational determination of a summary judgment motion, the court is likely to accept it; when it is scanty, incomplete, or inconclusive, the court probably will reject it.” *Id.*; see also *Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 193 n. 3 (5th Cir.1988).

[3] The Court finds, in this case, that it would be inappropriate to accept the affidavits submitted in support of the motion to dismiss. The affidavits submitted are scanty and inconclusive and would not assist the court to resolve this dispute as a motion for summary judgment. Therefore, the motion will be determined under the requisite standard of Rule 12(b)(6).

[4] In judging the legal sufficiency of the complaint against a Rule 12(b)(6) challenge, the Court must accept all factual allegations in the complaint as true. *Cohen v. Koenig*, 25 F.3d 1168, 1171 72 (2d Cir.1994). The Court may only dismiss the action where “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45 46, 78 S.Ct. 99, 101 02, 2 L.Ed.2d 80 (1957).

A. Tortious Interference With Contract

[5] To state a claim for tortious interference with contract under New York law, the plaintiff must allege (1) the existence of a valid contract; (2) that the defendant had knowledge of this contract; (3) that defendant intentionally procured the breach of that contract; and (4) that the plaintiff was damaged by the breach. See *Finley v. Giacobbe*, 79 F.3d 1285, 1294 (2d Cir.1996); *G.K.A. Beverage Corp. v. Honickman*, 55 F.3d 762, 767 (2d Cir.1995). The Estate argues that Leggoons has failed adequately to allege the third element.

[6] Leggoons alleges that “[t]he Estate tortiously interfered with the License Agreement by authorizing third persons to use the John Lennon image, the John Lennon signature and the artwork on the specified clothing within the stated markets in derogation of Leggoons' exclusive license.” *Counterclaim* ¶ 17. Although Leggoons did respond to the Estate's motion on this point, and thus narrowly averted a default, it did not cite any legal authority in defense of its counterclaim. Such memoranda are not helpful to the Court and are discouraged.

I conclude that the counterclaim fails to state a claim because it does not allege the requisite intent. Leggoons does not allege that the Estate acted with the intent to procure the breach of the contract between Bag One and Leggoons. Cf. *G.K.A. Beverage*, 55 F.3d at 767 68. Since intent is an essential element of the tort, Leggoons' second counterclaim is dismissed.

B. Fraud

[7] The Estate argues that Leggoons' fraud counterclaim must be dismissed for failure to plead with sufficient particularity as required by Rule 9(b). Leggoons claims that the Estate made fraudulent representations regarding the exclusivity of the Agreement. Local Rule 3(b) requires

that a party opposing a motion serve and file an answering memorandum that sets forth the points and authorities relied upon in opposition. The rule clearly warns parties that “[f]ailure to comply may be deemed sufficient cause for ... the granting of the motion by default.” *293 Leggoons did not respond to the plaintiff’s motion on this point at all; rather it acted as if the motion had not been brought. Accordingly, under Local Rule 3(b), the motion is granted by default.

II. Motion for Summary Judgment

[8] The Estate and Bag One seek summary judgment finding that the Agreement terminated on April 2, 1995. Defendant argues that this motion is not yet ripe for determination and that further discovery is needed. Fed.R.Civ.P. 56(f) requires that a party opposing a motion for summary judgment on this basis submit an affidavit that details: “(1) the information sought and how it is to be obtained; (2) how a genuine issue of material fact will be raised by that information; (3) what efforts the affiant has made to obtain the information; and (4) why those efforts were unsuccessful.” *Sage Realty Corp. v. Insurance Co. of North America*, 34 F.3d 124, 128 (2d Cir.1994). Furthermore, the discovery sought must be material to the opposition of the summary judgment motion. *Id.*

Defendant's counsel, Joe Jacobson, Esq., submitted an affidavit in support of his application to adjourn this motion. While this affidavit does not exactly satisfy the *Sage Realty* requirements, I conclude that given the preliminary stage of these proceedings, it is preferable to permit further discovery before conclusively ruling on this issue. Accordingly, plaintiffs' motion for summary judgment is denied with leave to renew following further discovery.

III. Motion for Preliminary Injunction

[9] [10] [11] The Estate and Bag One also seek a preliminary injunction to enjoin Leggoons from infringing the Estate's trademark and copyrights. A preliminary injunction is “an extraordinary and drastic remedy which should not be routinely granted.” *Medical Society v. Toia*, 560 F.2d 535, 538 (2d Cir.1977); see also *Patton v. Dole*, 806 F.2d 24, 28 (2d Cir.1986). To obtain a preliminary injunction, the moving party must establish “(1) irreparable injury and (2) a likelihood of success on the merits or a sufficiently serious question going to the

merits and a balance of hardships tipping decidedly in the moving party's favor.” *Laureyssens v. Idea Group, Inc.*, 964 F.2d 131, 135 36 (2d Cir.1992); see also *Fisher Price Inc. v. Well Made Toy Manufacturing Corp.*, 25 F.3d 119, 122 (2d Cir.1994). Plaintiffs have presented compelling arguments that they have a likelihood of success on the merits and will be irreparably harmed without preliminary relief. Injunctions, however, are an equitable remedy and I find that plaintiffs are precluded from equitable relief under the doctrine of unclean hands.

[12] A court may deny injunctive relief based on the defense of unclean hands “ ‘where the party applying for such relief is guilty of conduct involving fraud, deceit, unconscionability, or bad faith related to the matter at issue to the detriment of the other party.’ ” *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1383 (6th Cir.1995) (quoting *Novus Franchising, Inc. v. Taylor*, 795 F.Supp. 122, 126 (M.D.Pa.1992)); see also *Saxon v. Blann*, 968 F.2d 676, 680 (8th Cir.1992); *Fuddruckers, Inc. v. Docs' B.R. Others, Inc.*, 826 F.2d 837, 847 (9th Cir.1987).

Leggoons argues that Bag One committed several acts evidencing bad faith during the negotiations of the Agreement. First, it claims that James Powers acted as an agent for Leggoons in negotiating with Bag One when in fact he was an agent for Bag One. In addition, Leggoons claims that Bag One misrepresented the exclusivity of the Agreement. Finally, Leggoons cites several other alleged misrepresentations by Bag One. See Def.Mem. at 15 16.

The record established that there was a relationship between James Powers and Bag One. For example, in a July 25, 1994 letter to Lynne Clifford of Bag One, Powers noted that he was in a difficult position because he had been hired as a consultant to Leggoons but his “allegiance and alliance has always and will always be with you personally along with Yoko and Bag One Arts.” Def.Ex.N., at 1. Similarly, in an August 11, 1994 letter to Clifford, Powers wrote that “although my gut says to dump these guys [Leggoons], I think it is a more prudent position to gain more *294 control over them until we see that they can perform.” Def.Ex. O, at 1. See also Deposition of James Clinton at 111; Deposition of Robert Tamsky at 116 17 (both attached to Affidavit of Robert J. Lack, Esq.) (stating that Leggoons was unaware of Powers' relationship with Bag One when he was consulting for them in the negotiations with Bag One). Bag One's acts

of negotiating with its own agent posing as the agent of its bargaining adversary raise the specter of bad faith.

Leggoons also claims that the plaintiffs have unclean hands because they misrepresented the exclusivity of the Agreement. As noted above, Bag One agreed to provide Leggoons an exclusive license to use the John Lennon signature, John Lennon artwork and the MacMillan photograph of John Lennon. Leggoons, however, argues that Bag One made several misrepresentations regarding the exclusivity of the Agreement to induce it to enter into the Agreement. *See* Deposition of Robert S. Tamsky at 140-41. In addition, during the negotiations between Bag One and Leggoons, the Estate had granted a competing license to Winterland to use approved photographs of John Lennon on t-shirts.

I find that the record sufficiently supports Leggoons' unclean hands defense. Therefore, as a court of equity, I must deny plaintiffs' motion for a preliminary injunction.

To minimize any risks of irreparable harm to the plaintiffs, however, the Court will place this action on an accelerated schedule.

Conclusion


As stated above, the Estate's motion to dismiss is granted. The motion by the Estate and Bag One for a preliminary injunction and summary judgment is denied. Plaintiffs may renew their motion for summary judgment following additional discovery. The parties are directed to contact Chambers within seventy-two hours to schedule a conference during the week of September 16, 1996.

SO ORDERED.

All Citations

939 F.Supp. 287

EXHIBIT 269

 KeyCite by Westlaw Group, Negative Treatment
 Distributed by Santa Lawrence Communications LLC v. Motorola
 Mobility LLC, E.D.Tex., February 5, 2018

2012 WL 6863471

Only the Westlaw citation is currently available.
 United States District Court,
 S.D. California.

MULTIMEDIA PATENT TRUST, Plaintiff,

v.

APPLE INC., et al., Defendants.

No. 10–CV–2618–H (KSC).

|
 Nov. 9, 2012.

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ORDER:

(1) GRANTING CANON'S MOTION FOR SUMMARY JUDGMENT

(2) GRANTING IN PART AND DENYING IN PART APPLE AND LG'S MOTION FOR PARTIAL SUMMARY JUDGMENT

(3) GRANTING IN PART AND DENYING IN PART MPT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

MARILYN L. HUFF, District Judge.

*1 On October 9, 2012, the parties filed motions for summary judgment on various issues. (Doc. Nos.379, 384, 387.) On October 23, 2012, the parties filed their respective opposition briefs. (Doc. Nos.476, 477, 477 4, 478.) On October 26, 2012, the parties filed their respective replies. (Doc. Nos.503, 521, 522.) On November 1, 2012, MPT filed a sur-reply to Canon's motion for summary judgment. (Doc. No. 546.) On November 9, 2012, the Court held a hearing on the matter. Christopher Mathews and Frederick Lorig appeared for MPT. Justin Barnes, Lara Garner, Alex Eaton Salners, Richard Sterba, and Frank J. Albert appeared for Apple and LG. Kelly Hunsaker and Sarita Venkat appeared for Apple. Richard Martinelli, Joseph Calvaruso, Alyssa Caridis, Mark Wine, and Glen Liu appeared for Canon. For the reasons below, the Court **GRANTS** Canon's motion for summary judgment, **GRANTS IN PART** and **DENIES IN PART** Apple and LG's motion for partial summary judgment, and **GRANTS IN PART** and **DENIES IN PART** MPT's motion for partial summary judgment.

BACKGROUND

On December 20, 2010, Plaintiff Multimedia Patent Trust (“MPT”) filed a complaint for patent infringement against Defendants Apple, Inc. (“Apple”), LG, and Canon.² (Doc. No. 1, Compl.) The complaint alleges that Defendants are liable for infringement of one or more of four patents related to video compression technology: U.S. Patent Nos. 4,958,226 (“the #266 Patent”), 5,227,878 (“the #878 Patent”), 5,500,678 (“the #678 patent”), and 5,136,377 (“the #377 Patent”) (collectively the “Patents in Suit”). (*Id.*) On March 21, 2011, Apple, LG, and Canon filed their answers. (Doc. Nos.38–39, 41.)

- 1 “LG includes LG Electronics, Inc., LG Electronics U.S.A., Inc., and LG Electronics Mobilecomm U.S.A., Inc.
- 2 “Canon includes Canon U.S.A., Inc. and Canon, Inc.

DISCUSSION

The parties move for summary judgment on several issues. Canon moves for (1) summary judgment of its affirmative defenses of licensing and patent exhaustion; (2) summary judgment of non-infringement of the #377 Patent; and (3) summary judgment of no infringement by the doctrine of equivalents. (Doc. No. 424 1 at 1 2.) Apple and LG move for (1) summary judgment of no infringement by the doctrine of equivalents; (2) an order estopping MPT from re-raising its infringement contentions against products that were dropped or struck from this action; (3) summary judgment of non-infringement of claim 13 of the #878 Patent by LG; (4) summary judgment of invalidity of claims 13 and 31 of the #878 Patent based on lack of written description; (5) summary judgment of non-infringement of Apple's iPod Nano (5th Gen); (6) summary judgment of no willful infringement; and (7) partial joinder in Canon's motion for summary judgment of non-infringement of the #377 Patent. (Doc. No. 425 at 1.) MPT moves for partial summary judgment of Defendants' affirmative defenses of: (1) invalidity for indefiniteness, lack of enablement, and failure to comply with the best mode requirement; (2) laches; (3) patent exhaustion, equitable estoppel, licensing, and waiver; (4) violation of a reasonable and non-discriminatory licensing agreement; (5) standards setting organization estoppel/waiver; (6) patent misuse and unclean hands; and (7) standing and nonjoinder. (Doc. No. 426 at 1.)

I. Summary Judgment Standard

*2 Summary judgment is appropriate under Rule 56 of the Federal Rules of Civil Procedure if the moving party demonstrates the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). A fact is material when, under the governing substantive law, it could affect the outcome of the case. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *Freeman v. Arpaio*, 125 F.3d 732, 735 (9th Cir.1997). A dispute is

genuine if a reasonable jury could return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248.

A party seeking summary judgment always bears the initial burden of establishing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. The moving party can satisfy this burden in two ways: (1) by presenting evidence that negates an essential element of the nonmoving party's case; or (2) by demonstrating that the nonmoving party failed to establish an essential element of the nonmoving party's case on which the nonmoving party bears the burden of proving at trial. *Id.* at 322 23. “Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment.” *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir.1987). Once the moving party establishes the absence of genuine issues of material fact, the burden shifts to the nonmoving party to set forth facts showing that a genuine issue of disputed fact remains. *Celotex*, 477 U.S. at 322. The nonmoving party cannot oppose a properly supported summary judgment motion by “rest[ing] on mere allegations or denials of his pleadings.” *Anderson*, 477 U.S. at 256. “The ‘opponent must do more than simply show that there is some metaphysical doubt as to the material fact.’” *Kennedy v. Allied Mut. Ins. Co.*, 952 F.2d 262, 265 66 (9th Cir.1991) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)).

When ruling on a summary judgment motion, the court must view all inferences drawn from the underlying facts in the light most favorable to the nonmoving party. *Matsushita*, 475 U.S. at 587. The Court does not make credibility determinations with respect to evidence offered. See *T.W. Elec.*, 809 F.2d at 630 31 (citing *Matsushita*, 475 U.S. at 587). Summary judgment is therefore not appropriate “where contradictory inferences may reasonably be drawn from undisputed evidentiary facts.” *Hollingsworth Solderless Terminal Co. v. Turley*, 622 F.2d 1324, 1335 (9th Cir.1980).

I. Canon's Affirmative Defenses of Licensing and Patent Exhaustion

Both Canon and MPT move for summary judgment of Canon's affirmative defenses of licensing and patent exhaustion. (Doc. No. 424 1 at 4 10; Doc. No. 426 at 10 12.) MPT accuses Canon's CAN 1 and CAN 3 groups of accused products of infringing the ‘ 377 Patent based on the encoding and decoding functions of

Fujitsu chips³ contained in those products. (Doc. No. 328 1, Declaration of Chris Mathews Ex. 3 at 3 5, 7 9.) Canon contends that the affirmative defense of patent exhaustion applies as a matter of law to these infringement allegations because MPT exhausted its patent rights when Fujitsu sold the accused products to Canon pursuant to an unconditional worldwide license to the #377 Patent that Fujitsu received from AT & T. (Doc. No. 424 1 at 9 10.)

³ Specifically, MPT identifies the Fujitsu DIGIC 4 chip and the Fujitsu VIC D chip as the infringing instrumentalities. (Doc. No. 328 1, Declaration of Chris Mathews Ex. 3; see also Doc. No. 424 1 at 7; Doc. No. 477 at 19 20.)

A. Legal Standards for Patent Exhaustion

*3 Under 35 U.S.C. § 271, a defendant can only be liable for infringement if the allegedly infringing acts are carried out “without authority.” 35 U.S.C. §§ 271(a), (f), (g). “The longstanding doctrine of patent exhaustion provides that the initial authorized sale of a patented item terminates all patent rights to that item.” *Quanta Computer, Inc. v. LG Elecs., Inc.*, 553 U.S. 617, 625, 128 S.Ct. 2109, 170 L.Ed.2d 996 (2008). “The exhaustion doctrine prohibits patent holders from selling a patented article and then ‘invoking patent law to control postsale use of the article.’” *Excelstor Tech., Inc. v. Papst Licensing GmbH & Co. KG*, 541 F.3d 1373, 1376 (Fed.Cir.2008). The rationale underlying the doctrine rests upon the theory that an unconditional sale of a patented device exhausts the patentee's right to control the purchaser's use of that item thereafter because the patentee has bargained for and received the full value of the goods. *Princo Corp. v. ITC*, 616 F.3d 1318, 1328 (Fed.Cir.2010) (en banc). However, “[e]xhaustion is triggered only by a sale authorized by the patent holder.” *Quanta*, 553 U.S. at 636.

B. Analysis

On December 14, 1988, Fujitsu Limited (“Fujitsu Ltd.”) and American Telephone and Telegraph Company (“AT & T”), a prior owner of the #377 Patent, entered into a patent licensing agreement (“the Agreement”), and on January 22, 1996, the parties entered into a subsequent addendum agreement (“the Addendum”). (Doc. No. 424 3, Declaration of Maki Ohmizu Exs. B, D.) Section 1.01 of the Agreement provides:

(a) AT & T grants to FUJITSU under AT & T's PATENTS nonexclusive and nontransferable licenses,

and FUJITSU grants to AT & T under FUJITSU's PATENTS nonexclusive, nontransferable and royalty-free licenses, for SEMICONDUCTIVE DEVICES.

(b) All licenses granted herein under any patent shall, notwithstanding the expiration of the LIMITED PERIOD, continue for the entire unexpired term of such patent....

(c) The licenses granted herein are licenses to (i) make, have made, use, lease, sell and import SEMICONDUCTIVE DEVICES....

(*Id.* Ex. B § 1.01.) The Agreement defines “AT & T PATENTS” as: “all patents ... issued at any time in any or all countries of the world for INVENTIONS (i) which are owned (either solely or jointly with others) or controlled at any time during the LIMITED PERIOD by AT & T or any of its RELATED COMPANIES....” (*Id.* (definitions appendix).) “LIMITED PERIOD” is further defined in the Agreement as “the period commencing on June 1, 1986 and ending on January 1, 1994.” (*Id.*) The #377 Patent was issued on August 4, 1992 to assignee AT & T Bell Laboratories. See U.S. Patent No. 5,136,377. As a result, the Agreement covers the #377 Patent. (Doc. No. 424 1 at 6.; Doc. No. 539 at 2.) Accordingly, under the terms of the Agreement, Fujitsu Ltd. has a license to “make, have made, use, lease, sell and import SEMICONDUCTIVE DEVICES” that practice the #377 Patent. (Doc. No. 424 3, Declaration of Maki Ohmizu Ex. B § 1.01.)

*4 The Agreement defines “SEMICONDUCTIVE DEVICE” as “a device consisting primarily of a body of a single semiconductive material or a plurality of semiconductive materials and a plurality of electrodes associated therewith....” (Doc. No. 424 3, Declaration of Maki Ohmizu Ex. B (definitions appendix).) Canon asserts, and MPT does not dispute, that the Fujitsu DIGIC 4 chips and the Fujitsu VIC D chips at issue in this case are within the scope of the term “SEMICONDUCTIVE DEVICE” and, therefore, are covered by the Agreement. (Doc. No. 424 1 at 7.) Therefore, these Fujitsu chips were licensed to practice the #377 Patent.

In its opposition, MPT argues that there is a dispute of fact as to whether the Fujitsu AT & T Agreement is still in effect. (Doc. No. 477 at 16 18.) Specifically, MPT argues that Canon failed to provide sufficient evidence showing that Fujitsu had made all the necessary royalty

payments it was required to make to AT & T under the Agreement. (*Id.* at 16.) MPT also argues that Canon failed to provide sufficient evidence showing that the Agreement was never terminated. (*Id.* at 17-18.) In response to these arguments, Canon has provided the Court with evidence showing that Canon has made all the necessary royalty payments to AT & T. (Doc. No. 521, Declaration of Maki Ohmizu ¶¶ 8-11, Ex. E.) Canon has also provided the Court with a stipulation from Alcatel Lucent stating that it is not aware of any notices of breach or notices of termination relating to the Fujitsu AT & T Agreement. (Doc. No. 521, Declaration of Alyssa Caridis Ex. 8.) In its sur-reply, MPT concedes that this evidence is sufficient to establish that the Agreement is still in effect. (Doc. No. 546 at 2.) Accordingly, the Court concludes that there is no genuine dispute of fact as to whether the Fujitsu AT & T Agreement is still in effect.

In its opposition, MPT also argues that there is a dispute of fact as to whether the Fujitsu chips were sold under the Agreement because Canon has presented evidence showing that the chips were sold to Canon by Fujitsu Electronics, Inc. (“Fujitsu Electronics”), not Fujitsu Ltd. (Doc. No. 477 at 19-21.) Fujitsu Ltd. and not Fujitsu Electronics is the party to the AT & T agreement. (Doc. No. 424-3, Declaration of Maki Ohmizu Ex. B.) However, Section 1.01(d) of the Agreement provides: “The grant of each license hereunder includes the right to grant sublicenses within the scope of such license to a party’s RELATED COMPANIES for so long as they remain its RELATED COMPANIES.” (*Id.* § 1.01(d).) “RELATED COMPANIES” is defined in the Agreement as “SUBSIDIARIES” is further defined as “a corporation or other legal entity the majority of whose shares or other securities entitled to vote for election of directors ... is now or hereafter controlled by such company.” (*Id.*) Canon has provided the Court with evidence showing that Fujitsu Electronics is a wholly owned subsidiary of Fujitsu Semiconductor Limited (“Fujitsu Semiconductor”), which is a wholly owned subsidiary of Fujitsu Ltd. (Doc. No. 521, Declaration of Maki Ohmizu ¶¶ 12-16, Exs. F-J 1.)⁴ Canon also provides evidence showing that the AT & T Agreement was expressly sublicensed from Fujitsu Ltd. to Fujitsu Semiconductor and its subsidiaries. (*Id.* ¶¶ 17-21 Exs. K-1-N 2.) In its sur-reply, MPT states that it no longer contests that Fujitsu’s subsidiaries are covered under the AT & T licensing agreement. (Doc. No. 546 at 2.) Accordingly, the Court concludes that there is no genuine

issue of fact that Fujitsu Electronics, the seller of the chips at issue, had a sublicense to the #377 Patent through the Fujitsu AT & T Agreement.

4 In its opposition, MPT objected to the statements made in Mr. Ohmizu’s original declaration about Fujitsu Electronics for lack of personal knowledge and on hearsay grounds. (Doc. No. 477 at 20.) In response, Canon provided a more detailed declaration from Mr. Ohmizu along with additional exhibits. (Doc. No. 521, Declaration of Maki Ohmizu.) In its sur-reply, MPT does not object to the statements made in the second declaration. (Doc. No. 546.)

*5 Turning to the application of the above facts to Canon’s exhaustion defense, MPT argues that Canon’s exhaustion defense fails as a matter of law because sales occurring outside of the United States do not exhaust patent rights, relying on the *Jazz Photo* line of cases⁵ and *Ninestar Tech. Co. v. ITC*, 667 F.3d 1373 (Fed.Cir.2012). (Doc. No. 477 at 21-23.) These cases hold that “United States patent rights are not exhausted by products of foreign provenance. To invoke the protection of the first sale doctrine, the authorized first sale must have occurred under the United States patent.” *Jazz Photo*, 264 F.3d at 1105. MPT has presented evidence, which Canon does not dispute, showing that the sales at issue between Fujitsu Electronics and Canon occurred in Japan. (Doc. No. 477 at 23; *see also* Doc. No. 521 at 4.) Therefore, the authorized sales relied on by Canon did not occur in the United States.

5 The *Jazz Photo* line of cases includes *Jazz Photo Corp. v. ITC*, 264 F.3d 1094 (Fed.Cir.2001), *Fuji Photo Film Co., Ltd. v. Benun*, 463 F.3d 1252 (Fed.Cir.2006), and *Fujifilm Corp. v. Benun*, 605 F.3d 1366 (Fed.Cir.2010).

Significantly, the cases relied on by MPT are distinguishable from the present case because those cases only involved foreign sales made directly by the patentee and did not involve sales made pursuant to an unconditional worldwide license. *See Jazz Photo*, 264 F.3d at 1105; *Ninestar Tech.*, 667 F.3d at 1376-77. In the present case, the sales were made pursuant to a license between Fujitsu and AT & T where AT & T granted Fujitsu and its subsidiaries an unconditional worldwide license to practice the #377 Patent. (Doc. No. 424-3, Declaration of Maki Ohmizu Ex. B.) Therefore, the present case is governed by the Federal Circuit’s decision in *Tessera, Inc. v. ITC*, 646 F.3d 1357 (Fed.Cir.2011).

See also *Honeywell Inc. v. Victor Co. of Japan, LTD.*, 298 F.3d 1317, 1328 29 (Fed.Cir.2002). In *Tessera*, the Federal Circuit found that the doctrine of patent exhaustion applied where the patentee gave the licensee “an unconditional grant of a license ‘to sell ... and/or offer for sale’ the accused products” even though the authorized sales were made in a foreign jurisdiction. See *id.* at 1369 70. Here, AT & T gave Fujitsu and its subsidiaries an unconditional grant of license to “make, have made, use, lease, sell and import” the accused chips.⁶ (Doc. No. 424 3, Declaration of Maki Ohmizu Ex. B § 1.01(c).) Therefore, Fujitsu Electronics was authorized under the #377 Patent to sell Canon the accused chips, and the doctrine of patent exhaustion applies to these sales.⁷ See *Quanta*, 553 U.S. at 636 37; *Tessera*, 646 F.3d at 1369 71; *Honeywell*, 298 F.3d at 1328 29.

⁶ MPT attempts to argue that the scope of the license is limited because sections 1.01(d) and 4.02 of the Agreement limit Fujitsu's rights to assign the license or grant sublicenses. (Doc. No. 546 at 1 3.) However, this argument only applies to Canon's affirmative defense of licensing. The argument does not apply to Canon's defense of patent exhaustion, which focuses on the rights possessed by Fujitsu Electronics and whether its sales were authorized by the patentee. See *Tessera*, 646 F.3d at 1369 70. In determining whether there has been exhaustion, the issue is not whether the licensee can assign its rights under the license or grant a sublicense; the issue whether licensee made an authorized sale. See *Quanta*, 553 U.S. at 636 38.

⁷ The Court declines to allow a patentee who has granted unconditional worldwide rights in a license and received royalties from that license to sue downstream customers of the licensee simply because the products traveled to another country. To allow an infringement lawsuit to proceed under those circumstances would be contrary to the rationale behind the exhaustion doctrine. Under the exhaustion doctrine, the unconditional sale of a patented device exhausts the patentee's right to control the purchaser's use of that item thereafter because the patentee has bargained for and received the full value of the goods. See *Princo*, 616 F.3d at 1328. MPT's interpretation of the exhaustion doctrine would also substantially hinder the rights of the licensee. Under MPT's view of exhaustion, an overseas component manufacturer like Fujitsu would have to possess a distribution network that would allow it to import and sell its component parts in each country where

its components might eventually be used and sold by its downstream customers. This would be the only way that the licensee could ensure that its downstream customers would not be later liable for patent infringement. This circumstance is contrary to the licensee's possession an unconditional worldwide license to practice the patent.

C. Conclusion

In sum, Canon has established as a matter of law that MPT's patent rights under the #377 Patent are exhausted as to the CAN 1 and CAN 3 groups of accused products. Accordingly, the Court grants Canon's motion for summary judgment and denies MPT's motion for summary judgment on Canon's affirmative defense of patent exhaustion.⁸

⁸ Because the Court grants Canon's motion on the basis of its defense of patent exhaustion, the Court does not address Canon's contention that MPT's infringement allegations are also barred by the affirmative defense of licensing. (See Doc. No. 424 1 at 8 9.) However, the Court notes that the cases relied on by Canon to support its affirmative defense of licensing are cases dealing with the affirmative defense of patent exhaustion rather than the defense of express licensing. See, e.g., *Unidisco, Inc. v. Schattner*, 824 F.2d 965, 968 (Fed.Cir.1987) (analyzing whether there had been an authorized sale of the accused products); *Lisle Corp. v. Edwards*, 777 F.2d 693, 695 (Fed.Cir.1985) (same); see also 5 16 CHISUM, CHISUM ON PATENTS § 16.03 2] a] (Rev. Ed.1997). Indeed, at the hearing, Canon conceded that it is not contending that it possesses a sublicense to the #377 Patent.

MPT has represented that the CAN 2 group of accused products have been withdrawn from this lawsuit. (Doc. No. 522 at 4 n. 6.) Therefore, the CAN 1 and CAN 3 group of accused products are the only Canon accused products remaining in this action. (See Doc. No. 328 1, Declaration of Chris Mathews Ex. 3 (MPT's final infringement contentions against Canon).) Because the Court concludes that MPT has exhausted its patent rights as to the CAN 1 and CAN 3 groups of accused products, the remainder of MPT's motion for partial summary judgment of the Defendants' affirmative defenses is moot with respect to Canon's other affirmative defenses. The remainder of Canon's motion for summary judgment is also moot, except for the non-infringement arguments that were joined by Apple and LG. (See Doc. No. 425 at

23 24 (“Apple and LG join Canon’s motion for summary judgment relating to the #377 Patent’s claimed ‘prediction means’ (all asserted claims), ‘controllable quantizer means’ (claims 1, 2, 4, 8) and ‘coder means’ (claims 26 and 27).”) The Court will separately address these non-infringement arguments to the extent they relate to Defendants Apple and LG.

II. The Parties’ Motions for Summary Judgment on Invalidity

A. Written Description Requirement for Claims 13–15 and 31 of the #878 Patent

*6 Apple and LG move for summary judgment of their affirmative defense that claims 13 15 and 31 of the #878 Patent are invalid for failure to meet the written description requirement. (Doc. No. 425 at 6 17.) Apple and LG argue that these claims fail to meet the written description requirement because these claims cover both interlaced and non-interlaced fields, but the #878 Patent’s written description only discloses interlaced fields. (*Id.*)

The first paragraph of 35 U.S.C. § 112 provides that the “specification shall contain a written description of the invention....” To satisfy the written description requirement of § 112, “the description must ‘clearly allow persons of ordinary skill in the art to recognize that [the inventor] invented what is claimed.’” *Ariad Pharms., Inc. v. Eli Lilly & Co.*, 598 F.3d 1336, 1351 (Fed.Cir.2010) (en banc). “In other words, the test for sufficiency is whether the disclosure of the application relied upon reasonably conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date.” *Id.*

“To overcome the presumption of validity of patents, the accused [infringer] must show that the claims lack a written description by clear and convincing evidence.” *Hynix Semiconductor, Inc. v. Rambus, Inc.*, 645 F.3d 1336, 1351 (Fed.Cir.2011) “Compliance with the written description requirement is a question of fact, but is amenable to summary judgment in cases where no reasonable fact finder could return a verdict for the non-moving party.” *PowerOasis, Inc. v. T Mobile USA, Inc.*, 522 F.3d 1299, 1307 (Fed.Cir.2008); see also *Ariad Pharms.*, 598 F.3d at 1351 (“[The written description requirement, “as we have long held, is a question of fact.”])

In the Court’s claim construction order, the Court construed the claim term “fields” to include both interlaced and non-interlaced fields. (Doc. No. 258 at 4 5.) Apple and LG argue that under this construction, claims 13 15 and 31 of the #878 Patent are invalid for failure to meet the written description requirement as a matter of law because the preferred embodiment disclosed in the #878 Patent only discusses the coding of interlaced fields. (Doc. No. 425 at 10 15; Doc. No. 503 at 7 (arguing that “the #878 Patent must disclose at least one embodiment illustrating non-interlaced fields or non-interlaced field coding”)) However, “[a] claim will not be invalidated on section 112 grounds simply because the embodiments of the specification do not contain examples explicitly covering the full scope of the claim language.” *LizardTech, Inc. v. Earth Res. Mapping, Inc.*, 424 F.3d 1336, 1345 (Fed.Cir.2004); see also *In re Hayes Microcomputer Products, Inc. Patent Lit.*, 982 F.2d 1527, 1535 (Fed.Cir.1992) (“While [the inventor] was required to disclose some structure in the specification for all ‘means’ recitations in the claims, he was not required to disclose every means for implementing the stated function.”). “That is because the patent specification is written for a person of skill in the art, and such a person comes to the patent with the knowledge of what has come before.” *LizardTech*, 424 F.3d at 1345. Therefore, “it is unnecessary to spell out every detail of the invention in the specification; only enough must be included to convince a person of skill in the art that the inventor possessed the invention....” *Id.* The relevant inquiry in determining whether the written description requirement is satisfied is not whether interlaced fields are the only type of “fields” disclosed in the preferred embodiment; the relevant inquiry is whether the disclosures in the # 878 Patent are sufficient to convey to a person of ordinary skill in the art that the inventors possessed an invention claiming both interlaced fields and non-interlaced fields as of the filing date. See *id.*; *Ariad Pharms.*, 598 F.3d at 1351.

*7 MPT has presented evidence in the form of an expert report from its validity expert, Dr. Horne, stating a person of ordinary skill in the art would understand that the #878 Patent discloses non-interlaced fields, for example a submacroblock. (Doc. No. 447 2, Declaration of Christopher Mathews Ex. 2 ¶¶ 710, 712.) Apple and LG have presented evidence in the form of an expert report from their invalidity expert, Dr. Bovik, stating that a person of ordinary skill in the art would not take the position that a “field” is a submacroblock and that the

person would understand that the only “fields” disclosed in the # 878 Patent are interlaced fields. (Doc. No. 451 2, Declaration of Justin Barnes Ex. B at 52.) As a result, there is a genuine dispute of material fact as to whether claims 13 15 and 31 of the #878 Patent satisfy the written description requirement. Accordingly, the Court denies Apple and LG’s motion for summary judgment of their affirmative defense of invalidity based on failure to meet the written description requirement.

B. Enablement Requirement for the Asserted Claims of the #878 Patent

MPT moves for summary judgment of Apple and LG’s affirmative defense that the asserted claims of the #878 Patent are invalid for failure to meet the enablement requirement. (Doc. No. 426 at 6 9.) In response, Apple and LG argue that MPT’s motion should be denied because they have provided sufficient evidence showing that the #878 Patent is not enabled. (Doc. No. 478 at 4 5.)

The first paragraph of [35 U.S.C. § 112](#) provides that “[t]he specification shall contain a written description of the invention, and the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same.” To satisfy the enablement requirement, “the specification of a patent must teach those skilled in the art how to make and use the full scope of the claimed invention without undue experimentation.” [MagSil Corp. v. Hitachi Global Storage Techs.](#), [687 F.3d 1377, 1380 \(Fed.Cir.2012\)](#). In determining whether a disclosure requires undue experimentation, a court may consider the following factors:

- (1) the quantity of experimentation necessary,
- (2) the amount of direction or guidance presented,
- (3) the presence or absence of working examples,
- (4) the nature of the invention,
- (5) the state of the prior art,
- (6) the relative skill of those in the art,
- (7) the predictability or unpredictability of the art, and
- (8) the breadth of the claims.

[In re Wands](#), [858 F.2d 731, 737 \(Fed.Cir.1988\)](#).

Enablement is a question of law based on underlying factual findings, and is determined as of the patent’s effective filing date. [MagSil](#), [687 F.3d at 1380](#). Lack of enablement must be proven by clear and convincing evidence. *Id.*

Apple and LG argue that the #878 Patent is not enabled because a person of ordinary skill in the art would not be able to practice the invention using non-interlaced field coding and decoding based on the disclosures in the patent. (Doc. No. 478 at 4 5.) See [MagSil](#), [687 F.3d at 1381](#). (“The specification must contain sufficient disclosure to enable an ordinarily skilled artisan to make and use the entire scope of the claimed invention at the time of filing.”) Apple and LG have presented evidence in the form of an expert report from their invalidity expert, Dr. Bovik, stating that the disclosures in the #878 Patent are insufficient to meet the enablement requirement because the disclosures do not teach a person of ordinary skill in the art how to decode a non-interlaced field. (Doc. No. 451 2, Declaration of Justin Barnes Ex. B at 52.) MPT has presented evidence in the form of an expert report from its validity expert, Dr. Horne, stating that the disclosures are sufficient to teach a person of ordinary skill in the art how to decode a non-interlaced field because a person of ordinary skill would recognize that a “submacroblock” is a non-interlaced field. (Doc. No. 447 2, Declaration of Christopher Mathews Ex. 2 ¶¶ 711 13.) Summary judgment on the issue of enablement is inappropriate because there remains a genuine dispute of material fact for the jury as to whether the disclosures of the #878 Patent teach a person of ordinary skill in the art how to decode a non-interlaced field. See [Johns Hopkins Univ. v. Cellpro, Inc.](#), [152 F.3d 1342, 1359 \(Fed.Cir.1998\)](#) (explaining that summary judgment on the issue of enablement is inappropriate when there is “a dispute upon which a reasonable jury could have resolved enablement in [the defendant]’s favor after a review of the entire record”); [Mformation Techs., Inc. v. Research in Motion Ltd.](#), [830 F.Supp.2d 815, 833 \(N.D.Cal.2011\)](#) (denying plaintiff’s motion for summary judgment on enablement where there was competing expert testimony about whether one of ordinary skill in the art would understand the phrase “enabling/disabling” and understand how to practice the claimed phrase).

*8 MPT also argues that Apple and LG's enablement defense fails because the Court has already rejected the evidence and arguments they rely on in support of this defense during claim construction. (Doc. No. 522 at 2 3.) MPT fails to recognize that what is the proper construction of a claim and whether that claim as construed is enabled are two separate inquiries. “[T]he Federal Circuit has made clear that, where a plaintiff seeks and obtains a broad construction, the fact finder may later invalidate those claims for failing one or more requirements of § 112, paragraph 1.” *Synthes USA, LLC v. Spinal Kinetics, Inc.*, 2012 U.S. Dist. LEXIS 139571, at *23 (N.D.Cal. Sept. 27, 2012) (citing *Ariad Pharms.*, 598 F.3d at 1351). Accordingly, the Court denies MPT's motion for summary judgment on the Apple and LG's affirmative defense of invalidity of the #878 Patent based on lack of enablement.

C. Best Mode Requirement for Claims 2 and 12 of the #226 Patent

MPT moves for summary judgment of Apple and LG's affirmative defense that claims 2 and 12 of the #226 Patent are invalid for failure to meet the best mode requirement. (Doc. No. 426 at 5 6.) Apple and LG argue that MPT's motion should be denied because the #226 Patent violates the best mode requirement. (Doc. No. 478 at 2 3.)

The first paragraph of 35 U.S.C. § 112 provides that the specification “shall set forth the best mode contemplated by the inventor of carrying out his invention.” 35 U.S.C. § 112 ¶ 1. To prove invalidity for failure to disclose the best mode, a defendant must satisfy a two part test:

“First, the factfinder must determine whether, at the time of filing the application, the inventor possessed a best mode for practicing the invention.” The first prong ... is highly subjective and focuses on the inventor's state of mind as of the date of filing the application. Second, if the inventor subjectively considered one mode to be preferred over all others, then “the second inquiry is whether the inventor's disclosure is adequate to enable one of ordinary skill in the art to practice the best mode of the invention. This inquiry is objective and depends upon the scope of the claimed invention and the level of skill in the relevant art.”

Bayer AG v. Schein Pharms., Inc., 301 F.3d 1306, 1320 (Fed.Cir.2002) (citations omitted).

Invalidity for failure to satisfy the best mode requirement must be proven by clear and convincing evidence. *AllVoice Computing PLC v. Nuance Commc'ns, Inc.*, 504 F.3d 1236, 1240 (Fed.Cir.2007). The best mode inquiry is assessed on a claim by claim basis. *Pfizer, Inc. v. Teva Pharms. USA, Inc.*, 518 F.3d 1353, 1365 (Fed.Cir.2008). “Subject matter outside the scope of the claims also falls outside the scope of the best mode requirement.” *AllVoice Computing*, 504 F.3d at 1246. Compliance with the best mode requirement is a question of fact. *Bayer AG v. Schein Pharms., Inc.*, 301 F.3d 1306, 1312 (Fed.Cir.2002).

*9 MPT argues that Apple and LG have failed to produce any evidence demonstrating that the inventors of the #226 Patent, at the time of filing their patent application, considered a particular mode of practicing the invention to be superior to all other modes. (Doc. No. 426 at 5.) Apple and LG have presented evidence from which a reasonable inference could be drawn that Dr. Puri, one of the inventors of the #226 Patent attended an international video coding workshop three weeks prior to the filing of the #226 Patent where he presented an abstract entitled “Conditional Motion Compensated Interpolation and Coding.” (Doc. No. 451 2, Declaration of Justin Barnes Ex. B at 25 26.) Apple and LG have also presented an expert report from their invalidity expert, Dr. Bovik, stating that this abstract asserts that the quantization of interpolation error should be performed more coarsely than the quantization of prediction error, and that this was a better mode of practicing the invention embodied in the #226 Patent because it would result in bandwidth savings. (*Id.* at 26.) Dr. Bovik's expert report also concludes that the #226 Patent does not disclose the relative coarseness with which a person should quantize the prediction error and the interpolation error and only discloses controlling the coarseness of these two errors based on buffer overflow. (*Id.* at 25.) See also #226 Patent at 4:22 25, 4:59 62.

MPT argues that this evidence is insufficient to establish a best mode violation because quantization falls outside of the scope of the asserted claims. (Doc. No. 522 at 2.) Specifically, MPT argues that quantization does not apply to claim 12, which is for a decoder, and claim 2 does not refer to quantization coarseness or quantization control. (*Id.*) The best mode inquiry must be assessed on a claim by claim basis. *Pfizer, Inc. v. Teva Pharms. USA, Inc.*, 518 F.3d at 1365. In its claim construction

order, the Court held that one of the corresponding structures for encoder claim 2 of the #226 Patent contains a “quantizer 40.” (Doc. No. 258 at 62.) Therefore, Apple and LG's best mode argument falls within the scope of that asserted claim. However, “quantizer 40” is part of not a corresponding structure for decoder claim 12. (See *id.* at 67 70.) Therefore, Apple and LG's best mode argument is outside the scope of claim 12 of the #226 Patent, and Apple and LG's best mode defense against claim 12 fails as a matter of law. See *AllVoice Computing*, 504 F.3d at 1246. Accordingly, Apple and LG have only shown that there is a genuine dispute of fact as to whether claim 2 of the #226 Patent fails to satisfy the best mode requirement.

MPT also argues that Apple and LG have failed to present any evidence showing that either of the inventors of the #226 Patent intentionally concealed the alleged better mode of their invention, citing *Wellman, Inc. v. Eastman Chem. Co.*, 642 F.3d 1355 (Fed.Cir.2011). (Doc. No. 426 at 5 6.) In *Wellman*, the Federal Circuit stated that “[i]nvalidation based on a best mode violation requires that the inventor knew of and intentionally concealed a better mode than was disclosed.” 642 F.3d at 1365. However, in a more recent case, the Federal Circuit stated that there is no requirement of intent to conceal in determining whether the best mode requirement has been met, and “the proper inquiry focuses on the adequacy of the disclosure rather than motivation for any nondisclosure.” *In re Cyclobenzaprine Hydrochloride Extended Release Capsule Patent Lit.*, 676 F.3d 1063, 1086 (Fed.Cir.2012). In *Cyclobenzaprine Hydrochloride*, the Federal Circuit explained that an intent requirement would be inconsistent with the Federal Circuit's prior instruction that the second prong of the best mode test is an objective inquiry. *Id.* at 1085. The court also explained that the term “concealment” when used to describe the best mode inquiry is merely “a shorthand way of inquiring about the adequacy of the disclosure.” *Id.* The Court agrees with the *Cyclobenzaprine Hydrochloride* opinion. Therefore, Apple and LG do not need to present evidence showing that the inventors intentionally concealed the better mode. See *id.* at 1085 86.

*10 Accordingly, the Court grants in part and denies in part MPT's motion. The Court grants MPT's motion for summary judgment of Apple and LG's affirmative defense of invalidity for failure to meet the best mode requirement with respect to claim 12 of the #226 Patent. The Court denies MPT's motion for summary judgment of Apple and

LG's affirmative defense of invalidity for failure to meet the best mode requirement with respect to claim 2 of the # 226 Patent.

D. Definiteness of the Asserted Claims of the #878 Patent

MPT moves for summary judgment of Apple and LG's affirmative defense that the asserted claims of the #878 Patent are invalid for indefiniteness. (Doc. No. 426 at 6 9.) Apple and LG state that they do not oppose MPT's motion for summary judgment, conceding that the Court has already ruled on this issue in construing the asserted claims of the #878 Patent. (Doc. No. 478 at 3 4.) Accordingly, the Court grants MPT's motion for summary judgment of Apple and LG's affirmative defense of indefiniteness with respect to the asserted claims of the #878 Patent.

III. Defendants' Motions for Summary Judgment of Non-Infringement

Apple and LG move for summary judgment of non-infringement on several issues. (Doc. No. 425 at 6 7, 23 24.) Under 35 U.S.C. § 271(a), “whoever without authority makes, uses, offers to sell, or sells any patented invention, within the United States ... infringes the patent.”

A patent infringement analysis proceeds in two steps. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 976 (Fed.Cir.1995), *aff 'd* 517 U.S. 370, 116 S.Ct. 1384, 134 L.Ed.2d 577. In the first step, the court construes the asserted claims as a matter of law. See *id.* In the second step, the factfinder compares the claimed invention to the accused device. *Id.*; see also *Verizon Servs. Corp. v. Cox Fibernet Va., Inc.*, 602 F.3d 1325, 1340 (Fed.Cir.2010) (“A determination of infringement is a question of fact....”). “Summary judgment on the issue of infringement is proper when no reasonable jury could find that every limitation in a properly construed claim either is or is not found in the accused device either literally or under the doctrine of equivalents.” *U.S. Philips Corp. v. Iwasaki Elec. Co. Ltd.*, 505 F.3d 1371, 1374 75 (Fed.Cir.2007) (quoting *PC Connector Solutions LLC v. SmartDisk Corp.*, 406 F.3d 1359, 1364 (Fed.Cir.2005)).

“To prove literal infringement, the patentee must show that the accused device contains every limitation in the asserted claims. If even one limitation is missing or not met as claimed, there is no literal infringement.” *Riles*

v. Shell Exploration & Prod. Co., 298 F.3d 1302, 1308 (Fed.Cir.2002) (quoting *Mas Hamilton Group v. LaGard, Inc.*, 156 F.3d 1206, 1211 (Fed.Cir.1998)). Specifically, literal infringement of a means-plus-function claim “requires that the relevant structure in the accused device perform the identical function recited in the claim and be identical or equivalent to the corresponding structure in the specification.” *Odetics, Inc. v. Storage Tech. Corp.*, 185 F.3d 1259, 1267 (Fed.Cir.1999). An accused structure is equivalent if it “performs the claimed function in substantially the same way to achieve substantially the same result.” *Id.* at 1267; see also *Chiuminatta Concrete Concepts, Inc. v. Cardinal Indus., Inc.*, 145 F.3d 1303, 1309 (Fed.Cir.1998) (“The proper test is whether the differences between the structure in the accused device and any disclosed in the specification are insubstantial.”). “[T]he claim limitation is the overall structure corresponding to the claimed function.” *Odetics*, 185 F.3d at 1268.

A. Claim 13 of the #878 Patent

*11 LG moves for summary judgment of non-infringement of claim 13 of the # 878 Patent. (Doc. No. 425 at 6 7.) LG argues that their accused products do not infringe claim 13 because they cannot decode P-pictures. (*Id.*)

Claim 13 of the #878 Patent contains the means-plus-function limitation of a “means responsive to a motion compensation type signal for selectively and adaptively performing motion compensated decoding of frames of the compressed digital video bit stream and fields of the compressed video bit stream.” # 878 Patent at 90:35-39. For this limitation, the Court construed the claimed function as “selectively and adaptively performing motion compensated decoding of frames of the compressed digital video bit stream” and the corresponding structure as “circuit 100 (as shown in Fig. 2 and its internal circuitry as shown in Figs. 3, 4A, and 4B and as described at col. 15 line 22 to col. 18 line 10); circuit 94 (as shown in Fig. 2 and the circuitry within circuit 94 as shown and described in Figs. 15, 16A, and 16B, and the description of circuit 94 and its internal circuitry set forth in col. 15 lines 11-28 and in col. 25 line 26 to col. 27 line 34); summing element 92; picture stores 100C and 100A; circuit 54 (as shown in Fig. 2, and as described in Fig. 12 and at col. 14 lines 5-68 and col. 24 lines 47-60); circuit 80 (as shown in Fig. 2 and as described at col. 15 lines 4-10); and including all interconnections of these elements.” (Doc. No. 258 at 12, 17.)

In construing this limitation, the Court explained: “The structures in Fig. 2, which include circuit 100, must decode both P-pictures and B-pictures.” (*Id.* at 14.) LG argues, therefore, that its accused products do not possess this claim limitation because it is undisputed that their products cannot decode P-pictures. (Doc. No. 425 at 6 7.) However, circuit 100 is only one of multiple components to the overall corresponding structure identified by the Court in the claim construction order for this means-plus-function claim limitation. (Doc. No. 258 at 17.) The Federal Circuit has explained that the individual components of a structure for a means-plus-function claim “are not claim limitations.” *Odetics*, 185 F.3d at 1268. “Rather, the claim limitation is the overall structure corresponding to the claimed function. This is why structures with different numbers of parts may still be equivalent under § 112, P 6, thereby meeting the claim limitation.” *Id.*; accord. *Caterpillar Inc. v. Deere & Co.*, 224 F.3d 1374, 1380 (Fed.Cir.2000). Therefore, it is impermissible for a district court to engage in a “component-by-component analysis to determine [whether a] reasonable jury could find structural equivalence.” *Caterpillar*, 224 F.3d at 1380. Accordingly, even if MPT’s expert has conceded that LG’s accused products cannot decode P-pictures, LG is not entitled to summary judgment of non-infringement on that basis alone.

To be entitled to summary judgment of non-infringement based on this claim limitation, LG must show that there is no dispute of fact that the relevant structures in their accused products do not perform the function of “selectively and adaptively performing motion compensated decoding of frames of the compressed digital video bit stream” in substantially the same way to achieve substantially the same result as the corresponding structure disclosed in the specification. See *Odetics*, 185 F.3d at 1267. LG has not made such a showing. In response to LG’s motion, MPT submitted evidence in the form of an expert report from their infringement expert, Dr. Richardson, identifying the relevant structure in LG’s accused products and concluding that the relevant structure performs the above function in substantially the same way to achieve substantially the same results as the overall corresponding structure identified by the Court during claim construction.⁹ (Doc. No. 477 15, Declaration of Iain Richardson Ex. B at 414 18, 432 35.) Therefore, there is a triable issue of fact as to whether LG’s

accused products contain this particular claim limitation. Accordingly, the Court denies LG's motion for summary judgment of non-infringement of claim 13 of the #878 Patent.

9 In Canon's motion for summary judgment of non-infringement, which Apple and LG join, Canon argues that the conclusions in Dr. Richardson's expert report are insufficient to create a genuine dispute of fact, relying on *Intellectual Sci. & Tech., Inc. v. Sony Elecs., Inc.*, 589 F.3d 1179 (Fed.Cir.2009). (Doc. No. 424 1 at 15.) However, the present case is distinguishable from *Intellectual Sci. & Tech.* In *Intellectual Sci. & Tech.*, the Federal Circuit rejected the expert's unsupported infringement conclusion where the expert had failed to pinpoint where the claimed elements could be found in the accused devices. See 589 F.3d at 1184. In contrast, here, Dr. Richardson has identified the relevant structures in the accused products he contends perform the claimed functions with citations to the relevant source code. (See, e.g., Doc. No. 477 15, Declaration of Iain Richardson Ex. B at 414 18.)

B. The #377 Patent

*12 Apple and LG join part of Canon's motion for summary judgment of non-infringement of the #377 Patent. (Doc. No. 425 at 23 24.) Specifically, Apple and LG argue that MPT has failed to raise a triable issue of fact as to whether their accused products meet the "prediction means" limitation found in claims 1 and 26, the "controllable quantizer means" limitation found in claim 1, or the "coder means" limitation found in claim 26. (*Id.*)

Claims 1 and 26 of the #377 Patent contain the means-plus-function limitation of a "prediction means." #377 Patent at 25:36 37, 27:12. For claim 1, the Court construed the claimed function as "predicting a next frame's signals" and the corresponding structure as "adders 41 and 54, subtractor 44, multiplier 45, motion compensator 43, inverse quantizer 39 and inverse DCT 40." (Doc. No. 258 at 43 44.) For claim 26, the Court construed the claimed function as "developing frame prediction signals in response to output signals of the encoder" and identified the same corresponding structure as for claim 1. (*Id.* at 56.)

Claim 1 of the #377 Patent contains the means-plus-function limitation of a "controllable quantizer

means." #377 Patent at 25:43. For this limitation, the Court construed the claimed function as "quantizing the difference signals mentioned earlier in the claim in accordance with a quantization schema that varies with the dictates of a control signal" and the corresponding structure as "[q]uantizer vector selector 38[QVS], as shown in Figure 2 and its internal circuitry shown in Figures 9 and 10." (Doc. No. 258 at 46 47.)

Claim 26 of the #377 Patent contains the means-plus-function limitation of a "coder means." #377 Patent at 27:17. For this limitation, the Court construed the claimed function as "encoding the frame difference signals under direction of the control signal mentioned earlier in the claim" and the corresponding structure as "[q]uantizer vector selector 38" (QVS), which includes the internal circuitry shown in Figures 9 and 10, and "variable length encoders 46 and 47." (Doc. No. 258 at 57 58.)

Apple and LG argue that MPT has failed to raise a triable issue of fact with respect to the "prediction means" limitations because MPT's expert has failed to identify where adder 54, subtractor 44, and multiplier 45 are found in the accused products. (Doc. No. 425 at 23; Doc. No. 424 1 at 17 18.) Similarly, Apple and LG argue that MPT has failed to raise a triable issue of fact with respect to the "controllable quantizer means" and "coder means" limitations because MPT's expert has failed to identify where the internal QVS circuitry can be found in the accused products. (Doc. No. 425 at 24; Doc. No. 424 1 at 14 16.) However, by making these arguments, Apple and LG are again asking this Court to engage in an impermissible component-by-component infringement analysis. Apple and LG are not entitled to summary judgment of non-infringement simply because MPT's expert has not shown that their products contain all of the identified components of the corresponding structures. See *Caterpillar*, 224 F.3d at 1380 (explaining that it is impermissible for a district court to engage in a "component-by-component analysis to determine [whether a] reasonable jury could find structural equivalence").

*13 To be entitled to summary judgment of non-infringement based on these claim limitations, Apple and LG must show that there is no dispute of fact that the relevant structures in their accused devices do not perform the identified functions in substantially the same way to achieve substantially the same result as the

corresponding structures in the specification. See *Odetics*, 185 F.3d at 1267. MPT has submitted evidence in the form of an expert report from their infringement expert, Dr. Richardson, identifying the relevant structures in Apple and LG's accused products and concluding that the relevant structures perform the identified functions of the above limitations in substantially the same way to achieve substantially the same results as the overall corresponding structures identified by the Court during claim construction. (Doc. No. 477 14, Declaration of Iain Richardson Ex. A at 95 101, 105 08, 120 26, 130 36, 193 97, 199 202, 213 17, 219 23; Doc. No. 477 25, *id.* Ex. B at 358 61, 363 65, 372 75, 377 80, 386 89, 391 93, 400 03, 405 08, 448 51, 453 54, 458 60, 462 64, 467 69, 471 73, 476 78, 480 82.) Therefore, there is a triable issue of fact as to whether Apple and LG's accused products contain these claim limitations. Accordingly, the Court denies Apple and LG's motion for summary judgment of non-infringement of the #377 Patent.

C. Apple's iPod Nano (5th Gen)

Apple moves for summary judgment of non-infringement with respect to the iPod Nano (5th Gen) accused product. (Doc. No. 425 at 17 18.) Apple argues that MPT has failed to provide any infringement analysis for this product. (*Id.*) In response, MPT argues that Dr. Richardson's expert report provides a sufficient analysis because the iPod Nano (5th Gen) uses the same Samsung encoder as Apple's 1 12/1 13 products. (Doc. No. 477 4 at 18 19.)

Dr. Richardson's expert report states that he included Apple's iPod Nano (5th Gen) along with Apple's 1 12/1 13 products because "[t]he source code Apple identified as representing the encoder used in the S5L8730 is essentially the same as the source code identified as representing the encoder used in the H2P and H3P chips." (Doc. No. 425, Declaration of Justin Barnes Ex. 3, at 29.) Apple argues that this is insufficient analysis because Dr. Richardson does not identify the source code that is essentially the same. (Doc. No. 425 at 18.) A patentee may prove infringement by having its expert testify in detail about a particular device and then stating the same analysis applies to other allegedly infringing devices that operate similarly, without discussing each type of device in detail. See *TiVo, Inc. v. EchoStar Comm's Corp.*, 516 F.3d 1290, 1308 (Fed.Cir.2008); *Spansion, Inc. v. ITC*, 629 F.3d 1331, 1350 51 (Fed.Cir.2011). Apple does not contend that Dr. Richardson's infringement analysis with respect to the H2P and H3P chips is insufficient. Therefore, Dr.

Richardson may rely on this analysis as proof that the iPod Nano (5th Gen) infringes as long as the devices operate similarly. See *id.* MPT has presented evidence from which a reasonable inference could be drawn that the S5L8730 chip uses the same Samsung 720P encoder as the H2P and H3P chips because the chips use the same source code. ⁰ (Doc. No. 477 2, Declaration of Dr. Iain Richardson ¶¶ 9 11.) Therefore, the statements in Dr. Richardson's expert report are sufficient to create a triable issue of fact as to whether the iPod Nano (5th Gen) infringes MPT's patents. Accordingly, the Court denies Apple's motion for summary judgment of non-infringement of Apple's iPod Nano (5th Gen).

¹⁰ Apple argues that the Court should not consider Dr. Richardson's declaration because it includes opinions and analysis that was not included in his expert report. (Doc. No. 503 at 8 9.) However, Apple has failed to show how it is prejudiced by the statements made in the declaration, particularly in light of the fact that these statements were made prior to Dr. Richardson's deposition. Therefore, the Court will consider the declaration. See *Dukes v. Wal Mart, Inc.*, 222 F.R.D. 189, 195 (N.D.Cal.2004) (denying motion to strike expert testimony for failure to timely disclose the full extent of that testimony where the moving party failed to establish sufficient prejudice).

¹¹ In support of this motion for summary judgment, Apple attempts to rely on the Court's prior ruling on LG's motion to strike MPT's final infringement contentions. (Doc. No. 425 at 18.) That ruling is distinguishable from the present motion because it involved disclosures made in infringement contentions that are subject to Patent Local Rule 3.1 rather than disclosures made in an expert report that are not subject to that patent local rule. In addition, in briefing that motion, MPT's expert admitted that there were differences in the source code found in the different Qualcomm chips (Doc. No. 420 at 6); here, MPT's expert contends that the source code for the different chips is the same for 50 of the 52 files.

D. Doctrine of Equivalents

*14 Apple and LG move for summary judgment of no infringement by the doctrine of equivalents. (Doc. No. 425 at 2 3.) In its oppositions, MPT states that its infringement claims are not based on the doctrine of equivalents, and it does not oppose an in limine ruling excluding it from relying on the doctrine of equivalents during the trial. (Doc. No. 477 4 at 1.) Indeed, MPT has

filed a non-opposition to Apple and LG' motion in limine to exclude evidence and/or testimony about the doctrine of equivalents. (Doc. No. 600 at 13.) Accordingly, Apple and LG's motion for summary judgment of no infringement by the doctrine of equivalents is moot.

IV. Order Estopping MPT From Re-Raising Infringement Contentions Against Dropped and Struck Products

Apple and LG move for an order estopping MPT from re-raising its infringement contentions against products that were voluntarily dropped or struck from its final infringement contentions in this litigation and in any future litigation. (Doc. No. 425 at 3 6.) In response, MPT argues that Apple and LG's request is overbroad and unnecessary. (Doc. No. 477 4 at 2 3.)

When MPT served its final infringement contentions, it narrowed the number of accused products it was accusing of infringement in this action. (*Compare* Doc. No. 328 1, Declaration of Chris Mathews Exs. 1 2 with *id.* Exs. 4 5.) In addition, in ruling on the Defendants' motions to strike MPT's final infringement contentions, the Court limited MPT's final infringement contentions to exclude certain accused products. (Doc. No. 357.) A patentee is limited to the infringement theories it sets forth in its infringement contentions. *TQP Dev., LLC v. Merrill Lynch & Co.*, 2012 U.S. Dist. LEXIS 112803, at *10 (E.D.Tex. Aug. 10, 2012) (Bryson, J.). Therefore, MPT may not re-raise its claims of infringement against these products in this litigation.

With respect to Apple and LG's request to estop MPT in future litigation, Apple and LG are not entitled to such relief. In support of this request, Apple and LG rely on this Court's prior order in the *DirectTV* case, but Apple and LG misread the Court's order in that case. In *DirectTV*, the Court held that MPT was estopped from later re-asserting its infringement contentions from products that were dropped from its final infringement contentions in that action. *See Multimedia Patent Trust v. DirecTV, Inc.*, No. 09 cv 278 (S.D. Cal. Nov. 7, 2011 [Doc. No. 621 at 3 4]). The Court's order said nothing about estoppel applying in subsequent litigation. *See id.* Nor could it, because generally a court may not dictate to other courts the preclusive consequences of its own judgment. *See Smith v. Bayer Corp.*, U.S. , , 131 S.Ct. 2368, 2375, 180 L.Ed.2d 341 (2011). Whatever preclusive effect, if any, this action has on MPT in subsequent litigation, is for the court in that future litigation to decide. *See*

id. Accordingly, the Court grants in part and denies in part Apple and LG's motion. MPT is estopped from re-raising its infringement contentions in this action against products that were voluntarily dropped from its final infringement contentions or products that were struck from its final infringement contentions. ^{2 3}

¹² In their reply, Apple and LG argue that if the Court does not estop MPT from asserting its claims related to the dropped or struck products in subsequent litigation, then it should dismiss these claims with prejudice pursuant to [Federal Rule of Civil Procedure 41\(b\)](#) for failure to prosecute. However, because this argument was raised for the first time in a reply brief, the Court does not consider it. *See United States v. 191.07 Acres of Land*, 482 F.3d 1132, 1137 n. 2 (9th Cir.2007).

¹³ This Order does not preclude the parties from agreeing to treat the verdict on the one Qualcomm chip as representative of the other Qualcomm chips or preclude the Court from severing the infringement and declaratory relief claims for the struck “representative Qualcomm chips from this suit and placing them into the recently filed suit.

IV. Apple and LG's Motion for Summary Judgment of No Willful Infringement

*15 Apple and LG move for summary judgment of no willful infringement. (Doc. No. 425 at 18 23.) Specifically, Apple and LG argue that the defenses they have asserted against MPT's claims of infringement are reasonable as a matter of law. (*Id.*) In response, MPT argues that Apple and LG's motion should be denied because there are numerous questions of fact that would have to be decided by the jury before the Court should make its determination of whether Apple and LG were objectively reckless.

A. Legal Standards for Willful Infringement

To establish willful infringement, a patentee must make a “showing of objective recklessness.” *In re Seagate Technology, LLC*, 497 F.3d 1360, 1371 (Fed.Cir.2007) (en banc).

Accordingly, to establish willful infringement, a patentee must show by clear and convincing evidence

that the infringer acted despite an objectively high likelihood that its actions constituted infringement of a valid patent. The state of mind of the accused infringer is not relevant to this objective inquiry. If this threshold objective standard is satisfied, the patentee must also demonstrate that this objectively-defined risk (determined by the record developed in the infringement proceeding) was either known or so obvious that it should have been known to the accused infringer. *Id.* (citations omitted). The two-prong objective/subjective test must be determined on a claim by claim basis. ⁴ *Highmark, Inc. v. Allcare Health Mgmt. Sys.*, 687 F.3d 1300, 1311 (Fed.Cir.2012).

¹⁴ *Highmark* is a case interpreting the standard for determining whether a claim is objectively baseless under 35 U.S.C. § 285. See 687 F.3d at 1308. In *iLor, LLC v. Google, Inc.*, the Federal Circuit explained that this standard is identical to the standard for determining willful infringement under *Seagate*. See 631 F.3d 1372, 1377 (Fed.Cir.2011).

An accused infringer is generally not objectively reckless where it “relies on a reasonable defense to a charge of infringement.” *Spine Solutions, Inc. v. Medtronic Sofamor Danek USA, Inc.*, 620 F.3d 1305, 1319 (Fed.Cir.2010); accord. *Bard Peripheral Vascular, Inc. v. W.L. Gore & Assocs.*, 682 F.3d 1003, 1005 06 (Fed.Cir.2012) (“[T]he question ... often posed is whether a defense or noninfringement theory was ‘reasonable.’”). Therefore, legitimate defenses to infringement and credible invalidity arguments can demonstrate that the accused infringer was not objectively reckless. See *Black & Decker, Inc. v. Robert Bosch Tool Corp.*, 260 Fed. App’x 284, 291 (Fed.Cir.2008) (“[B]oth legitimate defenses to infringement claims and credible invalidity arguments demonstrate the lack of an objectively high likelihood that a party took actions constituting infringement of a valid patent.”); see, e.g., *Advanced Fiber Techs. Trust v. J & L Fiber Servs.*, 674 F.3d 1365, 1377 78 (Fed.Cir.2012) (affirming district court’s summary judgment of no willfulness where

the “facts show[ed] that [the defendant’s] assertions of invalidity and noninfringement were, at minimum, objectively reasonable defenses to [the plaintiff’s] charge of infringement”).

The Federal Circuit has recently held that “the objective determination of recklessness, even though predicated on underlying mixed questions of law and fact, is best decided by the judge as a question of law.” *Bard*, 682 F.3d 1007. However, in considering the objective prong of the *Seagate* test, when the defendant relies on the reasonableness of his defenses to infringement, the judge may “allow the jury to determine the underlying facts relevant to the defense in the first instance, for example, the questions of anticipation or obviousness.” *Id.* at 1008.

B. Analysis

^{*16} As an initial matter, MPT argues that under *Bard*, whenever there are any disputed factual issues related to the willfulness determination, the factual issues must be decided first by the jury. (Doc. No. 477 4 at 19 20.) MPT is incorrect. In *Bard*, the Federal Circuit stated that in determining whether a defendant’s defense to infringement is objectively reasonable, a judge “may” allow the jury to decide the underlying factual issues. See 682 F.3d 1007. The Federal Circuit did not hold that a judge was required to do so. See *id.* Indeed, the Federal Circuit has affirmed the granting of summary judgment of no willfulness upon a finding that the defendant’s defenses to infringement were objectively reasonable. See *Advanced Fiber Techs.*, 674 F.3d at 1377 78.

MPT accuses Apple of infringing claims 2, 4, and 12 of the #226 Patent, claims 13, 14, 15, 31 and 32 of the #878 Patent, and claims 1, 2, 4, 8, 26, and 27 of the #377 Patent, and MPT accuses LG of infringing claims 13, 31, and 32 of the #878 Patent and claims 1, 2, 8, 26 and 27 of the #377 Patent. (Doc. No. 328 1, Declaration of Chris Mathews Exs. 1 2.) To support its claim of willfulness, MPT relies on the following pre-litigation evidence. ⁵ On March 15, 2007, MPT sent Apple a demand letter, accusing Apple of infringing the #226 Patent, the #878 Patent, and the #377 Patent. (Doc. No. 477 6, Declaration of Chris Mathews Ex. 7.) On August 13, 2008, MPT sent LG a similar demand letter. (*Id.* Ex. 8.) In May 2009, MPT provided Apple with detailed claim charts of its infringement contentions, including claim charts for claims 1 and 12 of the #226 Patent, claims 13, 32, and 33 of the #878

Patent, and claim 26 of the #377 Patent. ⁶ (*Id.* Ex. 11.) Therefore, although MPT had made Apple and LG aware of its assertion that they were infringing the Patents In Suit prior to the commencement of this action, out of the claims asserted in this action MPT only provided Apple with detailed infringement allegations for claim 12 of the #226 Patent, claims 13 and 32 of the #878 Patent, and claim 26 of the #377 Patent and failed to provide LG with detailed allegations for any of the claims of the Patents In Suit. MPT's failure to provide evidence showing that LG was ever provided with claim charts for the claims at issue in this litigation is by itself sufficient for the Court to conclude that LG was not acting objectively reckless. *Cf. Highmark*, 687 F.3d at 1311 (Fed.Cir.2012) (explaining that willfulness is determined on a claim by claim basis). Similarly, MPT's failure to provide evidence showing that Apple was ever provided with detailed claim charts for claim 2 of the # 226 Patent or claim 1 of the #377 Patent is by itself sufficient for the Court to conclude that Apple was not acting objectively reckless with respect to these two claims and their dependent claims. *See id.*

¹⁵ In *Seagate*, the Federal Circuit explained that a claim of willful infringement “must find its basis in prelitigation conduct rather than postlitigation conduct. 497 F.3d at 1374.

¹⁶ LG asserts that MPT never provided it with detailed claim charts prior to the commencement of this lawsuit. (Doc. No. 425 at 20.) MPT does not dispute this contention in its opposition. (*See generally* Doc. No. 477 4.) An exhibit attached to MPT's opposition states that LG was provided with claim charts prior to the commencement of this lawsuit. (Doc. No. 477 6, Declaration of Chris Mathews Exs. 10) However, because the Court was not provided with the attachments to these emails, the Court cannot evaluate the detail of these claim charts or if they even are related to the claims that are currently being asserted against LG in this lawsuit.

In support of their motion for summary judgment of no willfulness, Apple and LG primarily rely on the two jury verdicts that were reached in prior lawsuits between Microsoft and MPT involving the #226 Patent and the #878 Patent. In 2008, in *Lucent v. Gateway*, No. 07 cv 2000, a jury rendered a verdict of non-infringement in favor of Microsoft and against MPT on claim 12 of the # 226 Patent, and in *Lucent v. Microsoft*, No. 06 cv 684, a jury rendered a verdict of non-infringement in favor of Microsoft and against MPT on claims 13

and 15 of the #878 Patent. ⁷ *Lucent v. Gateway*, No. 07 cv 2000 (S.D. Cal. Apr. 4, 2008 [Doc. No. 735]); *Lucent v. Microsoft*, No. 06 cv 684 (S.D. Cal. Jun. 4, 2008 [Doc. No. 851]). In *Lucent v. Gateway*, this Court upheld the jury's verdict and denied MPT's motions for judgment as a matter of law because, among other reasons, Microsoft introduced substantial evidence for the jury to conclude that Microsoft's product did not use a discrete cosine transform (“DCT”) and that “replacing the DCT with VC 1 integer transforms would result in structures that, as a whole, were not equivalent to those in the claim elements.” *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.Supp.2d 1016, 1050 (S.D.Cal.2008) (“[T]he jury could reasonably conclude that this substitution rendered the overall structure of the VC 1 decoders substantially different from those in the claim elements.”). Similarly, in *Lucent v. Microsoft*, one of the arguments Microsoft made to the jury with respect to claim 15 of the #878 Patent was that the structure of the accused products' decoders was “substantially different because they use a set of 16 bit integer transforms rather than an inverse discrete cosine transform.” *Lucent v. Microsoft*, No. 06 cv 684 (S.D. Cal. Jul. 23, 2008 [Doc. No. 918 at 13]). The Court subsequently entered judgment in favor of Microsoft and against MPT in the two cases. *Lucent v. Gateway*, No. 07 cv 2000 (S.D. Cal. Jun. 19, 2008 [Doc. No. 853]); *Lucent v. Microsoft*, No. 06 cv 684 (S.D. Cal. Jul. 23, 2008 [Doc. No. 919]).

¹⁷ In its opposition, MPT argues that both of these jury verdicts were based on flawed reasoning. (Doc. No. 477 4 at 23.) MPT first states that the jury in *Lucent v. Gateway* erroneously determined that claim 12 of the #226 patent was invalid. (*Id.*) However, MPT fails to explain how the jury's determination of invalidity is relevant to its infringement determination, which was upheld by this Court. MPT also asserts that the verdict in *Lucent v. Microsoft* was tainted by jury misconduct. (*Id.*) However, the only evidence that MPT relies on is an unsworn letter from a juror, alleging that some misconduct might have occurred, but also stating that any possible misconduct did not affect the jury's determination of Microsoft's liability with respect to the #878 Patent. *See Lucent v. Microsoft*, No. 06 cv 684 (S.D. Cal. Oct. 29, 2008 Doc. No. 942]). The Federal Circuit did not reverse the jury verdict or the Court's judgment. Instead, the Federal Circuit dismissed the appeal on motion of the parties. *See id.* (S.D. Cal. Jan. 8, 2009 Doc. No. 950]).

*17 Apple and LG have presented evidence stating that each of their accused products includes an integer transform and not a DCT. (Doc. No. 520, Declaration of Justin Barnes Ex. 3; *see also* Doc. No. 384 13, Declaration of Justin Barnes Ex. 24.) In its opposition, MPT does not dispute that the Apple and LG products include an integer transform rather than a DCT. MPT merely argues that the prior verdicts involved a different defendant with different products. (Doc. No. 477 4 at 23.) Although the Microsoft cases involved different products, Apple and LG have provided a factual link showing why it is reasonable for them to rely on the Microsoft verdicts—that their products also use an integer transform rather than a DCT. MPT has failed to present any evidence rebutting that factual assertion. Accordingly, even looking at the above evidence in the light most favorable to MPT, the two jury verdicts in the Microsoft cases alone are sufficient to show that Apple and LG have an objectively reasonable non-infringement defense to claim 12 of the #226 Patent and claim 15 of the #878 Patent.

In addition, the Court concludes that Apple and LG have presented objectively reasonable non-infringement arguments in their expert report from Dr. Bovik. (*See* Doc. No. 520, Declaration of Justin Barnes Ex. 3.) This case involves complex technology with highly disputed issues of infringement. Much of the infringement analysis deals with means-plus-function claim terms, and Apple and LG's expert has detailed many ways in which their accused products allegedly contain structures that are substantially different from the structures disclosed in the Patents in Suit. (*Id.*) In particular, the Court notes the reasonableness of those opinions as they relate to claims 2 and 4 of the # 226 Patent, claim 31 of the #878 Patent, and claims 1, 2, 4, 8, 26, and 27 of the #377 Patent, which the Court has also interpreted to include a DCT as part of their corresponding structures. (Doc. No. 258 at 21, 39, 44, 46, 56, 62, 65, 68 69.) Moreover, although the Court has denied Apple and LG's motion for summary judgment on invalidity, their invalidity argument based on written description and enablement with respect to claims 13 and 31 of the #878 Patent were objectively reasonable. While it is true that many genuine issues of fact remain, and it is possible that the jury may reject Apple and LG's non-infringement and invalidity arguments, the Court cannot conclude that Apple and LG arguments were objectively unreasonable by clear and convincing evidence.

In light of the above, even viewing the evidence in the light most favorable to MPT, the Court concludes as matter of law that MPT cannot show by clear and convincing evidence that Apple and LG acted despite an objectively high likelihood that its actions constituted infringement of a valid patent. *See Advanced Fiber Techs.*, 674 F.3d at 1377 78. Accordingly, the Court grants Apple and LG's motion for summary judgment of no willful infringement.

V. MPT's Motions for Summary Judgment of Apple and LG's Other Affirmative Defenses

A. Licensing and Exhaustion

*18 MPT moves for summary judgment of Apple and LG's affirmative defenses of licensing and patent exhaustion. (Doc. No. 426 at 10 12.) The Court has already issued an order ruling on MPT and Apple's cross motions for summary judgment of Apple's affirmative defense of licensing through MPEG LA. (Doc. No. 479.) The Court granted Apple's motion for summary judgment and denied MPT's motion for summary judgment. (*Id.*) Apple does not oppose MPT's motion for summary judgment of Apple's affirmative defense of patent exhaustion. (Doc. No. 478 at 8.) Accordingly, the Court grants MPT's motion for summary judgment of Apple's affirmative defense of patent exhaustion.

LG does not oppose MPT's motion for summary judgment on LG's affirmative defenses of licensing and patent exhaustion. (Doc. No. 478 at 16.) Accordingly, the Court grants MPT's motion for summary judgment on LG's affirmative defenses of licensing and patent exhaustion.

B. Laches

MPT moves for summary judgment of Apple and LG's affirmative defense of laches. (Doc. No. 426 at 9 10.) In response, Apple argues that MPT's motion should be denied because MPT has unreasonably delayed filing this suit against Apple for over 10 years. (Doc. No. 478 at 5 7.)

To prevail on a defense of laches in a patent case, a defendant must prove: (1) that the patentee delayed filing suit for an unreasonable and inexcusable length of time from the time it knew or reasonably should have known of its claim against the defendant, and (2) the delay operated to the prejudice or injury of the defendant. *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1032

(Fed.Cir.1992) (en banc). “The length of time which may be deemed unreasonable has no fixed boundaries but rather depends on the circumstances. The period of delay is measured from the time the plaintiff knew or reasonably should have known of the defendant's alleged infringing activities to the date of suit.” *Id.* “A presumption of laches arises where a patentee delays bringing suit for more than six years after the date the patentee knew or should have known of the alleged infringer's activity.” *Id.* at 1028.

“Material prejudice to adverse parties resulting from the plaintiff's delay is essential to the laches defense. Such prejudice may be either economic or evidentiary.” *A.C. Aukerman*, 960 F.2d at 1033. “Evidentiary, or ‘defense’ prejudice, may arise by reason of a defendant's inability to present a full and fair defense on the merits due to the loss of records, the death of a witness, or the unreliability of memories of long past events, thereby undermining the court's ability to judge the facts.” *Id.* “Economic prejudice may arise where a defendant and possibly others will suffer the loss of monetary investments or incur damages which likely would have been prevented by earlier suit.” *Id.*

A defendant must satisfy the two-prong laches defense by a preponderance of the evidence. *A.C. Aukerman*, 960 F.2d at 1045. However, the ultimate application of the defense of laches is committed to the sound discretion of the district court.” *Id.* at 1032. The court may decline to apply the laches defense, even where the defendant establishes the laches factors by proof or presumption. *Id.*

*19 With respect to Apple's laches defense, the only evidence that Apple relies on to support its assertion of unreasonable delay is an April 14, 2000 letter from Lucent to Apple, requesting that Apple take a license to several patents, including the #226 Patent and the #878 Patent, for Apple's iMac and iBook. (Doc. No. 478, Declaration of Justin Barnes Ex. C.) In this case, MPT accuses Apple of infringing the #226 Patent and the #878 Patent based on its products' alleged use of H.264 technology. ⁸ (See Doc. No. 328 1, Declaration of Chris Mathews Ex. 1 (MPT's final infringement contentions against Apple).) MPT has shown, and Apple does not contest, that the H.264 standard did not even exist at the time of the letter. Moreover, MPT alleges that the infringement at issue in this case first began in 2005 when Apple launched QuickTime 7. (Doc. No. 495 1, Declaration of Justin Barnes Ex. C at 45.) Therefore, even looking at the April 14, 2000 letter in the light most favorable to Apple, it is not

relevant to the allegations of infringement in this action and is not evidence MPT unreasonably delayed filing the present lawsuit.

18 At the hearing, Apple argued that Apple's use of the MPEG 2 standard is in this case because it was mentioned in MPT's complaint. Although the complaint may have contained allegations related to the MPEG 2 standard, MPT's current infringement contentions are based on the H.264 standard. (See Doc. No. 328 1, Declaration of Chris Mathews Ex. 1.) Therefore, Apple's laches defense must relate to those current infringement contentions.

However, the fact that MPT alleges that the infringing conduct began in 2005 but did not file the present action against Apple until December 20, 2010 shows that MPT potentially delayed bringing this action for over five years. (Doc. No. 1.) See *Wanlass v. General Electric Co.*, 148 F.3d 1334, 1337 (Fed.Cir.1998) (“The period of delay begins at the time the patentee has actual or constructive knowledge of the defendant's potentially infringing activities.”). But, Apple has failed to show evidentiary prejudice that was caused by the delay other than speculative assertions. See *Odetics, Inc. v. Storage Tech. Corp.*, 919 F.Supp. 911, 919 (E.D.Va.1996) (explaining that to prevail on a laches defense, the defendant must show that the evidence “has become unavailable as a result of the delay”). Apple has also failed to present any evidence showing that it has suffered any economic prejudice as a result of the delay. In addition, the Court rejects Apple's contention that it was prejudiced by the delay because during this period, Lucent transferred the Patents in Suit to MPT to insulate itself from potential counterclaims. Apple has failed to explain to the Court why it cannot pursue these potential claims against Lucent. Accordingly, the Court grants MPT's motion for summary judgment of Apple's affirmative defense of laches.

LG does not oppose MPT's motion for summary judgment on this issue. (Doc. Nos. 451 3, 478 at 8.) Accordingly, the Court grants MPT's motion for summary judgment of LG's affirmative defense of laches.

C. Equitable Estoppel

MPT moves for summary judgment of the Apple and LG's affirmative defense of equitable estoppel. (Doc. No 426 at 10 12.) In response, Apple argues that MPT's motion should be denied based on the prior conduct of Lucent and MPT. (Doc. No. 478 at 8 9.)

*20 To prove the affirmative defense of equitable estoppel, a defendant must show: “(1) the patentee, through misleading conduct, led the alleged infringer to reasonably believe that the patentee did not intend to enforce its patent against the infringer; (2) the alleged infringer relied on that conduct; and (3) due to its reliance, the alleged infringer would be materially prejudiced if the patentee were permitted to proceed with its charge of infringement.” *Aspex Eyewear, Inc. v. Clariti Eyewear, Inc.*, 605 F.3d 1305, 1310 (Fed.Cir.2010); accord. *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1028 (Fed.Cir.1992) (en banc). “Misleading ‘conduct’ may include specific statements, action, inaction, or silence when there was an obligation to speak.” *Aspex Eyewear*, 605 F.3d at 1310.

The decision of whether to bar a claim of patent infringement under equitable estoppel is committed to the sound discretion of the trial court. *A.C. Aukerman*, 960 F.2d at 1041. “In deciding whether to bar the suit on estoppel grounds, the court must consider all evidence relevant to the equities.” *Aspex Eyewear*, 605 F.3d at 1310. Equitable estoppel must be proven by a preponderance of the evidence. *A.C. Aukerman*, 960 F.2d at 1046.

The only evidence Apple presents of allegedly misleading conduct in support of its equitable estoppel defense is the same April 14, 2000 letter from Lucent to Apple that Apple also relies on to support its laches defense. (Doc. No. 478, Declaration of Justin Barnes Ex. C.) In this case, MPT accuses Apple of infringing the #226 Patent and the #878 Patent based on its products' alleged use of H.264 technology. (See Doc. No. 328 1, Declaration of Chris Mathews Ex. 1 (MPT's final infringement contentions against Apple).) However, the H.264 standard did not even exist at the time of the letter. Therefore, even looking at the April 14, 2000 letter in the light most favorable to Apple, no reasonable inference could be drawn that Apple reasonably believed that MPT/Lucent did not intend to enforce its patent rights against Apple for its alleged use of H.264 technology. Accordingly, the Court grants MPT's motion for summary judgment of Apple's affirmative defense of equitable estoppel.

LG does not oppose MPT's motion for summary judgment on this issue. (Doc. No. 478 at 9.) Accordingly, the Court grants MPT's motion for summary judgment of LG's affirmative defenses of equitable estoppel.

D. Waiver

MPT moves for summary judgment of Apple and LG's affirmative defense of waiver. (Doc. No. 426 at 10 12.) Apple and LG do not oppose MPT's motion for summary judgment. (Doc. No. 476 at 1; Doc. No. 478 at 9.) Accordingly, the Court grants MPT's motion for summary judgment of Apple and LG's affirmative defenses of waiver.

E. Violation of Reasonable and Non-Discriminatory Licensing Agreement

MPT moves for summary judgment of Apple and LG's affirmative defense of violation of a reasonable and non-discriminatory licensing (“RAND”) agreement. (Doc. No. 426 at 12.) MPT argues that an alleged RAND agreement violation is not a defense to patent infringement, and Apple and LG have failed to present any evidence showing that the Patents in Suit were subject to a RAND obligation. (Doc. Nos.426, 512.) In response, Apple and LG argue that violation of a RAND commitment is an affirmative defense to patent infringement, and they have presented evidence showing that MPT is subject to RAND obligations. (Doc. No. 478 at 9 12.)

*21 Apple and LG have failed to cite to any authority holding that a patentee's violation of its RAND obligations represents an independent affirmative defense to claims of patent infringement. The only case that Apple and LG cite to in support of their contention that it is an affirmative defense is *UTStarcom, Inc. v. Starent Networks, Corp.*, 2008 WL 5142194, 2008 U.S. Dist. LEXIS 98498 (N.D.Ill. Dec. 5, 2008). In *UTStarcom*, the Court found that the defendant had properly pleaded a counterclaim for patent misuse based on allegations that the patentee had failed to offer the defendant a license to the patents on reasonable, nondiscriminatory terms before filing the action. See *id.* at *6. This case, at most, stands for the proposition that evidence that the patentee violated its RAND obligations can be used to support a counterclaim or affirmative defense of patent misuse. It does not stand for the proposition that a patentee's violation of its RAND obligations is an independent affirmative defense to patent infringement. See also *Barnes & Noble, Inc. v. LSI Corp.*, 849 F.Supp.2d 925, 933 40 (N.D.Cal.2012) (finding defendant had properly pleaded an affirmative defense of unenforceability due

to fraud based on the patentee's alleged violation of its RAND obligations); *Apple, Inc. v. Motorola Mobility, Inc.*, 2011 U.S. Dist. LEXIS 72745, at *22 42 (W.D.Wis. Jun. 7, 2011) (finding accused infringer plaintiff had properly pleaded claims for breach of contract, antitrust, estoppel, and patent misuse based on the patentee's alleged violation of its RAND obligations). Moreover, both Apple and LG allege patent misuse as a separate affirmative defense and rely on MPT's alleged violation of its RAND obligations to support that defense. (Doc. No. 39 ¶ 192 97; Doc. No. 41 ¶¶ 156 61.) Therefore, this affirmative defense is redundant of Apple and LG's patent misuse defense. Accordingly, the Court grants MPT's motion for summary judgment of Apple and LG's affirmative defense of violation of a RAND agreement. See *M.M. v. Lafayette Sch. Dist.*, 681 F.3d 1082, 1091 (9th Cir.2012) (“[A] district court has broad discretion to control its own docket, and that includes the power to dismiss duplicative claims.”).

F. Standards Settings Organizations Estoppel

MPT moves for summary judgment of Apple and LG's affirmative defense of standards settings organizations estoppel. (Doc. No. 426 at 13.) Specifically, MPT argues that Apple and LG have failed to present evidence showing which entity or entities owed an alleged duty of disclosure to a standard setting organization. (Doc. No. 426 at 13.) In response, Apple and LG argue that they have presented evidence showing that MPT's predecessors-in-interest were members of standards setting bodies relating to the MPEG 2 standard and the H.264 standards. (Doc. No. 478 at 12 14.)

“A member of an open standard setting organization may be equitably estopped or may have impliedly waived its right to assert infringement claims against standard-compliant products.” *Hynix Semiconductor Inc. v. Rambus Inc.*, 645 F.3d 1336, 1347 48 (Fed.Cir.2011). To establish an affirmative defense of waiver or estoppel in the standard setting organization context, a defendant must satisfy two elements: “(1) the patentee had a duty of disclosure to the standard setting organization, and (2) the patentee breached that duty.” *Id.* at 1348.

*22 In response to MPT's motion, Apple and LG have presented evidence from which a reasonable inference could be drawn that MPT's predecessors-in-interest were members of the standards setting bodies for the MPEG 2 and H.264 standards and participated in standards

setting activity for those two standards. (Doc. No. 478, Declaration of Justin Barnes Exs. H I.) Apple and LG also have also presented evidence from which a reasonable inference could be drawn that those two standard setting bodies required their members to disclose patents that might reasonably be necessary to practice those standards. (*Id.*) Therefore, Apple and LG have presented sufficient evidence to allow their defense of standards setting organization estoppel to survive summary judgment.

In its reply, MPT argues that, as Apple and LG's damages expert admits, there is no duty to disclose unless a participant in a standards setting organization declines to make a RAND commitment. (Doc. No. 522 at 7.) MPT argues, therefore, that Apple and LG's position is contradicted by their other affirmative defense of patent misuse which alleges that MPT's predecessors had indeed made a RAND commitment. (*Id.*) However, it is well established that a defendant may rely on inconsistent defenses in federal court. See *Fed.R.Civ.P.* 8(d)(3); *Molsbergen v. United States*, 757 F.2d 1016, 1018 (9th Cir.1985) (“[T]he Federal Rules of Civil Procedure ... explicitly authorize litigants to present alternative and inconsistent pleadings.”) Accordingly, the Court denies MPT's motion for summary judgment of Apple and LG's affirmative defense of standards setting organization estoppel. As an equitable defense, this issue will be tried to the Court.

G. Patent Misuse and Unclean Hands

MPT moves for summary judgment of the Defendants' affirmative defenses of patent misuse and unclean hands. (Doc. No. 426 at 13 14 .) The doctrine of unclean hands is based on the maxim that “ [o]ne who comes into equity must come with clean hands and keep those hands clean throughout the pendency of the litigation even to the time of ultimate disposition by an appellate court.’ ” *Honeywell Int'l, Inc. v. Universal Avionics Sys. Corp.*, 398 F.Supp.2d 305, 310 (D.Del.2004). To prove the defense of unclean hands, a defendant must show that the patentee conducted itself as to shock the moral sensibilities of the judge, or stated otherwise, that the patentee's conduct was offensive to the dictates of natural justice. *Id.* (citing *Aptix Corp. v. Quickturn Design Sys., Inc.*, 269 F.3d 1369, 1375 (Fed.Cir.2001); *Gaudiosi v. Mellon*, 269 F.2d 873, 882 (3d Cir.1959)). “The clean hands maxim gives broad discretion to the court's equity power in refusing to aid an unclean hands litigant.” *Id.*

“[T]he patent misuse doctrine is an extension of the equitable doctrine of unclean hands, whereby a court of equity will not lend its support to enforcement of a patent that has been misused.” *B. Braun Med., Inc. v. Abbott Labs.*, 124 F.3d 1419, 1427 (Fed.Cir.1997). To establish the affirmative defense of patent misuse, a defendant must prove that the patentee impermissibly broadened the physical or temporal scope of the patent grant and has done so in a manner that has anticompetitive effects. *Princo*, 616 F.3d at 1328. “In the licensing context, the doctrine limits a patentee’s right to impose conditions on a licensee that exceed the scope of the patent right.” *Id.* at 1321. The doctrine of patent misuse is grounded in the policy-based desire to prevent a patentee from using the patent to obtain market benefit beyond that which inheres in the statutory patent right. *Id.* at 1328.

*23 MPT argues that Apple and LG’s patent misuse defense should be dismissed because their claims that MPT violated its RAND obligations are insufficient to support this defense. However, several courts have held that a patentee’s violation of its RAND obligations may in certain circumstances constitute patent misuse. *See, e.g., Apple*, 2011 U.S. Dist. LEXIS 72745, at *40 42; *UTStarcom*, 2008 U.S. Dist. LEXIS 98498, at *6. In response to MPT’s motion, Apple and LG have presented evidence from which a reasonable inference could be drawn that MPT’s predecessors-in-interest were members of the standards setting bodies for the MPEG 2 and H.264 standards and participated in standards setting activity for those two standards. (Doc. No. 478, Declaration of Justin Barnes Exs. H I.) Apple and LG have also presented evidence from which a reasonable inference could be drawn that MPT’s predecessors-in-interest promised these standards bodies that they would license the patents-in-suit on RAND terms, and that MPT’s damages request might violate its RAND obligations. (*Id.* Exs.H J) In its reply, MPT argues that Apple and LG have failed to provide any evidence showing that the patents-in-suit are essential patents to the H.264 standard and, therefore, are subject to any potential RAND obligations related to that standard. (Doc. No. 522 at 6 7.) However, a reasonable inference could be drawn that the patents-in-suit are essential to the H.264 standard based on MPT’s assertion that the Defendants infringe the patents-in-suit by practicing that standard. (Doc. No. 328 1, Declaration

of Chris Mathews Exs. 1 2 (MPT’s final infringement contentions against Apple and LG.) *Cf. Barnes & Noble*, 849 F.Supp. at 938 (explaining that the accused infringer was not required to plead that the patents-in-suit were essential to the standard where the patentee based its infringement claims on the fact that the accused products practiced the standard). In addition, Apple and LG have presented the Court with testimony from one of MPT’s experts, Mr. Teece, stating that the #226 Patent and the #878 Patent are by some criteria essential to the H.264 standard. (*See also* Doc. No. 477 14, Declaration of Iain Richardson Ex. A B.) Accordingly, the Court denies MPT’s motion for summary judgment of Apple and LG’s affirmative defenses of patent misuse and unclean hands. As equitable defenses, these issues will be tried to the Court.

H. Standing and Non-Joinder

MPT moves for summary judgment of the Defendants’ affirmative defenses of standing and non joinder. (Doc. No. 426 at 15.) Apple and LG do not oppose MPT’s motion for summary judgment. (Doc. No. 476 at 1; Doc. No. 478 at 16.) Accordingly, the Court grants MPT’s motion for summary judgment of Apple and LG’s affirmative defense of standing and non joinder.

Conclusion

For the reasons above, the Court **GRANTS** Canon’s motion for summary judgment, **GRANTS IN PART** and **DENIES IN PART** Apple and LG’s motion for partial summary judgment, and **GRANTS IN PART** and **DENIES IN PART** MPT’s motion for partial summary judgment. Because the Court grants Canon’s motion for summary judgment, the Court **VACATES** all pending dates related to Canon, including the trial between MPT and Canon that was set to tentatively begin on Thursday, December 13, 2012 at 9:00 a.m.

*24 **IT IS SO ORDERED.**

All Citations

Not Reported in F.Supp.2d, 2012 WL 6863471

EXHIBIT 270

645 F.3d 1336
 United States Court of Appeals,
 Federal Circuit.

HYNIX SEMICONDUCTOR INC., Hynix
 Semiconductor America Inc., Hynix Semiconductor
 U.K. Ltd.; and [Hynix Semiconductor
 Deutschland GMBH](#), Plaintiffs–Appellants,
 v.
 RAMBUS INC., Defendant–Cross Appellant.

Nos. 2009–1299, 2009–1347.

|
 May 13, 2011.

|
 Rehearing and Rehearing En
 Banc Denied July 29, 2011.

Synopsis

Background: Manufacturer filed action against designer of computer memory systems seeking declaratory judgment of non-infringement. Designer counterclaimed alleging infringement. The United States District Court for the Northern District of California, [Ronald M. Whyte](#), Senior District Judge, granted judgment in part for designer. Parties appealed.

Holdings: The Court of Appeals, [Linn](#), Circuit Judge, held that:

[1] litigation was reasonably foreseeable prior to patentee's destruction of documents;

[2] patentee's destruction of documents in preparation of its suit against computer dynamic random access memory (DRAM) manufacturers reasonably could have constituted crime of fraud in California;

[3] submission of certain issues to jury was harmless error;

[4] patentee did not waive its right to litigate, and was not equitably estopped from litigating, infringement by standard-compliant computer DRAM;

[5] patents for random access memory device were not invalid for lack of written description;

[6] competitor waived right to contest sufficiency of evidence or weight of evidence on question of patent obviousness; and

[7] combination that was expected to increase cost had some bearing on obviousness of that combination.

Affirmed in part, vacated in part, and remanded.

Gajarsa, Circuit Judge, filed opinion concurring-in-part and dissenting-in-part, with whom [Newman](#), Circuit Judge, joined.

West Headnotes (32)

[1] Patents

🔑 Failure to respond;sanctions

On spoliation claim, litigation was reasonably foreseeable prior to patentee's destruction of documents, even if litigation was not imminent, where, among other things, patentee had determined that it would not initiate action until competing product entered market, patentee had planned to begin its licensing strategy at time that computer dynamic random access memory (DRAM) manufacturers were locked in to production of its DRAM and projected when that would occur, and patentee had planned to engaged in reverse engineering to produce claim charts for its license negotiations once customer samples were available in market.

[4 Cases that cite this headnote](#)

[2] Federal Civil Procedure

🔑 Failure to Comply;Sanctions

“Spoliation” refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.

[12 Cases that cite this headnote](#)

[3] Federal Civil Procedure

🔑 [Discovery and Production of Documents and Other Tangible Things](#)

Federal Civil Procedure

🔑 [Failure to Comply;Sanctions](#)

On a spoliation claim, the determination of when the duty to preserve evidence begins is informed by a number of policy considerations, including the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth and must balance the reality that litigation is an ever-present possibility in American life with the legitimate business interest of eliminating unnecessary documents and data.

[Cases that cite this headnote](#)

[4] **Courts**

🔑 [Particular questions or subject matter](#)

In a patent case, a district court's spoliation decision is reviewed under the law of the regional circuit where the district court is located.

[3 Cases that cite this headnote](#)

[5] **Federal Courts**

🔑 [Evidence](#)

Federal Courts

🔑 [Discovery sanctions](#)

In the Ninth Circuit, de novo review applies to the legal standard for a district court's spoliation decision, clear error review applies to the underlying facts, and abuse of discretion applies to the propriety of the remedy.

[Cases that cite this headnote](#)

[6] **Federal Civil Procedure**

🔑 [Failure to Comply;Sanctions](#)

On a spoliation claim, contingencies whose resolutions are reasonably foreseeable do not foreclose a conclusion that litigation is reasonably foreseeable; thus, a party may not destroy documents it expects will be

relevant in an expected future litigation, solely because contingencies exist, where the party destroying documents fully expects those contingencies to be resolved.

[10 Cases that cite this headnote](#)

[7] **Privileged Communications and Confidentiality**

🔑 [Criminal or other wrongful act or transaction;crime-fraud exception](#)

Patentee's destruction of documents in preparation of its suit against computer dynamic random access memory (DRAM) manufacturers reasonably could have constituted crime of fraud in California, and thus crime-fraud exception to attorney-client privilege applied, where patentee controlled timing of destruction of relevant evidence and controlled timing of initiation of investigation that triggered application of provision. *West's Ann.Cal.Penal Code § 135*.

[Cases that cite this headnote](#)

[8] **Patents**

🔑 [Estoppel](#)

Patents

🔑 [Waiver](#)

A member of an open standard setting organization may be equitably estopped or may have impliedly waived its right to assert patent infringement claims against standard-compliant products.

[10 Cases that cite this headnote](#)

[9] **Patents**

🔑 [Waiver](#)

Patents

🔑 [Degree of proof](#)

To support a finding of implied waiver in the standard setting organization context, the accused must show by clear and convincing evidence that the patentee's conduct was so inconsistent with an intent to enforce its rights as to induce a reasonable belief that such right has been relinquished; such conduct

can be shown where (1) the patentee had a duty of disclosure to the standard setting organization, and (2) the patentee breached that duty.

[16 Cases that cite this headnote](#)

[10] Patents

🔑 Estoppel

To support a finding of equitable estoppel, the accused must show that the patentee, through misleading conduct, led the alleged infringer to reasonably infer that the patentee does not intend to enforce its patent against the alleged infringer; conduct may include specific statements, action, inaction, or silence where there was an obligation to speak.

[7 Cases that cite this headnote](#)

[11] Patents

🔑 Harmless and reversible error

Submission of issues to jury, of whether members of standard setting organization (SSO) shared clearly defined expectation that members would disclose relevant knowledge that they had about patent applications or intent to file patent applications on technology being considered for adoption as standard, and whether pending patent applications covered standard prior to patentee's withdrawal from SSO, after determination that there was duty and categorization of scope as extending to all pending or issued claims that were reasonably necessary to practice the standard, was harmless error, where patentee did not breach duty of disclosure.

[3 Cases that cite this headnote](#)

[12] Patents

🔑 Waiver

Patents

🔑 Computers and Software

Patentee did not waive its right to litigate, and was not equitably estopped from litigating, infringement by standard-

compliant computer dynamic random access memory (DRAM), by delaying in amending its claims until after its exit from standard setting organization (SSO), where claims pending during patentee's participation in SSO were not reasonably necessary to practice standards, but claims prosecuted after its exit from SSO were.

[Cases that cite this headnote](#)

[13] Patents

🔑 Computers and Software

“Bus,” called for in patent for random access memory device, meant set of signal lines to which number of devices were connected, and over which information was transferred between devices; such set did not have to be multiplexed.

[Cases that cite this headnote](#)

[14] Patents

🔑 Rejection and Amendment of Claims; Prosecution History

When conducting patent claim construction, a court may look to the prosecution history to determine what a person of skill in the art would have understood disputed claim language to mean.

[2 Cases that cite this headnote](#)

[15] Patents

🔑 Particular products or processes

Patents for random access memory device were not invalid for lack of written description, after amendments deleted “narrow multiplexed bus” limitation in continuation applications, since supposed genus consisted of only multiplexed and a non-multiplexed bus and invention would not have been undermined by use of non-multiplexed bus. 35 U.S.C.A. § 112.

[1 Cases that cite this headnote](#)

[16] Patents

🔑 **Possession of claimed invention**

The test under the written description requirement is whether the disclosure of the application relied upon reasonably conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the patent filing date; the law must be applied to each invention at the time it enters the patent process. 35 U.S.C.A. § 112.

[20 Cases that cite this headnote](#)

[17] Patents

🔑 **Degree of proof**

To overcome the presumption of validity of patents, the accused must show that the claims lack a written description by clear and convincing evidence. 35 U.S.C.A. §§ 112, 282.

[21 Cases that cite this headnote](#)

[18] Courts

🔑 **Particular questions or subject matter**

In a patent case, the denial of judgment as a matter of law (JMOL) is a procedural issue, which the Court of Appeals for the Federal Circuit reviews under regional circuit law. Fed.Rules Civ.Proc.Rule 50, 28 U.S.C.A.

[4 Cases that cite this headnote](#)

[19] Federal Courts

🔑 **Taking case or question from jury; judgment as a matter of law**

The Ninth Circuit reviews a denial of judgment as a matter of law (JMOL) de novo. Fed.Rules Civ.Proc.Rule 50, 28 U.S.C.A.

[Cases that cite this headnote](#)

[20] Federal Civil Procedure

🔑 **Evidence**

Judgment as a matter of law (JMOL) is appropriate where the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion, or in other words,

whether the jury's determination of facts is supported by substantial evidence. Fed.Rules Civ.Proc.Rule 50, 28 U.S.C.A.

[Cases that cite this headnote](#)

[21] Federal Civil Procedure

🔑 **Weight of evidence**

A motion for a new trial can only be granted if the verdict is contrary to the clear weight of the evidence.

[Cases that cite this headnote](#)

[22] Federal Courts

🔑 **Insufficiency of evidence**

The Ninth Circuit reviews the district court's denial of a motion for a new trial on the basis that the verdict is not against the weight of the evidence for a clear abuse of discretion, a standard that is virtually unassailable.

[1 Cases that cite this headnote](#)

[23] Patents

🔑 **Genus and species**

So long as disclosure of the species is sufficient to convey to one skilled in the art that the inventor possessed the subject matter of the genus, the genus will be supported by an adequate written description under patent law; there is no special rule for supporting a genus by the disclosure of a species. 35 U.S.C.A. § 112.

[11 Cases that cite this headnote](#)

[24] Patents

🔑 **Genus and species**

Whether the genus is supported vel non depends upon the state of the art and the nature and breadth of the genus, when determining whether disclosure of the species is sufficient to convey to one skilled in the art that the inventor possessed the subject matter of the genus. 35 U.S.C.A. § 112.

4 Cases that cite this headnote

[25] Patents

🔑 Presentation and Reservation in Lower Court of Grounds of Review

Patents

🔑 Obviousness;lack of invention

Competitor waived right to contest sufficiency of evidence or weight of evidence on question of patent obviousness, and thus Court of Appeals on appeal had to imply from jury verdict all facts in favor of patentee, by not moving for judgment as a matter of law (JMOL) to overturn jury's finding of non-obviousness and by not contesting denial of motion for new trial on appeal; competitor could challenge judgment only on ground that judge had committed error of law in coming to his legal conclusion of obviousness. [Fed.Rules Civ.Proc.Rule 50](#), 28 U.S.C.A.

Cases that cite this headnote

[26] Patents

🔑 Computers and Software

Combination that was expected to increase cost had some bearing on obviousness of that combination, on claim that patent on computer dynamic random access memory (DRAM) was obvious, since market demand was legitimate consideration in determining obviousness and lowering cost was ubiquitous market demand.

Cases that cite this headnote

[27] Patents

🔑 Combination of prior art references; “teaching, suggestion, or motivation” test

How well a combination is expected to work is a legitimate consideration in an patent obviousness inquiry.

Cases that cite this headnote

[28] Patents

🔑 Questions of law or fact

The rationale for combining references is a question of fact in an patent obviousness inquiry.

Cases that cite this headnote

[29] Patents

🔑 De novo review in general

A district court's patent claim construction is reviewed de novo.

Cases that cite this headnote

[30] Patents

🔑 In general;utility

US Patent 5,243,703. Cited.

Cases that cite this headnote

[31] Patents

🔑 In general;utility

US Patent 5,915,105, US Patent 6,034,918, US Patent 6,324,120, US Patent 6,378,020, US Patent 6,426,916, US Patent 6,452,863. Valid and Infringed.

Cases that cite this headnote

[32] Patents

🔑 In general;utility

US Patent 6,032,214, US Patent 6,035,365, US Patent 6,101,152. Not Infringed.

Cases that cite this headnote

Attorneys and Law Firms

*1339 Sri Srinivasan, O'Melveny & Myers LLP, of Washington, DC, argued for plaintiffs-appellants. With him on the brief were [Walter Dellinger](#), [Mark S. Davies](#), [Meaghan E.M. VerGow](#), [Kathryn E. Tarbert](#), [Micah W.J. Smith](#), [Loren L. AliKhan](#); and [Kenneth L. Nissly](#) and [Susan Roeder](#), of Menlo Park, CA. Of counsel on the brief were [Theodore G. Brown, III](#) and [Julie J. Han](#), Townsend and Townsend and Crew LLP, of Palo Alto, CA.

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Robert E. Freitas, Orrick, Herrington & Sutcliffe LLP, of Menlo Park, CA, for amicus curiae Nanya Technology Corporation, et al. With him on the brief were Jason S. Angell and Craig R. Kaufman.

Before NEWMAN, LOURIE, BRYSON, GAJARSA and LINN, Circuit Judges.

Opinion

Opinion for the court filed by Circuit Judge LINN, with whom LOURIE and BRYSON, Circuit Judges, join. Concurring-in-part, dissenting-in-part opinion filed by Circuit Judge GAJARSA, with whom NEWMAN, Circuit Judge, joins.

LINN, Circuit Judge.

This patent infringement action concerns Synchronous Dynamic Random Access Memory (“SDRAM”) and Double Data Rate SDRAM memory (“DDR SDRAM”), in standard use in many computers beginning in the 1990s. The district court entered a final judgment of infringement and non-invalidity of claim 33 of Rambus Inc.’s (“Rambus”) U.S. Patent No. 6,324,120 (“#120 patent”); claims 32 and 36 of U.S. Patent No. 6,378,020 (“#020 patent”); claims 9, 28, and 40 of U.S. Patent No. 6,426,916 (“#916 patent”); claim 16 of U.S. Patent No. 6,452,863 (“#863 patent”); claim 34 of U.S. Patent No. 5,915,105 (“#105 patent”); and claims 24 and 33 of U.S. Patent No. 6,034,918 (“#918 patent”); entered judgment in the amount of \$349,035,842; required Hynix to pay prejudgment interest; and set a royalty rate for infringing products. *Hynix Semiconductor, Inc. v. Rambus Inc.*, No. 00 CV20905 (N.D.Cal. Mar. 10, 2009) (“*Judgment*”). Hynix Semiconductor Inc., Hynix Semiconductor America Inc., Hynix Semiconductor U.K. LTD,

and Hynix Semiconductor Deutschland (collectively, “Hynix”) appeal the district court’s: (1) denial of Hynix’s motion to dismiss due to unenforceability arising from Rambus’s alleged spoliation of documents, *Hynix Semiconductor Inc. v. Rambus Inc.*, 591 F.Supp.2d 1038 (N.D.Cal.2006) (Whyte, J.) (“*Spoliation* ”); (2) claim construction, *Hynix Semiconductor Inc. v. Rambus Inc.*, No. 00 CV 20905, 2004 WL 2610012 (N.D.Cal. Nov. 15, 2004) (“*Claim Construction* ”); (3) denial of Hynix’s motion for judgment as a matter of law or for a new trial on the basis of written description, *Hynix Semiconductor Inc. v. Rambus Inc.*, No. 00 CV 20905, 2009 WL 230039 (N.D.Cal. Jan. 27, 2009) (“*Written Description* ”); (4) denial of Hynix’s motion for a new trial on obviousness, *Hynix Semiconductor Inc. v. Rambus Inc.*, No. 00 CV 20905, 2009 WL 112834 (N.D.Cal. Jan. 16, 2009) (“*Obviousness* ”); and (5) rejection of Hynix’s equitable arguments of unenforceability due to implied waiver and equitable estoppel. *Hynix Semiconductor Inc. v. Rambus Inc.*, 609 F.Supp.2d 988 (N.D.Cal.2009) (“*Estoppel* ”).

Rambus cross-appeals the district court’s grant of summary judgment of non-infringement of claims of 15, 18, 25, and 26 of Rambus’s U.S. Patent No. 6,032,214 (“#214 patent”); claims 36 and 40 of the #105 patent; claims 1 and 4 of Rambus’s U.S. Patent No. 6,035,365 (“#365 patent”); and claim 14 of its U.S. Patent No. 6,101,152 (“#152 patent”). *Hynix Semiconductor *1341 Inc. v. Rambus Inc.*, No. 00 CV 20905 (N.D.Cal. Jan. 5, 2005) (“*Cross Appeal*”).

This court has jurisdiction over the appeal and the cross-appeal pursuant to 28 U.S.C. § 1295(a)(1).

This case is a companion case to *Micron Technology, Inc. v. Rambus Inc.*, 645 F.3d 1311 (Fed.Cir.2011) (“*Micron II*”) (decided contemporaneously herewith). That case is an appeal from the United States District Court for the District of Delaware, in which Judge Robinson held that Rambus had spoliated documents in dereliction of a duty to preserve, and held Rambus’s patents unenforceable as a sanction. See *Micron Tech., Inc. v. Rambus Inc.*, 255 F.R.D. 135, 150 51 (D.Del.2009) (“*Micron I*”).

Because this court concludes that the district court applied too narrow a standard of foreseeability in determining that litigation was not reasonably foreseeable until late 1999, this court (1) vacates the district court’s final judgment and its findings of fact and conclusions of law

regarding spoliation and remands for the district court to determine when Rambus's duty to preserve documents began under the framework set forth in *Micron II*, and the appropriate sanction, if any. This court (2) affirms the district court's decision on waiver and equitable estoppel, (3) its claim construction order, (4) its order denying Hynix's motion for JMOL or for a new trial on the basis of written description, and (5) its order denying Hynix's motion for a new trial on the basis of obviousness. This court also (6) affirms the district court's order granting Hynix's motion for summary judgment of noninfringement under Hynix's proposed claim construction challenged in Rambus's cross-appeal.

I. BACKGROUND

A. Rambus

Rambus was founded in 1990 to commercialize inventions related to features of computer dynamic random access memory ("DRAM"). All of the patents in suit claim priority to Rambus's 07/510,898 application ("#898 application"), filed on April 18, 1990. The first filed and issued of the patents in suit, the # 105 patent, was filed on November 26, 1997, and issued on June 22, 1999. Rambus prosecuted the patents in suit continuously throughout the 1990s and until 2002.

Rambus's primary business is licensing its intellectual property to DRAM manufacturers. Initially, Rambus focused its efforts on the "Direct RDRAM ramp," which comprised granting narrow licenses to RAM manufacturers to produce only a particular type of DRAM known as Rambus DRAM ("RDRAM") and later Direct RDRAM, and restricting the use of Rambus's intellectual property for the production of other types of RAM (what Rambus terms "non-compatible" uses). Rambus achieved a measure of success through this practice, licensing RDRAM production by Samsung, Hynix (then Hyundai), Hitachi, Micron, and several of the largest RAM manufacturers to meet the demand created by Intel's use of RDRAM in its Pentium 4 chipset. During the licensing period, however, several of the manufacturers also produced noncompatible DRAM, including SDRAM and DDR SDRAM, which are at issue in this case. As discussed in further detail in *Micron II*, Intel eventually began to move away from RDRAM, in favor of SDRAM and DDR SDRAM.

B. Joint Electron Devices Engineering Council

Beginning in February 1992, Rambus became a member of the Joint Electron Devices Engineering Council ("JEDEC"), an open standard setting organization that developed (and continues to develop) standards *1342 for semiconductor products, including computer memory interfaces, to facilitate the interchangeability of products produced by different manufacturers. Members of a JEDEC committee meet several times a year to hear presentations by other members on proposed features to be included in the standard. The members then vote for which features to include.

Rambus was represented at JEDEC by Richard Crisp. After Crisp heard presentations on features to be included in the standard at JEDEC, he would discuss the inventions with the attorneys prosecuting Rambus's patents, signaling them to direct Rambus's prosecution efforts to cover those features. JEDEC Trial Tr. vol. 5 day 5, 990, 993. *See also* Reply Br. of Rambus, Inc., *Rambus Inc. v. Infineon Techs. AG*, 318 F.3d 1081, 1085 (Fed.Cir.2003) ("Infineon"), at 62 ("Rambus changed its pending patent claims based on discussions at public JEDEC meetings.").

Under JEDEC policies, the members agreed to participate "in good faith under policies and procedures which will assure fairness and unrestricted participation." Crisp, made no secret of the fact that he did not attend JEDEC in good faith, if "good faith means that you are attending JEDEC with the goal of creating an open standard for JEDEC SDRAM." Several JEDEC rules governed the behavior of members, including Manual 21 I, discussed below. *Estoppel*, 609 F.Supp.2d at 999 1000. As of 1993, JEDEC policy "required members to disclose patents and patent applications 'related to' the standardization work of the committees." *Infineon*, 318 F.3d at 1085. Crisp disclosed one patent, U.S. Patent No. 5,243,703 ("#703 patent") to JEDEC in September 1993. *Id.* This patent has a substantially similar specification to the patents in suit, differing only in the claims.

During Rambus's membership, JEDEC adopted SDRAM as a standard. The SDRAM standard incorporated features such as programmable CAS latency, programmable burst length, externally supplied

reference voltage, and two-bank design. *Id.* In December 1995, Rambus attended its last meeting as a member of JEDEC, and formally resigned in June 1996. Meanwhile, by December 1996, JEDEC was busy working on the successor to SDRAM, DDR SDRAM. *Id.* DDR SDRAM incorporated source-synchronous clocking, low-voltage swing signaling, dual clock edging, and on-chip delay locked loop. *Id.* After Rambus's formal resignation, Crisp continued to receive reports from sources termed “deep throat” and “secret squirrel” regarding the progress of the JEDEC RAM committee through at least December 1997.

C. Document Retention Policy

As both parties agree, the facts underlying Rambus's alleged spoliation are substantially identical in the two cases. Br. of Rambus at 21, *Micron II*, (noting that the facts in *Hynix* and *Micron* are “virtually the same”); Br. of Hynix at 21, *Hynix Semiconductor Inc. v. Rambus Inc.*, 645 F.3d 1311 (Fed.Cir.2011). *See also Spoliation*, 591 F.Supp.2d at 1041 42 (“[T]he district court in Delaware held a bench trial with respect to an essentially identical claim by Micron that Rambus spoliated evidence.”).

¹ In *Micron II*, Rambus argued that the differences in the records are “makeweight, “cumulative, and “insignificant, and *not* sufficient to compel a different outcome on spoliation in response to Micron's arguments to the contrary. Reply Br. of Rambus at 2 3, *Micron II*. Thus, to the extent the records are in fact different, Rambus has waived any argument that the different records justify different outcomes.

*1343 Rambus took its first steps towards enforcing its IP against non-compatible DRAM in October 1997, when it hired Joel Karp as its Vice President for Intellectual Property. Karp's role was “to prepare and then to negotiate to license our patents for infringing [DRAMs].” *Spoliation*, 591 F.Supp.2d at 1045. Rambus recognized that hiring Karp would make partners and competitors suspicious about its intellectual property plans, but it hoped “to downplay the whole infringement/IP issue until there is actual infringement,” by having their “spin control ready” to tell its partners and competitors that Karp was being hired to assist with “contract negotiations.”

Shortly thereafter, in January 1998, Geoff Tate, Rambus's CEO, instructed Karp to prepare a licensing and litigation

strategy for presentation to the Board at its March 1998 meeting. Karp enlisted Dan Leal, a Cooley Godward litigation attorney, to prepare a “litigation strategy by [the] March [1998] board meeting.” Cooley's notes of a follow-up February 12, 1998 meeting between Karp, Leal, Dan Johnson (another Cooley litigator), and yet another Cooley attorney state that Rambus will “[n]eed to litigate against someone to establish [a] royalty rate and have [a] court declare [the] patent valid,” and noted that the royalty rates proposed by Karp would “probably push us into litigation quickly.” Finally, the notes reference a proposal to create a document retention policy in order to “[m]ake ourselves battle ready,” and the need to “clean out all attorney notes so that [the PTO prosecution] file is same as official file.”

At the March 1998 presentation to the Board, Karp proposed a litigation strategy prioritizing his choices of defendants and forums, and set a timeframe wherein Rambus would “commence legal action” in 4 6 months after procuring the potentially infringing parts. He also proposed a five percent royalty rate for non-compatible RAM, a rate his later memo said was for situations where Rambus was “not interested in settling.” Finally, he set as “near term actions” the creation of a document retention policy and “discovery database.”

In April 1998, CEO Tate met with Intel, a meeting he summarized as follows: “[I]ntel says they are basically going to compete with us on [the] next generation [of DRAM].” He understood that such a shift in the “midterm” from RDRAM to SDRAM could “force [Rambus] to play [its] IP card with the [DRAM] companies *earlier*.” (emphasis added). Karp announced the document retention policy in May 1998, noting that he would prefer not to discuss the policy in writing. In July 1998, Tate emailed Karp that Hyundai would be “a great company to start [Karp's] plan with in q1/99 potentially.” The district court determined that the said “plan” was a licensing agreement with Hyundai. Also in July 1998, Karp made presentations on the document retention policy to engineers, where he told them to “LOOK FOR THINGS TO KEEP,” including documents that could potentially help establish a conception date.

In September 1998, Rambus held its first “Shred Day,” destroying 400 boxes of documents pursuant to Karp's document retention policy.

In October 1998, Karp advised Rambus executives to delay litigation, saying that there was no “rush” to sue “until” the Direct RDRAM ramp reached the point of no return, likely in the first quarter of 2000. Karp advised Rambus to stay in “stealth mode,” and not to “ROCK THE DIRECT BOAT.” Moreover, he noted that the direct infringement case against *1344 Mosel and Nanya, two RAM manufacturers, “could be ready to go in Q1 #99.” In November 1998, Karp sent Rambus executives the “Nuclear Winter Memorandum,” which detailed a course of action in the “very unlikely” event that Intel cancelled RDRAM in its next generation chipset in favor of SDRAM. That memorandum identified litigation targets, time frames, and causes of action for infringement. It noted that Rambus had already made claim charts detailing infringement by Micron's non-compatible RAM products.

The first patent in suit, the #105 patent, issued in June 1999. Within two days, CEO Tate instructed Karp to identify and justify his choice for the first licensing or litigation target, and to set out what Rambus's “strategy [would be] for the battle with the first target that we will launch in [O]ctober [1999].” Karp's goals for the third quarter of 1999 thereafter included: “prepare litigation strategy against 1 of the 3 manufacturers,” and “be ready for litigation with 30 days notice.” In July 1999, Attorney Johnson prepared duration and timing charts for litigation in the Northern District of California and the Eastern District of Virginia, with October 1, 1999 as the prospective filing date.

Thereafter, on August 26, 1999, Rambus held its second “Shred Day,” destroying 300 additional boxes pursuant to its document retention policy. Through all the Shred Days, Rambus kept no record of what was destroyed, but admitted that some destroyed documents related to contract and licensing negotiations, patent prosecution, JEDEC participation, Board meetings, and Rambus finances.

On September 24, 1999, Karp made a presentation to the Rambus board entitled, “IS THERE LIFE AT RAMBUS AFTER INTEL?” The district court determined that this presentation, postdating the two shred days, “reflects the turning point in Rambus's litigation intentions” when Rambus “appear[ed] to be ready to seriously consider actually filing suit against someone.” *Spoliation*, 591 F.Supp.2d at 1063, 1064. During that presentation, Karp

told the board that Rambus “must increase the industry's perception of [its] value through aggressive assertion of IP rights.... [i]f Rambus is to have a future.” He noted that certain “[c]ompanies like Micron will fight us tooth and nail and will never settle,” and touted the desirability of litigation, noting that the “[b]est route to IP credibility is through victory over a major DRAM manufacturer.” Within a week, CEO Tate sent an e-mail recognizing the consensus that Rambus “need[ed] to sue a [DRAM] company to set an example.”

On October 22, 1999, Karp sent Hitachi a letter referencing its patents, and sued Hitachi on January 18, 2000.

D. Micron

In 2000, Micron Technology, Inc. filed a declaratory judgment action against Rambus in the District of Delaware (Robinson, J.). There, the district court determined that Rambus had spoliated documents in contravention of a duty to preserve because litigation was reasonably foreseeable prior to Rambus's second shred day, and held the patents unenforceable. *See Micron I*, 255 F.R.D. at 151. This court has now affirmed the district court's determination of spoliation. *Micron II*, 645 F.3d at 1326.

II. DISCUSSION

A. Spoliation

[1] [2] [3] “[S]poliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.” *Id.* at 1356 (citing *1345 *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 590 (4th Cir.2001)). Most relevant in this case is the point when the duty to preserve evidence begins. This determination is informed by a number of policy considerations, including “the need to preserve the integrity of the judicial process in order to retain confidence that the process works to uncover the truth,” *Silvestri*, 271 F.3d at 590, and must balance the reality that “litigation is an ever-present possibility in American life,” *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Murray Sheet Metal Co.*, 967 F.2d 980,

984 (4th Cir.1992), with the legitimate business interest of eliminating unnecessary documents and data.

Both parties agree that in balancing the competing interests relevant to the preservation and destruction of documents and data, the reasonable foreseeability standard described in *Silvestri* is the proper standard. The parties disagree, however, about what that standard means. Hynix argues that reasonable foreseeability incorporates no requirement of imminence of litigation, while Rambus argues that “to be reasonably foreseeable, litigation must be ‘imminent,’ at least in the sense that it is probable and free of significant contingencies.” Br. of Rambus at 65.

The district court here determined that litigation did not become reasonably foreseeable until late 1999, before which “the path to litigation was neither clear nor immediate” and was subject to “several contingencies [that] had to occur before Rambus would engage in litigation.” *Spoliation*, 591 F.Supp.2d at 1062. These contingencies included: locking-in of the manufacturers to the RDRAM standard, issuance of Rambus's patents covering noncompatible devices, availability and reverse-engineering of the accused's product samples to create claim charts, approval for litigation from Rambus's board to commence licensing negotiations with the manufacturers, and the manufacturer's rejection of Rambus's licensing terms. *Id.* According to the district court, the “turning point in Rambus's litigation intentions” was Karp's IP Strategy Update of September 24, 1999, which “clearly states that Rambus's intellectual property in its patents must be substantiated either by settlement with ‘an industry powerhouse’ or ‘winning court,’ and acknowledges that some manufacturers will never settle.” *Id.* at 1063. Because the second shred day preceded the IP Strategy Update, the district court determined that Rambus's destruction of documents was “a permissible business decision.” *Id.* at 1064.

[4] [5] This court reviews the district court's spoliation decision under the law of the regional circuit as follows: de novo for the legal standard, clear error for the underlying facts, and abuse of discretion for the propriety of the remedy. See *Qualcomm Inc. v. Broadcom Corp.*, 548 F.3d 1004, 1019 (Fed.Cir.2008).

In *Micron II*, this court held that that standard does not carry a gloss requiring that litigation be “imminent, or probable without significant contingencies.” *Micron II*, 645 F.3d at 1320. The district court here applied just such a standard. This is evident for three reasons.

[6] First, the district court's discussion of the contingencies did not consider the likelihood that those contingencies would be resolved. Instead, the district court determined that litigation was not reasonably foreseeable merely because some contingencies were present, which made litigation “neither clear nor immediate.” *Id.* at 1062. Notwithstanding the conclusion of no reasonable foreseeability, the record shows that the district court implicitly recognized that the resolution of each contingency was reasonably foreseeable:

- *1346 • “One of the basic assumptions [of the February 23, 1998 Cooley presentation] was that Rambus would not initiate action *until* a competing product enters the market.” *Id.* at 1047 (emphasis added).
- “Rambus initially planned to begin its licensing strategy *only at the time* the DRAM manufacturers were locked in to RDRAM production. By October 1998, *the projected time frame for this was early 2000.*” (citing Karp's statement that “[w]e should not assert patents against Direct partners *until* ramp reaches a point of no return”). *Id.* at 1048 (emphases added).
- “[S]everal contingencies had to occur *before* Rambus *would* engage in litigation.” *Id.* at 1062 (emphases added).
- “*Once* customer samples *were* available in the market, Rambus *planned to engage* in reverse engineering to produce claim charts for us in its license negotiations.” *Id.* at 1063 (emphases added).
- “Rambus did not actually intend to initiate licensing negotiations for non-compatible users *until* certain contingencies occurred, which did not happen until 1999.” *Id.* (emphasis added).

Though the district court understood that these contingencies were reasonably foreseeable, it nevertheless determined that the litigation itself was not. This reflects a mistaken view of the importance of these contingencies in determining the foreseeability of litigation. Contingencies

whose resolutions are reasonably foreseeable do not foreclose a conclusion that litigation is reasonably foreseeable. See *Micron II*, 645 F.3d at 1324–25. It would be inequitable to allow a party to destroy documents it expects will be relevant in an expected future litigation, solely because contingencies exist, where the party destroying documents fully expects those contingencies to be resolved. Cf. *United States v. Kitsap Physicians Serv.*, 314 F.3d 995, 1001 (9th Cir.2002) (“Defendants engage in spoliation of documents as a matter of law only if they had some notice that the documents were potentially relevant to the litigation before they were destroyed.” (internal citations omitted)).

Second, in addition to the contingencies, the district court found evidence of non-foreseeability of litigation because: (1) Rambus had not received Board approval for licensing negotiations or litigation against DRAM manufacturers as of August 1999, and (2) “Rambus had not budgeted for litigation” by June 1999. *Hynix*, 591 F.Supp.2d at 1063. While these facts may show that litigation was not imminent, they do not demonstrate that it was not reasonably foreseeable. Indeed, there is no evidence in the record that these facts changed as of January 2000, when Rambus in fact sued Hitachi.

Finally, the district court here was the only court to determine that the duty to preserve documents did not begin until after Rambus's second shred day, which suggests the application of a too-strict standard of foreseeability. See *Micron I*, 255 F.R.D. 135 (D.Del.2009); *Rambus Inc. v. Infineon Tech. AG*, 155 F.Supp.2d 668, 682 (E.D.Va.2001), *vacated-in-part, reversed-in-part, affirmed-in-part*, and *remanded* by 318 F.3d 1081 (Fed.Cir.2003); *Samsung Elecs. Co. v. Rambus Inc.*, 439 F.Supp.2d 524 (E.D.Va.2006), *vacated as moot and remanded* by 523 F.3d 1374 (Fed.Cir.2008).

The narrow standard applied by the district court in this case vitiates the reasonable foreseeability test, and gives free reign to destroy documents to the party with the most control over, and potentially the most to gain from, their destruction. This fails to protect opposing parties' and the courts' interests in uncovering potentially *1347 damaging documents, and undermines the level evidentiary playing field created by discovery that lies at the heart of our adversarial system. See *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir.1995).

Applying the correct standard of reasonable foreseeability, without the immediacy gloss, these considerations compel a finding that litigation was reasonably foreseeable prior to Rambus's Second Shred Day. Moreover, as noted above, Rambus has agreed that whatever differences the facts present, the two cases should not be decided differently.

This court thus concludes that the district court erred in applying too narrow a standard of reasonable foreseeability as requiring that litigation be immediate or certain, which was legal error. This court vacates the district court Findings of Fact and Conclusions of Law in connection with the rejection of Hynix's motion to dismiss on the basis of spoliation, and remand for further proceedings consistent with this opinion and the framework of reasonable foreseeability set forth in our companion *Micron* case.²

- 2 This court does not decide whether *Micron II* decision should be given any preclusive effect, the correctness of Judge Whyte's determinations on prejudice and good faith, or the propriety of any particular sanction on this record. Those questions all remain for consideration by the district court on remand.

B. Piercing of the Attorney Client Privilege

[7] During discovery, the district court pierced Rambus's attorney-client privilege on the basis of the crime-fraud exception, relying on *California Penal Code § 135*, which prohibits destruction of documents “about to be produced in evidence.” On appeal, Rambus argues that if this court vacates the district court's spoliation decision, it should also vacate the piercing of the attorney-client privilege because Rambus's conduct was not within the scope of *California Penal Code § 135*, because the delay between Rambus's destruction of documents and its filing suit undermined the “temporal closeness” necessary for a violation of § 135, based on *People v. Prysock*, 127 Cal.App.3d 972, 180 Cal.Rptr. 15, 31 (1982). This court rejects Rambus's argument.

As discussed in *Micron II*, this case is distinguishable from *Prysock*, because there “the defendant controlled the timing of the destruction of relevant evidence, while law enforcement, acting independently, controlled the timing of the initiation of the investigation that would trigger the application of § 135,” whereas here, “Rambus

controlled the timing of both events.” *Micron II*, 645 F.3d at 1330. Under a reasonable reading of § 135, Rambus's destruction of documents in preparation of its suit against the DRAM manufacturers could reasonably constitute a crime, and this court finds no error in the district court's determination that the crime-fraud exception to the attorney-client privilege applies. *See id.* at 1330 31.

C. Other Defenses

Although this court remands to the district court to address the spoliation issue, in the event the district court determines that Rambus did not spoliage documents, and/or that Rambus's patents are not unenforceable, this court considers the waiver and estoppel, claim construction, written description, and obviousness issues raised by Hynix.

i. Waiver and Estoppel

[8] A member of an open standard setting organization may be equitably estopped *1348 or may have impliedly waived its right to assert infringement claims against standard-compliant products. *Qualcomm*, 548 F.3d at 1022 24 (noting that either waiver or equitable estoppel may properly be asserted in this context). *See also A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1028 (Fed.Cir.1992) (en banc) (“*Aukerman* ”) (holding that equitable estoppel is a cognizable defense against patent infringement).

[9] To support a finding of implied waiver in the standard setting organization context, the accused must show by clear and convincing evidence that “[the patentee's] conduct was so inconsistent with an intent to enforce its rights as to induce a reasonable belief that such right has been relinquished.” *See Qualcomm*, 548 F.3d at 1020 (citing with approval district court's advisory jury instruction). Such conduct can be shown where (1) the patentee had a duty of disclosure to the standard setting organization, and (2) the patentee breached that duty. *See id.* at 1011 12.

[10] To support a finding of equitable estoppel, the accused must show that “[t]he patentee, through misleading conduct, led the alleged infringer to reasonably infer that the patentee does not intend to enforce its

patent against the alleged infringer.” *Aukerman*, 960 F.2d at 1028. “ ‘Conduct’ may include specific statements, action, inaction, or silence where there was an obligation to speak.” *Id.*

[11] The two elements of implied waiver must also be shown to prove equitable estoppel, because without a disclosure duty, Hynix could not “reasonably infer” that Rambus did not intend to enforce its patents against it, and without a breach of that duty, Rambus's nondisclosure could not be “misleading conduct.” This opinion thus discusses the applicability of both doctrines together.

The district court relied on a jury determination that “JEDEC members did not share a clearly defined expectation that members would disclose relevant knowledge they had about patent applications or the intent to file patent applications on technology being considered for adoption as a JEDEC standard,” *Estoppel*, 609 F.Supp.2d at 1026, and that prior to Rambus's withdrawal from JEDEC, none of its pending patent applications covered a JEDEC standard, *id.* at 1027 (“The patent[s]-at-issue in this case had not even been applied for during Rambus's membership in JEDEC.”).

In *Infinion*, this court held that participation in JEDEC imposed a duty to disclose pending applications and issued patents “with claims that a competitor or other JEDEC member reasonably would construe to cover the standardized technology.” 318 F.3d at 1100. This court noted that “this does not require a formal infringement analysis,” *id.*, but applies “when a reasonable competitor would not expect to practice the standard without a license under the undisclosed claims,” *id.* at 1101. The determination that there was a duty and the categorization of its scope as extending to all pending or issued claims that were reasonably necessary to practice the standard is dispositive in this case and should never have been submitted to the jury. However, because this court determines that *Infinion's* holding that Rambus did not breach the duty of disclosure applies here as well, *see infra*, submitting the issue to the jury was harmless error.

While Rambus was still a member of JEDEC, it disclosed to JEDEC its # 703 patent, a member of the #898 patent family with the same written description as the patents in suit. In *Infinion*, this court *1349 determined that the result of this disclosure was that

the fraud claim against Rambus was “claim-specific and standard-specific,” requiring that the claims *pending* during Rambus's membership in JEDEC were the only ones that could support a fraud ruling. *Id.* at 1102. “Because the patents-in-suit were filed after Rambus left JEDEC in 1996,” *id.*, and “substantial evidence does not support the finding that these [pending] applications had claims that read on the SDRAM standard,” *id.* at 1103, “Rambus's claimed technology did not fall within the JEDEC disclosure duty,” *id.* at 1104.

[12] Hynix argues that our determination in *Infineon* that Rambus did not violate this duty is not binding in this case, primarily because all of the patents in suit claim priority to the #898 application through the patents pending during Rambus's JEDEC participation. Hynix contends that “a patentee may not insist on the filing date of the original application for prior art purposes, while asking for the patents to be viewed as filed several years later for purposes of its equitable disclosure obligations.” Br. of Hynix at 39 (citing *Qualcomm*, 548 F.3d at 1019 (rejecting patentee's “ex post argument that the asserted patents do not meet the ‘reasonably might be necessary’ standard” where the patentee makes an “ex ante argument [] regarding infringement”)). Hynix argues that the pending applications, Serial Nos. 222,646 (“#646 application”), 847,961 (“#961 application”), 469,490 (“#490 application”), and 448,657 (“#657 application”), “contained claims to the five technologies at issue here,” *id.* at 40, and so this case is distinguishable from *Infineon*.

Were this court writing on a clean slate, it would be tempted to agree that equity demands that Rambus's participation in JEDEC equitably estopped or waived its claims against standard-compliant products, notwithstanding its delay in amending its claims until after its exit from JEDEC. However, this court is not writing on a clean slate. *Infineon* involved a virtually identical factual situation. Just as Hynix attempts to do here, “*Infineon* relie[d] on other applications [i.e., not the patents in suit] Rambus had pending before its 1996 withdrawal from JEDEC.” *Id.* at 1102. This court unequivocally held that the claims pending or issued during Rambus's JEDEC tenure were not necessary to practice the standard because “substantial evidence does not support the finding that *these applications* had claims that read on the SDRAM standard.” *Id.* at 1103 (emphasis added). The phrase “*these applications*” did not refer to the patents-at-issue, but to Rambus's pending and issued patents during its

tenure in the standard setting organization. Thus, there is no inconsistency in alleging that the claims pending during Rambus's participation in JEDEC were not reasonably necessary to practice the standards, but that the claims prosecuted after Rambus's exit from JEDEC were.

Hynix does not argue that the #646, #961, #490, or #657 applications are more reasonably necessary to practice the SDRAM standard than the pending applications in *Infineon*. Hynix does not proffer any persuasive reason why our holding that Rambus did not breach its disclosure duty in *Infineon* does not control, or why the standard for breach is different in the waiver/estoppel context than in the fraud context. This court thus affirms the district court's conclusion that Rambus did not waive its right to litigate, and is not equitably estopped from litigating infringement by standard-compliant DRAM.

ii. Claim Construction

[13] In *Infineon*, this court reversed the district court's construction of “bus” in *1350 several related patents and some of the same patents at issue as limited to a multiplexed bus because: (1) “[t]he claims do not specify that the bus multiplexes address, data, and control information;” (2) the phrase “bus” has a “well-recognized meaning” in the electrical arts that is not so limited; (3) the prosecution history shows that “[a]lthough some of Rambus's claimed inventions require a multiplexing bus, multiplexing is not a requirement in all of Rambus's claims;” and (4) some claims further define “bus” as one that multiplexes, which implies that the patentee did not redefine “bus” to mean a “multiplexing bus.” 318 F.3d at 1094 95. Hynix argues that this court has rejected the methodology used in *Infineon* by implication through our en banc decision in *Phillips v. AWH Corp.*, 415 F.3d 1303 (Fed.Cir.2005). This court disagrees.

Although *Phillips* ruled against the elevation of dictionaries above the specification, *id.* at 1321, this court nevertheless allowed the use of dictionaries “to assist in understanding the commonly understood meaning of words,” *id.* at 1322, which is precisely the use that was made of the dictionary in *Infineon*, see 318 F.3d at 1094 (“The term ‘bus’ is very common in the electrical arts and has a well-recognized meaning in such arts, namely, a set of signal lines (e.g., copper traces on a circuit board) to which a number of devices are connected, and over

which information is transferred between devices.”) (citing *The New IEEE Standard Dictionary of Electrical and Electronic Terms* 141 (5th ed.1993)). This court in *Infineon* determined that the specification could questionably be read to “limit the meaning of ‘bus’ ” in two places, but that the phrase should not be so limited because the prosecution history revealed that multiplexing was “only one of many inventions disclosed in the #898 application.” 318 F.3d at 1094 95. Additionally, this court looked to the U.S. Patent and Trademark Office’s (“PTO”) restriction requirements, which showed “that some of the inventions described in the #898 application did not require the multiplexing bus.” *Id.* at 1095. Finally, this court specifically recognized that inventors may define terms in the specification “implicitly,” and, like in *Phillips*, cited *Bell Atlantic Network Services Inc. v. Covad Communications Group, Inc.*, 262 F.3d 1258, 1268 (Fed.Cir.2001) for the proposition that “[a] claim term may be clearly redefined without an explicit statement of redefinition.” *Infineon*, 318 F.3d at 1088.

[14] *Phillips* counsels looking to the prosecution history to “show what a person of skill in the art would have understood disputed claim language to mean.” 415 F.3d at 1314. In *Infineon*, this court looked to the claim limitations of the ancestor patents, which included a claim limitation for “a bus wherein said bus includes a plurality of bus lines for carrying substantially all address, data and control information needed by said semiconductor device for communication with substantially every other semiconductor device connected to said bus [i.e., a multiplexed bus]”, a limitation that would be redundant if “bus” already meant “multiplexed bus.” 318 F.3d at 1096. See also *Phillips*, 415 F.3d at 1314 (“To take a simple example, the claim in this case refers to ‘steel baffles,’ which strongly implies that the term ‘baffles’ does not inherently mean objects made of steel.”).

Finally, as Rambus points out, this court has favorably cited the claim construction analysis in *Infineon* since *Phillips*. Br. of Rambus at 31 (citing *Netcraft Corp. v. eBay, Inc.*, 549 F.3d 1394, 1398 (Fed.Cir.2008); *Ortho McNeil Pharm., Inc. v. Mylan Labs., Inc.*, 520 F.3d 1358, 1362 (Fed.Cir.2008); *MBO Labs., Inc. v. Becton, *1351 Dickinson & Co.*, 474 F.3d 1323, 1330 (Fed.Cir.2007)).

This court is thus bound by the claim construction of this court in *Infineon* for the term “bus.” Hynix’s arguments on the merits that this court should construe the term “bus”

as limited to a narrow multiplexed bus are inapposite; this court is not writing on a clean slate. This court thus *affirms* the district court’s claim construction of “bus.”

iii. Written Description

[15] At the district court, a jury determined that Rambus’s patents were not invalid for lack of written description under 35 U.S.C. § 112, paragraph 1. See *Ariad Pharms., Inc. v. Eli Lilly and Co.*, 598 F.3d 1336, 1351 (Fed.Cir.2010) (en banc). Hynix moved for Judgment as a Matter of Law (“JMOL”) under Fed.R.Civ.P. 50(a) and 50(b), and moved in the alternative for a new trial. The district court denied both motions.

[16] [17] The test under the written description requirement is “whether the disclosure of the application relied upon reasonably conveys to those skilled in the art that the inventor had possession of the claimed subject matter as of the filing date.” *Ariad*, 598 F.3d at 1351. “The law must be applied to each invention at the time it enters the patent process.” *Id.* To overcome the presumption of validity of patents, the accused must show that the claims lack a written description by clear and convincing evidence. *ICU Med., Inc. v. Alaris Med. Sys., Inc.*, 558 F.3d 1368, 1376 (Fed.Cir.2009).

[18] [19] [20] [21] [22] The denial of JMOL is a procedural issue, which this court reviews under regional circuit law. *Wechsler v. Macke Int’l Trade, Inc.*, 486 F.3d 1286, 1290 (Fed.Cir.2007). The Ninth Circuit reviews a denial of JMOL de novo. *White v. Ford Motor Co.*, 312 F.3d 998, 1010 (9th Cir.2002). JMOL is appropriate where “the evidence, construed in the light most favorable to the nonmoving party, permits only one reasonable conclusion,” *id.*, or in other words, whether the jury’s determination of facts is supported by “substantial evidence,” *Ariad*, 598 F.3d at 1355. A motion for a new trial can only be granted if “the verdict is contrary to the clear weight of the evidence.” *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1139 (9th Cir.1999). The Ninth Circuit reviews the district court’s denial of a motion for a new trial on the basis that the verdict is not against the weight of the evidence for a “clear abuse of discretion,” a standard that is “virtually unassailable.” *Kode v. Carlson*, 596 F.3d 608, 612 (9th Cir.2010) (internal citations omitted).

On appeal, Hynix's sole argument is that Rambus's amendments deleting the "narrow multiplexed bus" limitation in its continuation applications was unsupported by the written description of the #898 application to which they all claim priority. Hynix argues that: (1) the "ultimate judgment" of written description is "a legal determination," citing *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398, 427, 127 S.Ct. 1727, 167 L.Ed.2d 705 (2007); (2) "disclosure of a species does not suffice to claim the genus;" and (3) *ICU Medical, Inc. v. Alaris Medical Systems, Inc.*, 558 F.3d 1368 (Fed.Cir.2009) controls.

These arguments are unconvincing. First, whether a claim is supported by an adequate written description is a factual inquiry, and has been for some time. *Ariad*, 598 F.3d at 1355; *Utter v. Hiraga*, 845 F.2d 993, 998 (Fed.Cir.1988). Hynix's argument that the ultimate determination of written description is a legal issue (relying on the Supreme Court's determination in *KSR*, 550 U.S. at 427, 127 S.Ct. 1727, that obviousness is a legal issue) is unavailing; *1352 written description and obviousness are distinct legal doctrines. Compare 35 U.S.C. § 112, ¶ 1 (written description), with 35 U.S.C. § 103 (obviousness). As such, our review of the district judge's denial of a new trial and denial of judgment as a matter of law on written description is severely circumscribed as a factual issue already decided by a jury and approved by the district court.

[23] [24] Second, there is no categorical rule that a species cannot suffice to claim the genus. It is true that, in *Ariad*, we continued a line of prior holdings that "a sufficient description of a genus instead requires the disclosure of either a representative number of species falling within the scope of the genus or structural features common to the members of the genus so that one of skill in the art can 'visualize or recognize' the members of the genus." 598 F.3d at 1350 (discussing *Regents of the Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 1559, 1568 69 (Fed.Cir.1997)). See also *Bilstad v. Wakalopulos*, 386 F.3d 1116, 1124 (Fed.Cir.2004) ("[T]his court has continued to apply the rule that disclosure of a species may be sufficient written description support for a later claimed genus including that species."). There is no special rule for supporting a genus by the disclosure of a species; so long as disclosure of the species is sufficient to convey to one skilled in the art that the inventor possessed the subject matter of the genus, the genus will be supported by an

adequate written description. See *Ariad*, 598 F.3d at 1351. Whether the genus is supported *vel non* depends upon the state of the art and the nature and breadth of the genus. Here, the supposed genus consists of only two species, a multiplexed and a non-multiplexed bus, and Hynix has failed to make any argument that persons of ordinary skill would not have understood that Rambus possessed a non-multiplexed bus. That is, Hynix has not argued that the disclosure of the multiplexed bus was not representative of the genus of buses that encompasses both the narrow multiplexed bus and the non-multiplexed bus.

There was substantial evidence that the invention would not be undermined by the use of a non-multiplexed bus, including testimony from Rambus's expert that a person of ordinary skill would "understand[] that buses come in all shapes and sizes. You can multiplex some lines, you cannot multiplex others.... [I]t can be different kinds of buses and you still benefit from the features described in the patent." Additionally, one of the inventors testified that the narrow multiplexed bus was not meant to be "something that all these different features ... [disclosed in the patents] needed to be used with." This testimony serves to aptly distinguish the cases cited by Hynix. See *ICU Med.*, 558 F.3d at 1372, 1374 75, 1378 (detailing solution to problems in the prior art of medical valves used in the transmission of fluids by "compress[ing] a seal on the valve to create a fluid pathway," noting that the spike was used to "pierc[e] a seal inside the valve" to effectuate the invention, and noting that no other method was disclosed to effectuate the fluid pathway because "the specification describes only medical valves with spikes"); *LizardTech, Inc. v. Earth Res. Mapping, Inc.*, 424 F.3d 1336 (Fed.Cir.2005) ("[a]fter reading the patent, a person of skill in the art would not understand how to make a seamless DWT generically and would not understand LizardTech to have invented a method for making a seamless DWT, except by 'maintaining updat[ed] sums of DWT coefficients,' " where "maintaining update[ed] sums of DWT coefficients" was the limitation omitted in the claims). Though it would certainly be reasonable to conclude that Rambus's claims do not meet the written *1353 description requirement on the basis of *ICU Med.*, that argument was presented to the jury and rejected by it. Hynix has not presented any cogent argument that the jury verdict was unsupported by substantial evidence, or that it was against the clear weight of the evidence. As such, this court rejects Hynix's arguments, and affirms the district court's denial of Hynix's motions for JMOL and new trial.

iv. Obviousness

The district court submitted the question of obviousness of claims 24 and 33 of the #918 patent; claim 33 of the #120 patent; claims 9, 28, and 40 of the #916; and claim 16 of the #863 patent to the jury. After the jury returned a verdict that the claims were nonobvious, Hynix moved only for a new trial, which the district court denied. Hynix appealed, not challenging the denial of a motion for new trial, but rather the district court's "ultimate legal judgment of nonobviousness as 'an error of law.'" Br. of Hynix at 68 n. 27.

[25] Through the combination of its failure to move for JMOL to overturn the jury's finding of non-obviousness and its failure on appeal to contest the denial of a motion for new trial, Hynix has waived the right to contest the sufficiency of the evidence or the weight of the evidence, and this court implies from the jury verdict all facts in favor of Rambus. See *Duro Last, Inc. v. Custom Seal, Inc.*, 321 F.3d 1098, 1108 (Fed.Cir.2003) (noting that the failure to file a post-verdict JMOL waives the right to contest the jury findings for sufficiency of the evidence, and presuming "that the jury resolved all underlying factual disputes in [favor of the prevailing party]"). Hynix "may [only] challenge the judgment on the ground that the judge committed an error of law" in coming to his legal conclusion of obviousness. *Southwest Software, Inc. v. Harlequin Inc.*, 226 F.3d 1280, 1297 (Fed.Cir.2000).

Hynix nevertheless mines the district court's comprehensive and well-reasoned opinion denying Hynix's motion for a new trial for supposed legal errors. Hynix argues that the district court: (1) improperly considered "economic disincentives"; (2) improperly considered that "it is not easy to recognize when making such combinations will yield benefits, as opposed to messy, expensive complexity"; and (3) relied on the jury verdict of a lack of a motivation to combine. None of these arguments have merit.

[26] [27] [28] First, in *KSR*, 550 U.S. at 419, 127 S.Ct. 1727, the Supreme Court noted that "market demand" is a legitimate consideration in determining obviousness. Lowering cost is a ubiquitous market demand, and the fact that a combination is expected to increase cost has some bearing on the obviousness of that combination.

Second, the district court's statement referring to the ease of recognizing the benefits of a combination was to explain why the "incentive to combine existing pieces of circuitry" was not controlling, i.e., because it was unclear whether the combination would be beneficial or detrimental. How well a combination is expected to work is certainly a legitimate consideration in an obviousness inquiry. Finally, the rationale for combining references is a question of fact, *Duro Last*, 321 F.3d at 1109, and, as discussed above, Hynix has waived its right to challenge the factual underpinnings of the obviousness determination.

Because Hynix has failed to show any legal error in the district court's conclusion of nonobviousness, this court affirms the jury verdict of no obviousness.

D. Cross Appeal

[29] The district court granted summary judgment of noninfringement of *1354 claims 15, 18, 25, and 26 of the #214 patent; claims 36 and 40 of the #105 patent; claims 1 and 4 of the #365 patent; and claim 14 of the #152 patent. *Cross-appeal* at *5. The common link between these claims was the presence of the "second external clock signal" limitation, in addition to a "first external clock signal" limitation. Rambus challenges both the claim construction of the "second external clock signal" limitation and the grant of summary judgment assuming the district court claim construction was correct. This court reviews the district court's claim construction de novo. *Hearing Components, Inc. v. Shure Inc.*, 600 F.3d 1357, 1370 (Fed.Cir.2010).

Both parties agree that "external clock" signal means "a periodic signal from a source external to the device to provide timing information." *Claim Construction* at *29 30. As the district court characterized it, the parties "disagree over whether the terms 'first' and 'second' refer to timing [as Hynix would have it], or whether they refer to two separate signals without reference to time [as Rambus prefers]." *Id.* at *30. The district court agreed with Hynix, and construed the phrase "second external clock" as "a periodic signal received by the memory device from an external source to provide second timing information that is different from the first timing information." *Id.* at *31. Rambus briefly argues that this improperly imports a limitation from the specification into the claims. However,

Rambus does not frame the issue fairly; the written description of the first and second external clocks was simply attempting to explain how Rambus's invention works, not merely to disclose a preferred embodiment. See [#152 patent](#), col.18 l.59 col.19 l.27. The only place where the clocks are referenced is in the discussion of avoiding propagation delay (i.e., the error resulting from the different amounts of time it takes information to travel to locations at different distances from the source). As the district court recognized, Rambus's expert in *Infineon* testified that to correct for this delay, the two signals must contain different information. *Claim Construction* at *30. Thus, there was no importation of a preferred embodiment into the claims, but a fair categorization of the meaning of the claims. To the extent Rambus relies on other arguments in its reply brief, those arguments are waived as not presented in its opening brief. This court therefore affirms the district court's claim construction of the "second external clock" limitation.

Rambus next argues that even under the district court's claim construction, there was a genuine issue of material fact as to infringement sufficient to overcome summary judgment. Rambus asserts an issue of material fact as to whether the clock signals in Hynix's accused device provide *different* timing information. Rambus relies on its expert, Murphy, for the proposition that "[i]f the two signals provided the same information, the second signal would be superfluous, and it would make no sense for Hynix to go to the effort and expense of including it." Br. of Rambus at 76-77. Hynix does not address this point in its reply brief. However, it notes that Rambus does not dispute the district court's statement that "the timing information provided by each of Hynix's external clocks is different along every point on the signals' waveform *except the crossing points*." *Cross Appeal* at *4 (emphasis added). At the crossing point, the two signals create a "tick," which is a single piece of timing information, and thus cannot meet the claim limitation of "second external clock" which requires the provision of a "second timing information different from the first timing information." This court agrees with Hynix that its accused devices do not meet the "second *1355 external clock" limitation, and thus affirms the district court's summary judgment of non-infringement of claims 15, 18, 25, and 26 of the [#214 patent](#); claims 36 and 40 of the [#105 patent](#); claims 1 and 4 of the [#365 patent](#); and claim 14 of the [#152 patent](#).

III. CONCLUSION

The district court's Findings of Fact and Conclusions of Law regarding spoliation are vacated, as is the district court's Final Judgment, and the case is hereby remanded for reconsideration of the spoliation issue under the framework set forth in *Micron II*. The district court's decision on waiver and estoppel, its claim construction order, its order denying Hynix's motion for judgment as a matter of law or for a new trial on the basis of written description, and its order denying Hynix's motion for a new trial on the basis of obviousness, are affirmed. This court also affirms the district court's grant of Hynix's motion for summary judgment for the claims at issue in Rambus's cross-appeal.

AFFIRMED-IN-PART, VACATED-IN-PART, AND REMANDED

COSTS

Costs are awarded to Hynix.

GAJARSA, Circuit Judge, concurring-in-part and dissenting-in-part, with whom [NEWMAN](#), Circuit Judge, joins.

I concur with the majority's affirmance of the district court's findings and conclusions in parts B, C, and D. I must, however, respectfully dissent from part A for the same reasons noted in my dissent in *Micron Technology, Inc. v. Rambus, Inc.*, 645 F.3d 1311, 1332-35 (Fed.Cir.2011), the companion to this case. The majority here applies a rule for spoliation premised upon a reasonably foreseeable litigation standard that it contoured and developed in *Micron*, 645 F.3d at 1319-21. Seizing on the district court's alleged grafting of an overly strict "gloss" on the reasonably foreseeable litigation standard, the majority claims that the district court erred as a matter of law by applying the wrong standard for spoliation. In so doing, the majority ignores the district court's well-articulated understanding of the relevant Ninth Circuit law and its factual findings, which demonstrate that the district court applied the very standard that the majority now requires. The majority obtenebrates the facts presented in the district court's

opinion to resolve the conflict between the spoliation determinations in this case and in *Micron*.

Being a procedural matter, regional circuit law is applicable. Because the Supreme Court and the Ninth Circuit, like the Third Circuit, have not defined a standard for reasonably foreseeable litigation, this court may seek guidance from other circuits on the issue. See *Loctite Corp. v. Ultraseal Ltd.*, 781 F.2d 861, 875 (Fed.Cir.1985), *overruled on other grounds by Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059 (Fed.Cir.1998). The majority applies the standard it crafted in *Micron* to this case. The newly established standard is coined as a “flexible one” lacking an additional “gloss” that requires litigation to be “imminent, or probable without significant contingencies” to find spoliation. *Micron*, 645 F.3d at 1320 (citation omitted).

The majority created this standard in *Micron* with the intention of reconciling the district court's spoliation determination in that case with the present one. The desires of an appellate tribunal, however, should not drive the outcome of decisions. Divergent district court opinions do not necessarily mean that the trial courts applied different “glosses” on a particular *1356 standard. Rather, this court must review district court opinions with the applicable standard of appellate review, which, in this case, is clear error or an abuse of discretion. In refusing to do so, the majority shirks its duties and performs its own factual analysis. The majority castigates the district court here for using a narrower “gloss” on the standard for spoliation just as the majority in *Micron* castigates the district court for holding the asserted patents unenforceable as a sanction for spoliation.

¹ In fact, there is no need to reconcile these divergent district court opinions. As the district court explained, The judicious application of issue preclusion rests on an assumption that a prior decision was more or less correct. *Crawford v. Ranger Ins. Co.*, 653 F.2d 1248, 1252 (9th Cir.1981). This assumption is not warranted where inconsistent decisions have been reached; it instead suggests that the outcomes may have been based on equally reasonable resolutions of doubt as to the probative strength of the evidence. *Id.*

Hynix Semiconductor, Inc. v. Rambus, Inc., No. 00 CV20905, slip op. at 6, 2009 WL 292205 (N.D.Cal.

Feb. 3, 2009) (D.I.3897) (internal citation and quotation marks omitted).

The majority begins with the correct premise that the various regional circuits generally do not require that litigation be imminent for it to be reasonably foreseeable. See, e.g., *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583 (4th Cir.2001) (“Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another’s use as evidence in pending or *reasonably foreseeable* litigation.” (emphasis added)). But unlike the majority, I am of the judgment that the district court here applied the appropriate flexible reasonably foreseeable litigation standard. The district court explained that “[s]poliation of evidence is the ... failure to properly preserve property for another’s use as evidence in pending or *reasonably foreseeable* litigation.” *Hynix Semiconductor Inc. v. Rambus, Inc.*, 591 F.Supp.2d 1038, 1061 (N.D.Cal.2006) (“*District Court Op.*”) (emphasis added) (citations and internal quotation marks omitted). The district court also relies on *Silvestri* and *Kronisch v. United States*, 150 F.3d 112 (2d Cir.1998) cases that the majority in *Micron*, 645 F.3d at 1320 21, cites in support of its flexible reasonably foreseeable litigation standard. Moreover, the district court here explicitly stated that “[a] reading of the court’s Findings and Conclusions ... shows that the court specifically framed the issues to be resolved using the ‘reasonably foreseeable’ standard.” See *Hynix Semiconductor, Inc. v. Rambus Inc.*, No. 00 CV 20905, slip op. at 1 2 (N.D.Cal. Feb. 23, 2006) (D.I.1732).

The factual findings on which the district court relies also support the conclusion that it applied the reasonably foreseeable litigation standard the majority imposes. As the majority acknowledges, the district court specifically found that the existence of *six* contingencies meant that litigation was not reasonably foreseeable until late 1999. *District Court Op.*, 591 F.Supp.2d at 1064. Those contingencies were:

- (1) the direct RDRAM ramp had to be sufficiently developed so as not to jeopardize RDRAM production;
- (2) Rambus's patents covering non-RDRAM technology had to issue;
- (3) product samples from potentially infringing DRAM manufacturers had to be available in the market;
- (4) the noncompatible products had

to be reverse engineered and claim charts made showing coverage of the actual products; (5) Rambus's board had to approve commencement of negotiations with a DRAM manufacturer; and (6) the targeted *1357 DRAM manufacturer had to reject Rambus's licensing terms.

Id. at 1062.

With respect to these contingencies, the district court determined that Rambus did not even “recommend[] initiating licensing negotiations” in the October 1998 presentation or even contemplate such negotiations until after early 1999, *id.* at 1062 63; that Rambus' board had not even budgeted for litigation as of June 1999, *id.* at 1063; and that Rambus did not have an “expectation of involvement in litigation” greater than one of its competitor companies, *id.* These findings were not clearly erroneous based on the record before the district court.

Indeed, the majority claims that the district court “understood that these contingencies were reasonably foreseeable [but] determined that the litigation was not,” thus “reflect[ing] a mistaken view of the importance of these contingencies in determining the foreseeability of litigation.” Majority Op. at 1346. In other words, the majority reweighs the facts and decides that the district court's understanding of them was erroneous because it would reach a different conclusion from the same facts. The district court, as the fact finder, is the proper forum for weighing and analyzing the facts. See *Hensley v. Eckerhart*, 461 U.S. 424, 437, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). Putting its thumb on the scales by reweighing the evidence to reach a desired result is not the proper function of an appellate court.

Moreover, in its well-drafted opinion, the district court does not conclude at any time that the facts as determined fail to meet a more stringent clear or imminent threat of litigation standard. Instead, the majority seizes upon the district court's single use of the phrase “neither clear nor immediate” and concludes that the district court applied this standard. Majority Op. at 1345 47. The use of that phrase by the district court, however, is not to establish a standard but to distinguish the present facts from those in *Silvestri*, which the district court noted had “significant factual distinctions.” *District Court Op.*, 591 F.Supp.2d at 1061 62. Namely, the plaintiff in *Silvestri* chose to destroy the only relevant piece of evidence—the car that was supposedly defective—after experts inspected the car and advised him to preserve the car. 271 F.3d at 591 92. In explaining that the present facts did not establish a clear or immediate path to litigation, the district court was simply differentiating these facts from those in *Silvestri* that it believed to be significantly more egregious. This does not indicate, as the majority claims, that the district court applied an admittedly heightened standard to the facts before it.

Therefore, after a careful review of the record, the majority's conclusion that the district court applied the incorrect legal standard rings hollow. While pretending to premise its conclusions on the improper application of a legal standard, the majority improperly substitutes its own fact findings for those of the district court. A court of appeals cannot and should not make such a judgment. Because the majority's actions go beyond the purview of the duties of an appellate court, I respectfully dissent.

All Citations

645 F.3d 1336, 98 U.S.P.Q.2d 1711

EXHIBIT 271

Restatement (Third) Of Agency § 1.01 (2006)

Restatement of the Law - Agency October 2018 Update

Restatement (Third) of Agency

Chapter 1. Introductory Matters

Topic 1. Definitions and Terminology

§ 1.01 Agency Defined

[Comment:](#)[Reporter's Notes](#)[Case Citations - by Jurisdiction](#)

Agency is the fiduciary relationship that arises when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act.

Comment:

a. Scope and cross-references. Comment *b* discusses various usages of agency terminology. Comment *c* is a general discussion of the defining elements of agency. Comment *d* discusses how a relationship of agency is formed. It is not necessary that the agent manifest assent to the principal. See Comment *c* and § 3.01, comment *b*. Comments *e-h* discuss the elements of agency in more detail. Section 1.02 states the principle that it is a legal conclusion whether a particular relationship is one of agency. Section 1.03 defines manifestation. Section 1.04 defines and distinguishes among some common types of agents and principals.

b. Usage. This definition states the elements of the relationship widely referred to as “common-law agency” or “true agency.” The definition excludes cognate relationships in which, although the legal consequences of one person's actions are attributed to another person, one or more of the defining elements of agency are not present. See §§ 3.12- 3.13, dealing with powers given as security and irrevocable proxies, and § 8.09, Comment *d*, discussing the duties of an escrow holder. Nonetheless, such cognate relationships are often grouped with relationships of common-law agency. More generally, legal usage varies. Some statutes and many cases use agency terminology when the underlying relationship falls outside the common-law definition.

Moreover, the terminology of agency is widely used in commercial settings and academic literature to characterize relationships that are not necessarily encompassed by the legal definition of agency. In philosophical and literary studies, “agency” often means an actor's capacity to assert control over the actor's own intentions, desires, and decisions. In

economics, definitions of principal-agent relations encompass relationships in which one person's effort will benefit another or in which collaborative effort is required. In commercial settings, the term “principal” is often used to designate one who benefits from or is affected by the acts of another, or one who sponsors or controls another. It is also common usage to refer without distinction to parties who serve any intermediary function as “agents.” Not all such situations, however, meet the legal definition of an agency relationship. Moreover, the legal consequences of agency may attach to only a portion of the relationship between two persons, a fact that dictates care in using the term “agency relationship.” Aspects of an overall relationship may constitute agency and entail its legal consequences while other aspects do not. It is also possible for the same person to be a principal as well as an agent in an interaction with a third party. The Introduction states the coverage of this Restatement.

c. Elements of agency. As defined by the common law, the concept of agency posits a consensual relationship in which one person, to one degree or another or respect or another, acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person. The person represented has a right to control the actions of the agent. Agency thus entails inward-looking consequences, operative as between the agent and the principal, as well as outward-looking consequences, operative as among the agent, the principal, and third parties with whom the agent interacts. Only interactions that are within the scope of an agency relationship affect the principal's legal position. In some situations, the consequences of agency are imposed without a person's consent, such as when a court appoints a lawyer for a person appearing before the court, or when a statute designates an agent for purposes of service of process. See Comment *d* for further discussion of consent.

The common-law definition requires that an agent hold power, a concept that encompasses authority but is broader in scope and connotation. The terminology of “power” is neutral in that it states a result but not the justification for the result. An agent who has actual authority holds power as a result of a voluntary conferral by the principal and is privileged, in relation to the principal, to exercise that power. Actual authority is defined in § 2.01. Actual authority does not exhaust the circumstances under which the legal consequences of one person's actions may be attributed to another person. An agent also has power to affect the principal's legal relations through the operation of apparent authority, as stated in § 2.03. Additionally, a person may be estopped to deny the existence of an agency relationship, as stated in § 2.05. Separately, a person may, through ratification, create the consequences of actual authority with respect to an actor's prior act. See Chapter 4.

Agency encompasses a wide and diverse range of relationships and circumstances. The elements of common-law agency are present in the relationships between employer and employee, corporation and officer, client and lawyer, and partnership and general partner. People often retain agents to perform specific services. Common real-estate transactions, for example, involve the use of agents by buyers, sellers, lessors, and lessees. Authors, performers, and athletes often retain specialized agents to represent their interests in dealing with third parties. Some industries make frequent use of nonemployee agents to communicate with customers and enter into contracts that bind the customer and a vendor. Agents who lack authority to bind their principals to contracts nevertheless often have authority to negotiate or to transmit or receive information on their behalf. Some common forms of agency have a personal and noncommercial flavor, exemplified by the relationship created by a power of attorney that confers authority to make decisions regarding an individual's health care, place of residence, or other personal matters. See Comment *d*. On durable powers of attorney, see § 3.08(2).

Not all relationships in which one person provides services to another satisfy the definition of agency. It has been said that a relationship of agency always “contemplates three parties—the principal, the agent, and the third party with whom the agent is to deal.” 1 Floyd R. Mechem, *A Treatise on the Law of Agency* § 27 (2d ed. 1914). It is important to define the concept of “dealing” broadly rather than narrowly. For example, a principal might employ an agent who acquires information from third parties on the principal's behalf but does not “deal” in the sense of entering into transactions on the principal's account. In contrast, if a service provider simply furnishes advice and does not interact with third parties as the representative of the recipient of the advice, the service provider is not acting as an agent. The adviser

may be subject to a fiduciary duty of loyalty even when the adviser is not acting as an agent. The common law of agency, however, additionally encompasses the employment relation, even as to employees whom an employer has not designated to contract on its behalf or otherwise to interact with parties external to the employer's organization. In contrast, the common term "independent contractor" is equivocal in meaning and confusing in usage because some termed independent contractors are agents while others are nonagent service providers. The antonym of "independent contractor" is also equivocal because one who is not an independent contractor may be an employee or a nonagent service provider. This Restatement does not use the term "independent contractor," except in discussing other material that uses the term. [Section 7.07\(3\)](#) states the criteria that classify a person as an employee, as opposed to a nonagent service provider, for purposes of an employer's vicarious liability for torts committed within the scope of employment.

Despite their agency relationship, a principal and an agent retain separate legal personalities. Agency does not merge a principal's personality into that of the agent, nor is an agent, as an autonomous person or organization with distinct legal personality, merged into the principal. The fact that an agent acts on behalf of, or represents, another person implies the existence of limits on the scope of the agency relationship and on the extent to which the principal is accountable for the agent's acts. The metaphor of identification, which merges an agent's distinct identity with the principal's, is potentially misleading and not helpful as a starting point for analysis.

A relationship is not one of agency within the common-law definition unless the agent consents to act on behalf of the principal, and the principal has the right throughout the duration of the relationship to control the agent's acts. A principal's manifestation may be such that an agency relationship will exist without any communication from the agent to the principal explicitly stating the agent's consent. If the principal requests another to act on the principal's behalf, indicating that the action should be taken without further communication and the other consents so to act, an agency relationship exists. If the putative agent does the requested act, it is appropriate to infer that the action was taken as agent for the person who requested the action unless the putative agent manifests an intention to the contrary or the circumstances so indicate.

A principal's right to control the agent is a constant across relationships of agency, but the content or specific meaning of the right varies. Thus, a person may be an agent although the principal lacks the right to control the full range of the agent's activities, how the agent uses time, or the agent's exercise of professional judgment. A principal's failure to exercise the right of control does not eliminate it, nor is it eliminated by physical distance between the agent and principal. For further discussion of control, see *Comment f*. The common-law definition of agency presupposes a principal who exists and who has legal capacity throughout the duration of the relationship; otherwise the principal will not be able on an ongoing basis to assess the agent's performance in relationship to the principal's interests. See [§ 3.04](#). The requirement that an agent be subject to the principal's control assumes that the principal is capable of providing instructions to the agent and of terminating the agent's authority. *Comments d* and *f* discuss, *inter alia*, the tension between these elements of the common-law definition and durable powers of attorney. The chief justifications for the principal's accountability for the agent's acts are the principal's ability to select and control the agent and to terminate the agency relationship, together with the fact that the agent has agreed expressly or implicitly to act on the principal's behalf.

d. Creation of agency. Under the common-law definition, agency is a consensual relationship. The definition requires that an agent-to-be and a principal-to-be consent to their association with each other. In contrast to the formulation in [Restatement Second, Agency § 1](#), the definition in this section refers to a principal's manifestation of "assent," not "consent." The different terminology is intended to emphasize that unexpressed reservations or limitations harbored by the principal do not restrict the principal's expression of consent to the agent. See [Restatement Second, Contracts § 17](#), *Comment c*. If an agent is otherwise on notice of the meaning the principal ascribes to a particular expression, that meaning is operative as between principal and agent. See [§ 1.03](#), *Comment e*. A principal's manifestation of assent to an agency relationship may be informal, implicit, and nonspecific. See [§ 1.03](#), which defines manifestation.

As to the agent, a relationship of agency as defined in this section requires that the agent “manifests assent or otherwise consents so to act,” in contrast to the requirement in [Restatement Second, Agency § 1](#) that the agent “consent.” The formulation in this section, consistent with Restatement Second, recognizes that it is not necessary to the formation of a relationship of agency that the agent manifest assent to the principal, as when the agent performs the service requested by the principal following the principal's manifestation, or when the agent agrees to perform the service but does not so inform the principal and does not perform. It is a question of fact whether the agent has agreed.

Additionally, the consensual aspect of agency does not mean that an enforceable contract underlies or accompanies each relation of agency. Many agents act or promise to act gratuitously. While either acting as an agent or promising to do so creates an agency relation, neither the promise to act gratuitously nor an act in response to the principal's request for gratuitous service creates an enforceable contract. See [Restatement Second, Contracts § 71](#).

In some instances, however, relationships that are less than fully consensual and, therefore, not common-law agency relations trigger legal consequences equivalent to those of agency. A notable instance is a durable power of attorney. The basic presupposition that agency is a consensual relationship that vests in the principal the right of interim control over the agent is at odds with the relationship between principal and agent created by a durable power of attorney, a relationship in which the agent's power survives or is triggered by the principal's loss of mental competence. Once the principal becomes unable to terminate the relationship or to provide instructions to the agent, the principal's relationship with the agent is no longer the relationship presupposed by the common law of agency, even though in creating the power the principal consented initially to the mechanism that led to the later and less consensual relationship with the agent. Although no res exists, the relationship then resembles a trust. Durable powers are treated in [§ 3.08\(2\)](#) and in [Restatement Third, Property \(Wills and Other Donative Transfers\) § 8.1, Comment l](#).

Many of the legal consequences of agency also apply in situations that resemble agency in form but in which the parties' consent is subject to constraints imposed by law or by legal or regulatory institutions. As a consequence of such constraints, the decision to appoint a particular agent or to continue the agency relation is not within the parties' exclusive control. For example, the law implies a principal-agency relationship between the owner of a lost item and government officials who recover it. Additionally, court-appointed counsel represents the client, notwithstanding the client's objection, and counsel's withdrawal from representation in litigation requires the court's assent. All attorneys are subject to ethical responsibilities that constrain the authority of their clients as principals.

Likewise, the legal consequences resemble those of common-law agency when an “agent's” powers are specified by operation of law, not by the parties. A statutory designation of the Secretary of State as agent to receive service of process is not a consensual choice of agent on the part of the principal or specification of the agent's powers but follows a choice to carry on activity in a particular state. In maritime law, under the 1989 International Convention on Salvage, a ship's master has authority to contract for salvage operations on behalf of the vessel's owner, and the master and the owner have authority to conclude such contracts on behalf of the owner of property on board the vessel. Additionally, the law may mandate that an agent be used to perform a particular function, such as the federal statutory requirement that stock in an employee ownership plan be held and voted by trustees.

e. Fiduciary character of relationship. The scope of an agency relationship defines the scope of an agent's duties to a principal and a principal's duties to an agent. If the relationship between two persons is one of agency as defined in this section, the agent owes a fiduciary obligation to the principal. The word “fiduciary” appears in the black-letter definition to characterize or classify the type of legal relationship that results if the elements of the definition are present and to emphasize that an agency relationship creates the agent's fiduciary obligation as a matter of law.

As a general matter, the term “fiduciary” signifies that an agent must act loyally in the principal's interest as well as on the principal's behalf. See Comment *g* for a discussion of “acting on behalf of.” See [§ 8.01](#) for an agent's basic duty of loyal action. Any agent has power over the principal's interests to a greater or lesser degree. This determines the scope

in which fiduciary duty operates. An agent has such power even when the principal holds a superior economic position or possesses greater expertise or acumen.

To establish that a relationship is one of agency, it is not necessary to prove its fiduciary character as an element. The obligations that a principal owes an agent, specified in §§ 8.13- 8.15, are not fiduciary. In addition to an agent's fiduciary duties, the agent has a duty to fulfill specific contractual undertakings that the agent has made to the principal and to third parties, as well as to fulfill any duties imposed on the agent by law. Correlatively, a principal can owe duties created by contractual undertakings to the agent. Chapter 8 states the specific duties owed by the agent and the principal. [Section 8.06](#) governs consent by the principal to conduct that would otherwise breach the agent's duties of loyalty.

Fiduciary duty does not necessarily extend to all elements of an agency relationship, and does not explain all of the legal consequences that stem from the relationship. Fiduciary duty does not operate in a monolithic fashion. Most questions concerning agents' fiduciary duty involve the agent's relationship to property owned by the principal or confidential information concerning the principal, the agent's undisclosed relationship to third parties who compete with or deal with the principal, or the agent's own undisclosed interest in transactions with the principal or competitive activity. It is open to question whether an agent's unconflicted exercise of discretion as to how to best carry out the agent's undertaking implicates fiduciary doctrines.

Three types of consequences result from an agent's fiduciary duties to the principal. First, if an agent breaches a fiduciary duty of loyalty, distinctive remedies are available to the principal. Moreover, burdens of proof are often allocated differently in cases alleging breach of fiduciary obligation than in civil litigation generally. A different limitation period may apply, and it may not begin to run until the principal discovers the breach of duty. These points are elaborated in §§ 8.01- 8.06.

Second, the content of an agent's duties to the principal is distinctive. Unless the principal consents as stated in [§ 8.06](#), an agent may not use the principal's property, the agent's position, or nonpublic information the agent acquires while acting within the scope of the relationship, for the agent's own purposes or for the benefit of another. Similarly, unless the principal consents as stated in [§ 8.06](#), an agent may not bind the principal to transactions in which the agent deals with the principal on the agent's own account without disclosing the agent's interest to the principal. Without the principal's consent, an agent may not compete with the principal as to the subject matter of the agency, nor may the agent act on behalf of one with interests adverse to those of the principal in matters in which the agent is employed. See §§ 8.01- 8.06 for a detailed treatment of these duties.

Third, the fiduciary character of an agent's position, on the one hand, and the principal's right to control the agent, on the other hand, are linked in a manner that differentiates both (a) the function of an agent-fiduciary from that of a nonagent-fiduciary and (b) agency relationships from nonagency relationships that are defined and controlled solely by contract. An agent's fiduciary position requires the agent to interpret the principal's statement of authority, as well as any interim instructions received from the principal, in a reasonable manner to further purposes of the principal that the agent knows or should know, in light of facts that the agent knows or should know at the time of acting. An agent thus is not free to exploit gaps or arguable ambiguities in the principal's instructions to further the agent's self-interest, or the interest of another, when the agent's interpretation does not serve the principal's purposes or interests known to the agent. This rule for interpretation by agents facilitates and simplifies principals' exercise of the right of control because a principal, in granting authority or issuing instructions to an agent, does not bear the risk that the agent will exploit gaps or ambiguities in the principal's instructions. In the absence of the fiduciary benchmark, the principal would have a greater need to define authority and give interim instructions in more elaborate and specific form to anticipate and eliminate contingencies that an agent might otherwise exploit in a self-interested fashion. That is, the principal would be at greater risk in granting authority and stating instructions in a form that gives an agent discretion in determining how to fulfill the principal's direction. For organizational principals, this rule simplifies the process through which directions are communicated, understood, and executed within an organization. Accordingly, instructions need not be drafted with

the detail and specificity that typify the instruments embodying the terms of many arm's-length commercial and financial relationships.

Illustrations:

1. P Corporation manufactures tobacco products, including two brands of cigarettes. Brand C has the largest sales in North America. Brand D has fewer sales in North America but exceeds Brand C in worldwide sales, chiefly in less developed countries. A is employed by P Corporation as the general manager of its cigarette division. A reports to P Corporation's Executive Vice President. A forms the beliefs that cigarette smoking is injurious to health and that it is socially desirable that fewer rather than more people smoke cigarettes. A does not disclose these beliefs to P Corporation. The Executive Vice President, intending to refer to Brand D, instructs A as follows: "Redirect all expenditures on advertising to the best selling brand. A believes that it is socially undesirable to export cigarette consumption in the face of a declining domestic market. A enters into an advertising contract with T Corporation, in which T Corporation will advertise Brand C exclusively.

A has breached the fiduciary duty A owes to P Corporation. Although the Executive Vice President's direction to A did not precisely specify how to determine the identity of "the best selling brand, A's interpretation of the instruction was contrary to P Corporation's interests as A should reasonably have understood them. P Corporation is a party to the contract A made with T Corporation if T Corporation reasonably believed A had authority to make the contract. See § 2.03, which defines apparent authority. A lacked actual authority to make the contract because A could not reasonably believe P Corporation wished A to do so. See §§ 2.01 2.02, which define actual authority and its scope.

2. P, an operatic tenor, employs A as a business manager with authority to book P's performances. P directs A to book P to perform a concert in a particular concert hall owned by T. A knows that the acoustic quality of T's concert hall has recently deteriorated in quality due to an error made in remodeling. Neither the error nor the deterioration is public knowledge, and A has no reason to believe P knows of it. A books P to perform in T's concert hall without telling P about the acoustic deterioration because A hopes to obtain employment with T. A has breached A's fiduciary duty to P, even though A carried out P's literal instructions.

f. Principal's power and right of interim control.

(1). *Principal's power and right of interim control in general.* An essential element of agency is the principal's right to control the agent's actions. Control is a concept that embraces a wide spectrum of meanings, but within any relationship of agency the principal initially states what the agent shall and shall not do, in specific or general terms. Additionally, a principal has the right to give interim instructions or directions to the agent once their relationship is established. Within an organization the right to control its agents is essential to the organization's ability to function, regardless of its size, structure, or degree of hierarchy or complexity. In an organization, it is often another agent, one holding a supervisory position, who gives the directions. For definitions of the terms "superior" and "subordinate" coagents, see § 1.04(9).

A principal may exercise influence over an agent's actions in other ways as well. Incentive structures that reward the agent for achieving results affect the agent's actions. In an organization, assigning a specified function with a functionally descriptive title to a person tends to control activity because it manifests what types of activity are approved by the principal to all who know of the function and title, including their holder.

A relationship of agency is not present unless the person on whose behalf action is taken has the right to control the actor. Thus, if a person is appointed by a court to act as a receiver, the receiver is not the agent of the person whose affairs the receiver manages because the appointing court retains the power to control the receiver.

A principal's control over an agent will as a practical matter be incomplete because no agent is an automaton who mindlessly but perfectly executes commands. A principal's power to give instructions, created by the agency relationship, does not mean that all instructions the principal gives are proper. An agent's duty of obedience does not require the agent to obey instructions to commit a crime or a tort or to violate established professional standards. See § 8.09(2). Moreover, an agent's duty of obedience does not supersede the agent's power to resign and terminate the agency relationship. See § 3.10.

The power to give interim instructions distinguishes principals in agency relationships from those who contract to receive services provided by persons who are not agents. In many agreements to provide services, the agreement between the service provider and the recipient specifies terms and conditions creating contractual obligations that, if enforceable, prescribe or delimit the choices that the service provider has the right to make. In particular, if the service provider breaches a contractual obligation, the service recipient has a claim for breach of contract. The service provider may be constrained by both the existence of such an obligation and the prospect of remedies for breach of contract. The fact that such an agreement imposes constraints on the service provider does not mean that the service recipient has an interim right to give instructions to the provider. Thus, setting standards in an agreement for acceptable service quality does not of itself create a right of control. Additionally, if a service provider is retained to give an independent assessment, the expectation of independence is in tension with a right of control in the service recipient.

To the extent the parties have created a relationship of agency, however, the principal has a power of control even if the principal has previously agreed with the agent that the principal will not give interim instructions to the agent or will not otherwise interfere in the agent's exercise of discretion. However, a principal who has made such an agreement but then subsequently exercises its power of control may breach contractual duties owed to the agent, and the agent may have remedies available for the breach.

Illustrations:

3. P arranges with A for A to buy large quantities of coffee beans on P's behalf. The compensation agreed to is predicated on P's assurance that A will not need to travel abroad to make the purchases. Later P directs A to fly to Colombia to buy coffee beans. A has a choice. A may resign as P's agent. If A does not resign, A must obey the instruction but may have a claim against P for the increased cost of A's performance. A may waive the claim if A fails to remind P of P's assurance before departing for Colombia if it is reasonable to do so, for example if it appears that P has forgotten the assurance.

4. P owns a professional baseball team. Needing a new general manager, P negotiates an agreement with A, a manager. A insists that P provide an assurance in A's employment agreement that A will have autonomy in running the team. P agrees. Before the start of the season, P directs A to schedule no night games on weeknights during the school term. It is feasible for A to comply with P's directive.

A must obey the instruction. Alternatively, A may resign. If A resigns, A has a contract claim against P. If A does not resign, A may have a contract claim against P, but A's ability to recover on the claim would depend, inter alia, on A's ability to show damage.

If an agent disregards or contravenes an instruction, the doctrine of actual authority, defined in § 2.01, governs the consequences as between the principal and the agent. Section 8.09 states an agent's duties to act only within the scope of actual authority and to comply with lawful instructions. The rights and obligations of the third party with whom the agent interacts are governed by the doctrines of actual authority and apparent authority. Doctrines of estoppel, restitution, and ratification are also relevant under some circumstances. See §§ 2.03, 2.05- 2.07, and 4.01- 4.08.

Illustrations:

5. Same facts as Illustration 4. After A learns of P's directive, A enters into a scheduling agreement with another team, owned by Q, under which P's team will play night games during the school term. Q has no notice of P's directive to A. Although A lacks actual authority to bind P to the agreement, the agreement may bind P and Q if A acted with apparent authority.

6. Same facts as Illustration 5, except that Q has notice of P's instructions to A. Unless P ratifies A's conduct, neither P nor Q is bound by the agreement because A has neither actual nor apparent authority to bind P. Section 4.01(2) states the circumstances under which ratification occurs.

The principal's right of control in an agency relationship is a narrower and more sharply defined concept than domination or influence more generally. Many positions and relationships give one person the ability to dominate or influence other persons but not the right to control their actions. Family ties, friendship, perceived expertise, and religious beliefs are often the source of influence or dominance, as are the variety of circumstances that create a strong position in bargaining. A position of dominance or influence does not in itself mean that a person is a principal in a relationship of agency with the person over whom dominance or influence may be exercised. A relationship is one of agency only if the person susceptible to dominance or influence has consented to act on behalf of the other and the other has a right of control, not simply an ability to bring influence to bear.

The right to veto another's decisions does not by itself create the right to give affirmative directives that action be taken, which is integral to the right of control within common-law agency. Thus, a debtor does not become a creditor's agent when a loan agreement gives the creditor veto rights over decisions the debtor may make. Moreover, typically a debtor does not consent to act on behalf of the creditor as opposed to acting in its own interests.

The principal's right of control presupposes that the principal retains the capacity throughout the relationship to assess the agent's performance, provide instructions to the agent, and terminate the agency relationship by revoking the agent's authority. See § 3.10 on the principal's power to revoke authority. Under the common law of agency, as stated in *Restatement Second, Agency* § 122(1), a durable agency power, one that survives the principal's loss of mental competence, was not feasible because of the loss of control by the principal. *Section 3.08(2)*, like statutes in all states, recognizes the efficacy of durable powers, which enable an agent to act on behalf of a principal incapable of exercising control. Legitimizing the power does not eliminate the risks for the principal that are inherent when the agent is not subject to direction or termination by the principal.

(2). *Principal's power and right of interim control – corporate context.* Many questions testing the nature of the right of control arise as a result of the legal consequences of incorporating or creating a juridical or legal person distinct from its shareholders, its governing body, and its agents. A corporation's agents are its own because it is a distinct legal person; they are not the agents of other affiliated corporations unless, separately, an agency relation has been created between the agents and the affiliated corporation. Similarly, the hierarchical link between a local union and its international affiliate does not by itself create a relationship of agency between the local and the international.

Although a corporation's shareholders elect its directors and may have the right to remove directors once elected, the directors are neither the shareholders' nor the corporation's agents as defined in this section, given the treatment of directors within contemporary corporation law in the United States. Directors' powers originate as the legal consequence of their election and are not conferred or delegated by shareholders. Although corporation statutes require shareholder approval for specific fundamental transactions, corporation law generally invests managerial authority over corporate affairs in a board of directors, not in shareholders, providing that management shall occur by or under the board of directors. Thus, shareholders ordinarily do not have a right to control directors by giving binding instructions to them. If the statute under which a corporation has been incorporated so permits, shareholders may be allocated power to give binding instructions to directors through a provision in the corporation's articles or through a validly adopted shareholder agreement. The fact that a corporation statute may refer to directors as the corporation's "agents" for a particular purpose does not place directors in an agency relationship with shareholders for purposes of the common law of agency. In any event, directors' ability to bind the corporation is invested in the directors as a board, not in individual directors acting unilaterally. A director may, of course, also be an employee or officer (who may or may not be an employee) of the corporation, giving the director an additional and separate conventional position or role as an agent. Fellow directors may, with that director's consent, appoint a director as an agent to act on behalf of the corporation in some respect or matter.

Illustrations:

7. A is an employee of S Corporation. P Corporation owns all the stock of S Corporation. A is not an agent of P Corporation because P Corporation's only relationship with A is that P Corporation is the sole shareholder of A's employer.

8. Same facts as Illustration 7, except that S Corporation and P Corporation are incorporated in a jurisdiction that permits a corporation to provide in its articles of incorporation that the powers of the corporation's directors shall be exercised subject to written instructions given by the corporation's shareholders in a resolution adopted by a majority of the shareholders. S Corporation's articles contain such a provision. A is not an agent of P Corporation.

9. Same facts as Illustration 7, except that A and P Corporation agree that, in performing A's duties as an employee of S Corporation, A shall act as P Corporation directs in the interest of P Corporation. A consents so to act. A is an agent of P Corporation as well as of S Corporation.

g. Acting on behalf of. The common-law definition of agency requires as an essential element that the agent consent to act on the principal's behalf, as well as subject to the principal's control. From the standpoint of the principal, this is the purpose for creating the relationship. The common law of agency encompasses employment as well as nonemployment relations. Employee and nonemployee agents who represent their principal in transactions with third parties act on the principal's account and behalf. Employee-agents whose work does not involve transactional interactions with third parties also act "on behalf of" their employer-principal. By consenting to act on behalf of the principal, an agent who is an employee consents to do the work that the employer directs and to do it subject to the employer's instructions. In either case, actions "on behalf of" a principal do not necessarily entail that the principal will benefit as a result.

In any relationship created by contract, the parties contemplate a benefit to be realized through the other party's performance. Performing a duty created by contract may well benefit the other party but the performance is that of an agent only if the elements of agency are present. A purchaser is not "acting on behalf of" a supplier in a distribution relationship in which goods are purchased from the supplier for resale. A purchaser who resells goods supplied by another is acting as a principal, not an agent. However, courts may treat a trademark licensee as the agent of the licensor in certain situations, with the result that the licensor is liable to third parties for defective goods produced by licensees.

Illustrations:

10. P Corporation designs and sells athletic footwear using a registered trade name and a registered trademark prominently displayed on each item. P Corporation licenses A Corporation to manufacture and sell footwear bearing P Corporation's trade name and trademark, in exchange for A Corporation's promise to pay royalties. Under the license agreement, P Corporation reserves the right to control the quality of the footwear manufactured under the license. A Corporation enters into a contract with T to purchase rubber. As to the contract with T, A Corporation is not acting as P Corporation's agent, nor is P Corporation the agent of A Corporation by virtue of any obligation it may have to defend and protect its trade name and trademark. P Corporation's right to control the quality of footwear manufactured by A Corporation does not make A Corporation the agent of P Corporation as to the contract with T.

11. Same facts as Illustration 10, except that P Corporation and A Corporation agree that A Corporation will negotiate and enter into contracts between P Corporation and retail stores for the sale of footwear manufactured by P Corporation. A Corporation is acting as P Corporation's agent in connection with the contracts.

12. P Corporation, a financial services firm, licenses A Corporation, a supermarket chain, to sell P Corporation's money transfer service through A Corporation's supermarkets. P Corporation's agreement with A Corporation requires A to handle transactions in accord with P's operating

procedures and to maintain records accessible by P. To use the service, a customer remits cash at an A Corporation supermarket. The intended recipient of the cash, upon presentation of appropriate identification, may collect it at another A Corporation supermarket or other outlet licensed by P Corporation. Once an A Corporation supermarket accepts cash from a customer, P is bound to wire cash in that amount to the outlet specified by the customer. A Corporation is P Corporation's agent in activities connected with the money transfer service.

13. P owns a shopping mall. A rents a retail store in the mall under a lease in which A promises to pay P a percentage of A's monthly gross sales revenue as rent. The lease gives P the right to approve or disapprove A's operational plans for the store. A is not P's agent in operating the store.

14. Same facts as Illustration 13, except that A additionally agrees to collect the rent from the mall's other tenants and remit it to P in exchange for a monthly service fee. A is P's agent in collecting and remitting the other tenants' rental payments. A is not P's agent in operating A's store in the mall.

An actor who acts under the immediate control of another person is not that person's agent unless the actor has agreed to act on the person's behalf. For example, a foreman or supervisor in charge of a crew of laborers exercises full and detailed control over the laborers' work activities. The relationship between the foreman and the laborers is not an agency relationship despite the foreman's full control, nor is their relationship one of subagency. [Section 1.04\(8\)](#) defines subagency. The foreman and the laborers are coagents of a common employer who occupy different strata within an organizational hierarchy. See [§ 1.04\(9\)](#), which defines "superior" and "subordinate" coagents. The foreman's role of direction, defined by the organization, does not make the laborers the foreman's own agents. The laborers act on behalf of their common employer, not the foreman. Likewise, the captain of a ship and its crew are coagents, hierarchically stratified, who have consented to act on behalf of their common principal, the ship's owner.

It is possible to create a power to affect a person's legal relations to be exercised for the benefit of the holder of the power. Such powers typically are created as security for the interests of the holder or otherwise to benefit a person other than the person who creates the power. Consequently, the holder of such a power is not an agent as defined in this section, even though the power has the form of agency and, if exercised, will result in some of agency's legal consequences. The creator does not have a right to control the power holder's use of the power, and the power holder is not under a duty to use it in the interests of the creator. [Sections 3.12- 3.13](#) specifically treat powers given as security.

Illustrations:

15. P, a building contractor, has a credit account with T, a seller of building supplies. P tells F, P's impecunious friend, that F may buy building supplies on P's account from T for F's own use. P must pay the charges that F incurs on P's account with T. F is not P's agent in buying the building supplies because F is not acting on P's behalf.

16. Same facts as Illustration 15, except that P tells F to make purchases from T and charge them to P's account only to meet P's needs. F is P's agent in making the purchases and charging them to P's account.

17. P lends A money to purchase a piece of property, taking a mortgage on the property as security. The mortgage gives P the power to sell the property if A defaults on the loan. In exercising the power of sale, P does not act as A's agent because P is acting, not on A's behalf, but to protect P's interest as mortgagee.

Relationships of agency are among the larger family of relationships in which one person acts to further the interests of another and is subject to fiduciary obligations. Agency is not antithetical to these other relationships, and whether a fiduciary is, additionally, an agent of another depends on the circumstances of the particular relationship. For example, as defined in [Restatement Third, Trusts § 2](#), a trust is a fiduciary relationship with respect to property that arises from a manifestation of intention to create that relationship; a trustee is not an agent of the settlor or beneficiaries unless the terms of the trust subject the trustee to the control of either the settlor or the beneficiaries. Principals in agency relationships have power to terminate authority and thus remove the agent; trust beneficiaries, in contrast, do not have power to remove the trustee.

As agents, all employees owe duties of loyalty to their employers. The specific implications vary with the position the employee occupies, the nature of the employer's assets to which the employee has access, and the degree of discretion that the employee's work requires. However ministerial or routinized a work assignment may be, no agent, whether or not an employee, is simply a pair of hands, legs, or eyes. All are sentient and, capable of disloyal action, all have the duty to act loyally. For further discussion of the scope of fiduciary duty, see [§ 8.01](#), Comment *c*.

Illustration:

18. A is an assembly line worker in an aircraft manufacturing plant owned by P Corporation. A's work consists solely of inserting rivets that fasten components in aircraft bodies. A's foreman tells A to speed up production. A asks why, and the foreman responds, "The top secret word from the plant manager is that P Corporation has received a large contract from the Defense Department. "So, is this a one time thing?" asks A. "No," replies the foreman. "They're going to have to expand the plant because the contract will require more manufacturing space. After the day's work, as a result of what A has been told by the foreman, A buys an option to purchase land adjacent to the plant. The land is the only space on which the plant might feasibly expand. A's purchase of the option breaches A's fiduciary duty to P Corporation because it constitutes a use of nonpublic information of P Corporation without P Corporation's permission. See [§ 8.05\(2\)](#).

h. Intermediaries. Many actors perform an intermediary role between parties who engage in a transaction. Not all are agents in any sense, and not all who are agents act on behalf of those who use the intermediary service provided. For example, an employee of a courier service who shuttles documents among parties who are closing a transaction among them is not the parties' agent simply because an intermediary function is provided.

Agents who perform intermediary functions vary greatly in the nature of the services provided. Variable as well are the scope of the agency relationship and its consequences for the principal. At the modest end of the spectrum, a translator employed by a principal in negotiations enables the principal's words to be understood by others and enables the principal to understand the language used by others. The translator does not occupy a role that conventionally involves identifying parties with whom the principal might deal or a role that confers discretionary authority to determine whether to commit the principal to the terms of a proposed transaction or to initiate or vary terms for the principal. Nonetheless, the translator's relation to the principal is one of agency. The translator acts on the principal's behalf and the principal has the power to provide interim instructions as to how the translation shall be done.

If an intermediary lacks authority even to negotiate on behalf of a party, characterizing the intermediary as an agent may not carry much practical import because the scope of the agency would be very narrow. But despite the narrowness of its scope, an agency relation imposes legal consequences when the agent's acts are within its scope. In some circumstances, an agent's inaction will have legal consequences for the principal.

Illustration:

19. P appoints A an agent to receive service of process. P instructs A, "Anything with which you are served in my name, send it to me by express service. A is served with a complaint in an action that names P as a defendant. A does not send the complaint to P, causing P to miss the deadline for filing an answer to the complaint. As a consequence, P's adversary in the lawsuit obtains a default judgment against P. A's receipt of process is within the scope of A's authority. P is bound by its consequences.

Farther along the spectrum, an intermediary who is a finder conventionally serves the function of identifying or introducing to each other prospective parties to transactions but does not engage in negotiations. Intermediaries who are brokers, on the other hand, negotiate on behalf of the principal. Some agents have authority to commit the principal to the terms of a transaction. An individual actor's role may evolve over the course of a transaction, expanding or shrinking the scope of any agency relationship. Moreover, an agent may assume a pivotal role in the course of a transaction, a role that may commence with relaying information from one party to another but then encompass explanations and clarifications, all of which induce reliance by the recipient.

Ordinarily, the scope of an agency relationship is defined solely by the parties to the relationship. Legislation may address specific transactions. For example, several states have legislation concerning residential real estate that permits prospective buyers and sellers to enter into agreements with real-estate brokers that modify or reconfigure the duties that the common law of agency has conventionally imposed on the broker with whom property is listed, and on brokers who assist prospective purchasers. For discussion, see § 3.15, Comment *f*.

Reporter's Notes

a. Comparison with Restatement Second, Agency, and codifications. The black letter for this section is consistent with the substance of the definition in [Restatement Second, Agency § 1](#), except for the introduction of “assent,” as explained in Comment *d*. The term “relationship” replaces “relation” to reflect contemporary usage. The commentary to this section addresses the essential elements of the agency relation, consistently in substance with [Restatement Second, Agency §§ 12-14](#).

In contrast, the definition of agency in the California Civil Code is “[a]n agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency.” [Cal. Civ. Code § 2295 \(1985 & Supp. 2005\)](#). California cases import control as an additional element in the definition, see, e.g., [DeSuza v. Andersack, 133 Cal.Rptr. 920, 924 \(Cal.App.1976\)](#). The Georgia Code states that “[t]he relation of principal and agent arises whenever one person, expressly or by implication, authorizes another to act for him or subsequently ratifies the acts of another in his behalf.” [Ga. Code § 10-6-1 \(1996 & Supp. 2004\)](#). Georgia cases also import an element of control. See, e.g., [Greenbaum v. Brooks, 139 S.E.2d 432, 434 \(Ga.App.1964\)](#).

The Louisiana Code defines two distinct types of agency, procuration and mandate. Procuration is “a unilateral juridical act by which a person, the principal, confers authority on another person, the representative, to represent the principal in legal relations. The procuration may be addressed to the representative or to a person with whom the representative is authorized to represent the principal in legal relations.” [La. Civ. Code Art. 2987 \(Supp. 2004\)](#). A mandate is “a contract by which a person, the principal, confers authority on another person, the mandatary, to transact one or more affairs for the principal.” *Id.* Art. 2989. As procuration is defined by [Art. 2987](#), the principal may confer authority on the representative without the representative's knowledge or acceptance. The fact that procuration is defined as a unilateral juridical act makes it an “offer to contract” under the Civil Code's provisions on consent, *La. Civ. Code Bk. III, T. IV, ch. 3, arts. 1927-1947*. Such an act requires the eventual consent of the representative in order to become a contract of mandate and create its effects.

b. Usage. In economics, the classic definition is Michael Jensen & William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 *J. Fin. Econ.* 305, 308-309 (1976) (“[w]e define an agency relationship as a contract in which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decisionmaking authority to the agent.”). On accounts of agency in economics contrasted with legal conceptions and consequences of agency relationships, see Daniel Spulber & Ramon Casadesus-Masanell, *Trust and Incentives in Agency*, *S. Cal. Interdisc. L.J.* (forthcoming 2005). On usage within philosophy, see, e.g., Charles Taylor, *Human Agency and Language: Philosophical Papers I*, at 99 (1985) (boundary between agents and “mere things” is mistakenly specified by others by a criterion of performance, while “[w]hat is crucial about agents is that things matter to them.... To say that things matter to agents is to say that we can attribute purposes, desires, aversions to them in a strong, original sense.”).

The classic illustration of an agency relationship formed when the parties had other significant legal relationships with each other is [Thayer v. Pacific Elec. Ry. Co., 360 P.2d 56 \(Cal.1961\)](#) (holding finder of fact could conclude that, by making notation of damage on freight bill at shipper's request, railroad's station agent acted as shipper's agent for purposes of giving notice of shipper's intention to file claim for damage to shipment).

For the point that an agent may additionally be a principal, see [American Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 353 \(2d Cir.1999\)](#) (shipyard acted as owners' agent in contracting for classification services but acted in part on its own behalf as well because hiring classification society fulfilled contractual undertaking to shipowners; shipyard thus derived sufficient benefit to be bound by arbitration clause in agreement with classification society); [Obras Civiles, S.A. v. ADM Sec., Inc., 32 F.Supp.2d 1018, 1023 \(N.D.Ill.1999\)](#) (under terms of payment-commitment letter, agent

incurred obligation to repay money deposited by third party, although money was deposited into account of disclosed principal).

c. Elements of agency. The treatment of “power” as distinct from “authority” appears in Francis M.B. Reynolds, Bowstead & Reynolds on Agency 5-6 (17th ed. 2001). For a discussion of how these concepts evolved in Nordic legal codes, in contrast to common-law doctrine, see Hugo Tiberg, Power and Authority in the Law of Agency 57, in *Lex Mercatoria* (Francis Rose ed. 2000). Statements that an agent has the “ability” to affect the principal’s legal relationship may be assertions about power not limited to authority. For an example, see [Chemtool, Inc. v. Lubrication Techs., Inc.](#), 148 F.3d 742, 745 (7th Cir.1998).

A lawyer is characterized as the client’s agent in Restatement Third, The Law Governing Lawyers, Chapter 2, Introductory Note (“A lawyer is an agent, to whom clients entrust matters, property, and information....”). Defining the scope of a lawyer’s agency relationship with a client is, of course, a separate matter.

An identification between agent and principal is the linchpin of some accounts of agency. “This notion of a fictitious unity of person has been pronounced a darkening of counsel in a recent useful work. But it receives the sanction of Sir Henry Maine, and I believe that it must stand as expressing an important aspect of the law, if, as I have tried to show, there is no adequate and complete explanation of the modern law, except by the survival in practice of rules which lost their true meaning when the objects of them ceased to be slaves. There is no trouble in understanding what is meant by saying that a slave has no legal standing, but is absorbed into the family which his master represents before the law.” Oliver Wendell Holmes, *The Common Law* 232 (1923) (citations omitted). When a principal is a corporation, identifying any particular agent with the principal requires the court to determine whether the agent should be treated as the corporation’s alter ego. For a trenchant critique of Anglo-New Zealand cases in this tradition, see Peter Watts, *The Company’s Alter Ego A Parvenu and Impostor in Private Law*, [2000] N.Z. L. Rev. 137. An explanation for this tradition is that it originated in criminal law, in which “[t]he individual human being remains ... the paradigmatic subject.... This means that in both doctrinal scholarship and legal theory, the debate about the liability of corporations is marked by the sustained use of metaphors, contrasts, images which depend upon the analogies and disanalogies between ‘corporate’ and ‘human’ persons.” Nicola Lacey, *Philosophical Foundations of the Common Law: Social not Metaphysical*, in *Oxford Essays in Jurisprudence, Fourth Series* 17, 25 (Jeremy Horder ed., 1999). Professor Lacey’s underlying assumption is that, whether a person is an individual or a corporation, “legal personality is not straightforwardly descriptive: rather, it makes reference to the conditions under which it is true to say that some social phenomenon human, corporate, or other may be held liable in law.” *Id.* at 26.

The term “independent contractor” is defined in [Restatement Second, Agency § 2\(3\)](#) as “a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent.” See also [Wiggs v. City of Phoenix](#), 10 P.3d 625, 628 (Ariz.2000) (“While it is always the case that an independent contractor is not a servant, it is not always the case that an independent contractor is not an agent”). In contrast, the preceding standard text defined an independent contractor as a person who was not an agent under the common-law definition. See 1 Floyd R. Mechem, 1 *A Treatise on the Law of Agency* § 40 (2d ed. 1914) (defining “independent contractor” as “one who exercises some independent employment, in the course of which he undertakes, supplying his own materials, servants and equipment, to accomplish a certain result, not being subject while doing so to the direction and control of his employer, but being responsible to him for the end to be achieved rather than for the means by which he accomplishes it.”). Usage in Restatement Second, Agency, is characterized as “ambiguous” in J. Dennis Hynes, *Agency, Partnership & the LLC* xxxii (5th ed. 1998). See also John J. Slain, Charles A. Thompson & Freda F. Bein, *Agency, Partnership & Employment: A Transactional Approach* xii (1980) (stating authors’ determination to use term “independent contractor” as little as possible due to confusion as to its meaning); Francis M.B. Reynolds, Bowstead & Reynolds on Agency 22 (17th ed. 2001) (expressing doubt that agency terminology “can be reduced to a satisfactory scheme.”).

d. Creation of agency. A relationship of agency requires consent of both principal and agent. See, e.g., [B & G Enters., Inc. v. United States](#), 220 F.3d 1318, 1323 (Fed.Cir.2000) (no agency relationship between federal government and state on basis that state enacted restrictions on tobacco vending machines to satisfy condition for federal funding; no manifestation by either federal government or state of intent to create relationship of agency); [Judah v. Reiner](#), 744 A.2d 1037, 1040-1041 (D.C.2000) (demonstrating existence of agency relationship requires showing that person alleged to be principal knew of and consented to representations made by persons who held themselves out as representatives).

If a person asserted to be an agent is aware of a would-be principal's effort to create an agency relationship but does not affirm or repudiate it, and does not act consistently with it, the person is not an agent. See [Fred Striffler, Inc. v. General Motors Corp.](#), 73 N.W.2d 526, 532 (Mich.1955). An agent's manifestation of consent is insufficient by itself to establish agency. See [Page v. Boone's Transport, Ltd.](#), 710 A.2d 256, 257 (Me.1998).

For a discussion of possible meanings that may be ascribed to “assent,” see Margaret Jane Radin, [Humans, Computers, and Binding Commitment](#), 75 Ind. L.J. 1125, 1141 (2000).

For examples of actors who gratuitously undertake to serve as agents, see, e.g., [Frawley v. Nickolich](#), 41 S.W.3d 420, 422 (Ark.App.2001) (friend of bail bondsman who distributed bondsman's business cards at jail, in violation of anti-solicitation statute, acted as bondsman's agent; friend given cell-phone contact for bondsman and instructed to obtain information on callers' “bonding needs”); [Sanders v. Bowen](#), 396 S.E.2d 908, 909-910 (Ga.App.1990) (in action brought by dog-bite victim, owner of pit bull charged with son's knowledge of dog's actions when son was responsible for dog's care); [Bostic v. Dalton](#), 158 S.W.3d 347 (Tenn.2005) (father acted gratuitously as his daughter's agent in supervising construction of her residence; father within exemption from liability for residential owners under workers'-compensation statute, Tenn. Code Ann. § 50-6-113(f)(1) (1999)).

On the agency relationship deemed to exist between an owner of lost property and government officials who recover it, see [United States v. Portrait of Wally](#), 105 F.Supp.2d 288, 294 (S.D.N.Y. 2000) (agency relationship, not dependent on principal's consent, deemed to exist because government officials hold stolen property on behalf of the owner; property thereafter is no longer treated as stolen). But cf. [United States v. Portrait of Wally, a Painting by Egon Schiele](#), 2002 WL 553532, at *15 (S.D.N.Y.2002) (revised factual allegations in government's subsequent amended complaint extinguish basis for characterizing officials who seized painting as agents of its owners; officials were unaware that painting had been stolen and did not act subject to a duty to return it).

On the stock holding and voting requirements in employee stock-ownership plans, see [Preston v. Allison](#), 650 A.2d 646 (Del.1994). In *Preston*, the nominee holder voted the plan's shares incorrectly and contrary to instructions given by the plan participants. The court granted declaratory relief, with the consequence that the plaintiffs were declared to be the duly elected directors, thereby ousting the defendants. The court distinguished the circumstances in the immediate case from precedents in which shareholders were held to assume the risk that a nominee holder might vote shares incorrectly because in those cases the shareholders voluntarily chose to hold their stock in a nominee name. The court's distinction appears to reflect a concern to protect the integrity of the shareholder franchise from errors made by agents when the decision to use the agent is not voluntary. See 650 A.2d at 649, distinguishing [Enstar Corp. v. Senouf](#), 535 A.2d 1351 (Del.1987) and [American Hardware Corp. v. Savage Arms Corp.](#), 136 A.2d 690 (Del.1957).

For the international convention on salvage, see International Convention on Salvage 1989, Sen. Treaty Doc. 12, 102d Cong., 1st Sess. (1991).

e. Fiduciary character of relationship. For another illustration of the appearance of “fiduciary” in a black-letter definition, see [Restatement Third, Trusts § 2](#) (“[a] trust, as the term is used in this Restatement when not qualified by the word ‘resulting’ or ‘constructive,’ is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit

of charity or for one or more persons, at least one of whom is not the sole trustee”). Trustees' duties in particular contexts may be limited to fulfilling the express terms of the governing instrument and avoiding conflicts of interest. See [Elliott Assocs. v. J. Henry Schroder Bank & Trust Co.](#), 838 F.2d 66, 71 (2d Cir.1988) (indenture trustee owes debenture holders no implicit pre-default duties; indenture trustee did not breach duty to debenture holders by waiving issuer's duty to give 50 days' advance notice of redemption of debentures when result was to save issuer one quarter's interest payment otherwise owed to debenture holders).

Some courts characterize fiduciary obligation in a manner that is inconsistent with a precise formulation. The best-known example is [SEC v. Chenery Corp.](#), 318 U.S. 80, 85-86 (1943) (“to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge those obligations? And what are the consequences of his deviation from duty?”).

While some courts treat “fiduciary duty” as a synonym for “duty of loyalty,” others do not. Compare [O'Malley v. Boris](#), 742 A.2d 845, 849 (Del.1999) (as an agent, a stock broker “has a duty to carry out the customer's instructions promptly and accurately. In addition, the broker must act in the customer's best interests and must refrain from self-dealing unless the customer consents, after full disclosure. These obligations at times are described as fiduciary duties of good faith, fair dealing, and loyalty”) (footnotes omitted) and [General Motors Acceptance Corp. v. Crenshaw, Dupree & Milam L.L.P.](#), 986 S.W.2d 632, 636 (Tex.App.1998) (agent's fiduciary duties “include a duty of good faith and fair dealing”) with [Condon Auto Sales & Serv., Inc. v. Crick](#), 604 N.W.2d 587, 599 (Iowa 1999) (employer claims against employees alleging unfair competition and self dealing are often brought as claims for breach of fiduciary duty because “a principal-agent relationship gives rise to a fiduciary duty of loyalty, and an employer-employee relationship can be closely associated with a principal-agent relationship”). For an argument that greater precision in terminology would be desirable, see Sarah Worthington, *Fiduciaries: When Is Self-Denial Obligatory*, 58 Cambridge L.J. 500, 503 (1999) (“In short, fiduciary terminology should be used carefully and restrictively, so that fiduciary law operates *only* to exact loyalty; it does not concern itself with matters of contract, tort, unjust enrichment and other equitable obligations (such as breach of confidence)”).

For the significance of the scope of the relationship to the extent of an agent's fiduciary duties, see [Fulcrum Fin. Partners v. Meridian Leasing Corp.](#), 230 F.3d 1004, 1013 (7th Cir.2000) (former general partner that retained authority as agent to remarket computer equipment owned by lessor did not breach fiduciary duty to lessor by providing upgrade service to lessor's customer without giving lessor opportunity to provide upgrade; parties' agreement that terminated partnership expressly permitted competitive activity and gave lessor no express right of first refusal on providing upgrade service when prior partnership agreement provided lessor right of first refusal); [Sonnenschein v. Douglas Elliman-Gibbons & Ives](#), 753 N.E.2d 857 (N.Y.2001) (real-estate broker did not breach fiduciary duty it owed to owner of apartment by showing other properties to prospective purchaser, absent any restriction to contrary in agreement between broker and owner).

For the general proposition that employees owe duties of loyalty to their employer, see *Employee Duty of Loyalty: A State-by-State Survey 1* (Stewart S. Manela & Arnold H. Pedowitz eds., 1995).

For an early articulation of the linkage between faithful execution of the principal's instructions and the fiduciary character of agency, see [Short v. Skipwith](#), 22 F.Cas. 9, 10-11 (D.Va.1806) (No. 12,809) (Marshall, C.J.) (despite fact that principal was in France and agent was in Virginia, “it was to be expected, that the orders of the [principal] would not be disobeyed, and his remote situation incurred the obligation not altogether to neglect any part of his business”; agent is accountable for lost profit suffered by principal due to agent's failure promptly to invest principal's funds as directed, when value of security into which principal directed investment rose because if remedy were limited simply to restoring funds with interest, “the encouragement which such a decision would give to dangerous and corrupt practices in the intercourse between a principal and his agent, must be apparent. It would hold forth an inducement, in every

instance where extraordinary profit might be made, to divert trust funds into other channels than those for which they were designed, to the great injury of a large portion of society.”).

On the distinction between fiduciary and other duties owed by an agent, see *Bristol & West Bldg. Soc. v. Mothew*, [1998] Ch. 1, 18 (C.A.) (per Millett, L.J.) (“Breach of fiduciary obligation connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.”).

A determination that partners are not subject to fiduciary constraints in an adversarial transaction is consistent with the recognition that actions taken as an agent on behalf of the partnership implicate fiduciary standards. See *Exxon Corp. v. Burglin*, 4 F.3d 1294, 1301 (5th Cir.1993) (in making buyout offer to limited partners, general partner not subject to fiduciary duty of disclosure but could rely on provision in partnership agreement permitting it to withhold information; “[i]n regard to the buyout offer, Exxon was not acting on behalf of the partnership, representing both its and the limited partners’ interests. If it were, the duty of good faith and fair dealing necessarily would be high, to avoid the problem of a general partner’s self-dealing.”).

For the proposition that only the scope of the agency limits an agent’s fiduciary duties, see *O’Malley v. Boris*, 742 A.2d 845, 849 (Del.1999) (although clients gave their stockbroker relatively little discretionary authority, broker made choice of sweep-account funds and thus is accountable for decision under fiduciary standards; clients alleged that broker breached its fiduciary duties by switching sweep account to fund in which it had an interest, without telling clients how broker acquired its interest in fund).

For an illustrative discussion of the context-specificity of fiduciary obligation, see *Gibbs v. Breed, Abbott & Morgan*, 710 N.Y.S.2d 578, 582-583 (App.Div.2000). At issue in *Gibbs* was the behavior of two partners who left one law firm for another, followed by clients and employees. The court observed that “the fiduciary restraints upon a partner with respect to client solicitation are not analogous to those applicable to employee recruitment. By contrast to the lawyer-client relationship, a partner does not have a fiduciary duty to the employees of a law firm, which would limit its [sic] duty of loyalty to the partnership. Thus, recruitment of firm employees has been viewed as distinct and ‘permissible on a more limited basis than ... solicitation of clients,’ ” quoting Robert Hillman, *Loyalty in the Firm: A Statement of General Principles on the Duties of Partners Withdrawing From Law Firms*, 55 Wash. & Lee L. Rev. 997, 1031 (1998).

For the agent’s duty to act in the principal’s interest, see *Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 135 F.3d 266, 271 (3d Cir.) (en banc) (1998) (when customers place orders with securities broker and do not specify price at which order should be executed, “it is a reasonable inference that [customers], in placing their orders, sought their own economic advantage and that they would not have placed them without an understanding that the defendants would execute them in a manner that would maximize [customers’] economic benefit from the trade.”).

On the source or nature of an agent’s fiduciary duty, it is relevant that no statutory provision alters or expressly permits alteration of the agent’s fiduciary duty of loyalty. See *Schock v. Nash*, 732 A.2d 217, 225 (Del.1999) (“Unlike corporate law and limited partnership law that provide statutory modifications to the common law of fiduciary duty, there is no statutory provision that alters the common law fiduciary duty of loyalty owed by an attorney-in-fact under a durable power of attorney”; holder of durable power breached fiduciary duties by gratuitously transferring substantially all of grantor’s property to herself when power did not clearly state grantor’s intention to permit gratuitous self-transfers to holder and holder did not present credible evidence that grantor knew of holder’s intention to convey property to herself during grantor’s lifetime).

Recent cases treating an agent’s fiduciary obligation as a consequence that follows from a determination that the relationship is one of agency include *In re Daisy Sys. Corp.*, 97 F.3d 1171, 1178-1179 (9th Cir.1996); *Pacific Tall Ships Co. v. Kuehne & Nagel, Inc.*, 76 F.Supp.2d 886, 895 (N.D.Ill.1999); *VNA Plus, Inc. v. Apria Healthcare Group, Inc.*,

29 F.Supp.2d 1253, 1264 (D.Kan.1998); *Arthur D. Little Int'l, Inc. v. Dooyang Corp.*, 928 F.Supp.1189, 1207-1208 (D.Mass.1996); *O'Malley v. Boris*, 742 A.2d 845, 849 (Del.1999).

For statements of fiduciary duties applicable to various nonagent fiduciaries, see *Restatement Second, Contracts* § 173; *Restatement Third, Trusts (Prudent Investor Rule)* § 170; *Restatement Third, The Law Governing Lawyers* §§ 60, 121-122; *Principles of Corporate Governance: Analysis and Recommendations* §§ 4.01 and 5.01.

For the proposition that a fiduciary's duty is not limited to following instructions, even when the instructions are stated clearly, see *Evtex Co. v. Hartley Cooper Assocs., Ltd.*, 102 F.3d 1327, 1333 n.7 (2d Cir.1996) (in addition to complying with clear instructions, agent or other fiduciary must also disclose relevant information). See also *Estate of O'Neal v. United States*, 81 F.Supp.2d 1205, 1225 (N.D.Ala.1999), vacated in part on other grounds, 258 F.3d 1265 (11th Cir.2001) (Alabama does not permit agent “to occupy a position that would allow him to profit as a result of that agency relationship”).

An employee-agent's failure to disclose a conflicting interest is treated as a breach of fiduciary duty in *Cameco, Inc. v. Gedicke*, 724 A.2d 783, 789 (N.J.1999), even though the risk of conflict may well have seemed slight to the employee, who set up an independent business that serviced competitors of the employer: “To an employee, the possibility of conflict with the employer's interest may seem remote; to the employer, the possibility may seem more immediate. The greater the possibility that another occupation will conflict with the employee's duties to the employer, the greater the need for the employee to alert the employer to that possibility.”

“Cause” to terminate under an employment agreement may include withholding information about activities that divert energy and loyalty from the employer's enterprise. See *Certified Sec. Sys., Inc. v. Yuspeh*, 713 So. 2d 558, 564 (La.App.1998).

Duties stemming from relationships characterized as fiduciary are, in the present legal order, distinct from the consequences of relationships stemming solely from arm's-length contracting. That contract law may oblige parties to act with good faith, and to deal fairly with each other, may produce results that are different from the consequences of a fiduciary relationship. See, e.g., *United Jersey Bank v. Kensey*, 704 A.2d 38, 46 (N.J.Super.App.Div.1997) (lender who does not actively encourage borrower to rely on its advice while concealing its self interest is under no duty to disclose to borrower information lender may have that bears on financial viability of transaction borrower is about to enter).

On the general consequences of imposing fiduciary duty, see Tamar Frankel, *Fiduciary Duties*, in 2 *New Palgrave Dictionary of Economics and the Law* 127, 128 (1998) (ultimate effect of the law “is to provide entrustors with incentives to enter into fiduciary relationships, by reducing entrustors' risks and costs of preventing abuse of entrusted power....”).

(1) *Principal's power and right of interim control in general.* Representative statements that control is an element in an agency relationship include *MJ & Partners Rest. Ltd. P'ship v. Zadikoff*, 10 F.Supp.2d 922, 931 (N.D.Ill.1998) (relationship of agency is considered fiduciary relationship as a matter of law in Illinois; “[t]o determine whether an agency relationship exists the court must consider two factors: (1) whether the principal has the right to control the manner and method in which agent performs his services, and (2) whether the agent has the power to subject the principal to personal liability”); *Nichols v. Arthur Murray, Inc.*, 56 Cal.Rptr. 728, 731 (Cal.App.1967) (“[i]f, in practical effect, one of the parties has the right to exercise complete control over the operation by the other an agency relationship exists”); and *Anderson v. Badger*, 191 P.2d 768, 771 (Cal.App.1948) (“[i]f the one who is to perform the service is subject to control as to the manner of performance by the one for whom the service is rendered he is an employee, or agent, whereas, if he is not subject to control but is engaged to produce a certain result by means and in a manner of his own choosing he is an independent contractor”).

On the definition of control when the agent is not an employee, see [Green v. H & R Block, Inc.](#), 735 A.2d 1039, 1051 (Md.1999) (“[i]n sum, the control a principal exercises over its agent is not defined rigidly to mean control over the minutia of the agent's actions, such as the agent's physical conduct, as is required for a master-servant relationship. The level of control may be very attenuated with respect to the details. However, the principal must have ultimate responsibility to control the end result of his or her agent's actions; such control may be exercised by prescribing the agent's obligations or duties before or after the agent acts, or both”). Accord, [Spencer v. Hendersen-Webb, Inc.](#), 81 F.Supp.2d 582, 596 (D.Md.1999) (key to control is whether principal has “ultimate responsibility to control the end result of the agent's actions”; test may be satisfied by relationship between a creditor and a debt collector); [Thrash v. Credit Acceptance Corp.](#), 821 So. 2d 968, 972 (Ala.2001) (actor engaged by creditor to repossess car acted as agent when creditor retained control; creditor instructed actor to make no contact with debtor prior to repossession and, upon learning that actor lubricated debtors' driveways to facilitate repossession, directed that practice cease); [Policy Mgmt. Sys. Corp. v. Indiana Dept. of State Revenue](#), 720 N.E.2d 20, 25 (Ind.T.C.1999) (principal's control need not be complete but cannot consist simply of right to dictate accomplishment of a desired end). See also [Scally v. Hilco Receivables, LLC](#), 392 F.Supp.2d 1036, 1040 (N.D.Ill.2005) (collection firm was not agent of assignee of defaulted debt; periodic reports from collection firm to assignee did not give assignee control of collection firm's activities); [J & E Air, Inc. v. State Tax Assessor](#), 773 A.2d 452, 456-457 (Me.2001) (management agreement between airplane's owner and its primary user did not create relationship of agency although owner made some “management decisions”; primary user of airplane, not its owner, was in control during plane's use in interstate commerce, held license to fly plane, directed booking of chartered flights, and had “ultimate decisional authority”).

For the proposition that a judicially appointed receiver is not the agent of the municipality whose affairs the receiver administers, see [Canney v. City of Chelsea](#), 925 F.Supp. 58, 64-65 (D.Mass.1996) (court's right to control receiver means receiver is not agent of municipality; relationship between receiver and court is “agency-type” but not necessarily one of common-law agency).

Control, however defined, is by itself insufficient to establish agency. In the debtor-creditor context, most courts are reluctant to find relationships of agency on the basis of provisions in agreements that protect the creditor's interests. See, e.g., [Krivo Indus. Supply Co. v. Nat'l Distillers & Chem. Corp.](#), 483 F.2d 1098 (5th Cir.1973), modified & reh'g denied, 490 F.2d 916 (5th Cir.1974); [Buck v. Nash-Finch Co.](#), 102 N.W.2d 84 (S.D.1960). In contrast, allegations of lender control over actors within the borrower's organization are consistent with a relationship of agency created on behalf of the creditor. Compare [Citibank, N.A. v. Data Lease Fin. Corp.](#), 828 F.2d 686, 692 (11th Cir.1987) (director of borrower testified in deposition that he worked for lender and worked closely with it in matters of policy) with [Pearson v. Component Tech. Corp.](#), 247 F.3d 471, 501 (3d Cir.2001) (unrebutted testimony of individual alleged to function as secured creditor's agent within borrower denying that creditor controlled his actions). An unusual example to the contrary is [A. Gay Jenson Farms Co. v. Cargill, Inc.](#), 309 N.W.2d 285 (Minn.1981). In *Jenson Farms*, the court held that the borrower was the agent of its lender on the basis of the lender's control, when the lender purchased virtually all of the debtor's output and financed all of its operations. In the borrower's final days of operation, it was run directly by an official sent by the lender. The court determined, moreover, that the borrower was not a supplier of goods to the lender because the borrower did not have an independent business. The court relied on [Restatement Second, Agency § 140](#), which states that “[a] creditor who assumes control of his debtor's business for the mutual benefit of himself and his debtor, may become a principal, with liability for the acts and transactions of the debtor in connection with the business.” For an analysis of cases involving debtor-creditor relationships, see J. Dennis Hynes, [Lender Liability: The Dilemma of the Controlling Creditor](#), 58 *Tenn. L. Rev.* 635 (1991).

Setting standards for mortgage paper that a financial institution would purchase from an originating lender does not create a right of control in the financial institution. See [Chase Manhattan Mortgage Corp. v. Scott, Royce, Harris, Bryan, Barra & Jorgensen, P.A.](#), 694 So. 2d 827, 832-833 (Fla.App.1997). See also [Enterprise Press, Inc. v. Fresh Fields Mkts., Inc.](#), 13 F.Supp.2d 413, 416 (S.D.N.Y.1998) (vendor not agent of marketing client; client's proofreading and slight corrections to drafts produced by vendor retained by marketing firm did not constitute sufficient exercise of control).

The right to enforce contractually defined standards regarding procedures to assure service quality does not establish that a medical clinic is the agent of a hospital, even though the agreement creates a situation of “broader, more general influence or control” over the clinic. See [Hefner v. Dausmann](#), 996 S.W.2d 660, 666 (Mo.App.1999). See also [Maruho Co. v. Miles, Inc.](#), 13 F.3d 6, 11 (1st Cir.1993) (relationship between patent licensor and licensee was not relationship of agency, although licensor's ability to deny extension of license enabled it to influence terms of sublicenses; license agreement gave licensor no right to participate in or control licensee's negotiation or grant of sublicenses).

Service providers retained with an expectation of independence include bank examiners, independent testing laboratories, and expert witnesses. See [Conduis v. Howard Sav. Bank](#), 986 F.Supp. 914, 917 (D.N.J.1997).

A bailee's freedom from control by the bailor establishes that the bailee is not the bailor's agent. A bailor's failure to assert control does not by itself establish that the bailor lacked the right to do so, but it is suggestive that the right is not present. See [Harris v. Keys](#), 948 P.2d 460, 465 (Alaska 1997) (owner of motor home in remote location who asked friend to occupy it to discourage theft from site did not control friend's conduct in home; in determining whether owner is subject to vicarious liability for injuries caused by occupant's conduct, court holds that owner's failure to exercise control despite friend's near-destruction of motor home suggests lack of ability to control).

Employment agreements resembling the agreement in Illustration 4 are problematic when entered into by a corporation's directors with a senior officer because the agreement may be understood to evidence the directors' abdication of ultimate managerial responsibility. See [Grimes v. Donald](#), 20 Del. J. Corp. L. 757 (Del.Ch.1995), aff'd, 673 A.2d 1207 (Del. 1996) (employment agreement explicitly assured chairman and CEO that directors would not “unreasonably interfere” with his work and defined CEO's good-faith determination of “unreasonable interference” to be constructive termination, which entitled CEO to severance benefits; court characterizes agreement as unusual but not violative of directors' duties because severance benefits payable under agreement were not excessive).

(2) *Principal's power and right of interim control corporate context.* On the relationship between local unions and international affiliates, see [Intercity Maint. Co. v. Local 254 Serv. Employees Int'l Union](#), 62 F.Supp.2d 483, 496-497 (D.R.I.1999), vacated in part on other grounds, 241 F.3d 82 (1st Cir.2001) (“traditional rules of agency law” define circumstances in which international union is responsible for illegal acts of local).

For the proposition that a parent-subsidary relationship does not in itself create a relationship of agency, see, e.g., [Manchester Equip. Co. v. American Way & Moving Co.](#), 60 F.Supp.2d 3, 7 (E.D.N.Y.1999) (parent liable on agency theory for acts of subsidiary only if subsidiary had actual or apparent authority to act on parent's behalf). See also [MOTORSPORT Eng'g, Inc. v. Maserati SPA](#), 316 F.3d 26, 30 (1st Cir.2002) (fact that automobile distributor and manufacturer had common controlling shareholder does not establish that distributor signed contract with dealer as agent of manufacturer); [Cellini v. Harcourt Brace & Co.](#), 51 F.Supp.2d 1028, 1034 (S.D.Cal.1999) (subsidiary not agent of parent corporation for purposes of liability under fair employment statute in absence of showing that parent “exercised any control over [subsidiary's] day-to-day employment decisions”); [Expeditors Int'l of Washington, Inc. v. Direct Line Cargo Mgmt. Servs., Inc.](#), 995 F.Supp. 468, 482 (D.N.J.1998) (court cannot find absence of control as matter of law when self-characterized “family of companies” jointly participated in dealings in freight and shared employees and stock ownership). The foundational principle is that a parent corporation is not liable for acts of its subsidiaries simply because it owns the subsidiary's stock. See [United States v. Bestfoods](#), 524 U.S. 51, 62 (1998) (general principle of corporate law is applicable to parent-corporation liability under CERCLA; nothing in legislation “purports to reject this bedrock principle”). For a statement of the circumstances under which a subsidiary corporation is treated as the agent of its parent, see [Transamerica Leasing, Inc. v. La Republica de Venezuela](#), 200 F.3d 843, 849 (D.C.Cir.2000) (parent must manifest desire for subsidiary to act on parent's behalf, subsidiary must consent so to act, parent must have right to exercise control with respect to matters entrusted to subsidiary, “and the parent exercises its control in a manner more direct than by voting a majority of the stock in the subsidiary or making appointments to the subsidiary's Board of Directors”). See also [In re Parmalat Sec. Litig.](#), 375 F.Supp.2d 278, 294-295 (S.D.N.Y.2005) (allegations that member

firm sought “direction and help” from global accounting firm and that global firm directed the removal of auditors on account sufficed as allegations of agency relationship).

The statutory basis for empowering shareholders to give binding instructions to directors is exemplified by Model Bus. Corp. Act § 2.02(b)(2)(iii) (permitting inclusion in certificate of incorporation of provision not inconsistent with law “defining, limiting, and regulating the powers of the corporation, its board of directors, and shareholders”) and § 7.32(a) (1) and (8) (permitting unanimously adopted shareholder agreement to contain provision that “restricts the discretion or powers of the board of directors” or “otherwise governs the exercise of the corporate powers ... or the relationship among the shareholders, the directors, and the corporation, or among any of them, and is not contrary to public policy....”).

For the proposition that directors as such are not agents, see James D. Cox, et al., *Corporations* § 8.03 (2d ed. 2003). A leading treatise from the United Kingdom characterizes directors as agents, finding it preferable to characterize them using an analogy to agency as opposed to drawing an analogy to trustees. See Paul L. Davies, *Gower on Company Law* 598 (6th ed. 1997) (“[T]o describe directors as trustees seems today to be neither strictly correct nor invariably helpful. In truth directors are agents of the company rather than trustees of it or its property.”). Some corporation statutes treat directors as agents for specific purposes. See, e.g., *Cal. Corp. Code* § 317(a) (for purposes of indemnification section, term “agent” means a present or former director, officer, employee or other agent of corporation, or a person presently or formerly serving in such capacity in another enterprise at corporation's request). A corporation's statutory power to indemnify someone does not by itself establish that the person acted as the corporation's agent as defined by § 1.01. See *VonFeldt v. Stifel Fin. Corp.*, 714 A.2d 79, 85 (Del.Supr.1998) (court holds that parent corporation's election of individual to board of wholly owned subsidiary establishes that individual served on the board “at the request” of parent corporation and thus may assert claims for indemnity against parent; court also observes in dictum that “this decision does not perforate the limitations on inter-firm liability that are a *raison d'être* of wholly-owned subsidiaries.”). For analysis, see Micah John Schruers, *VonFeldt v. Stifel Financial Corp.: Clarifying the Scope of Delaware Corporate Indemnification Law*, 25 *J. Corp. L.* 161 (1999). For an account more sympathetic to the general claim that directors may be characterized as shareholders' agents, see Robert A. Kessler, *The Statutory Requirement of a Board of Directors: A Corporate Anachronism*, 27 *U. Chi. L. Rev.* 696, 705 (1960). For examples of situations in which a board member served as an agent, see, e.g., *Cromer Fin. Ltd. v. Berger*, 245 F.Supp.2d 552, 561-562 (S.D.N.Y.2003) (partner in accounting firm allegedly served as member of committee of international association charged with, inter alia, strategic direction and practice integration of member firms' auditing work for off-shore investment funds; accounting firm charged with knowledge of information that partner acquired as member of committee concerning member's audit of fund when partner's familiarity with off-shore audits was basis for his committee membership); *Mercy Med. Ctr., Inc. v. United Healthcare of the Mid-Atlantic, Inc.*, 815 A.2d 886 (Md.App.2003) (two members of board of physicians' network served as agents of network's majority shareholder, a hospital; hospital charged with knowledge of amendments to agreement between network and HMO).

g. Acting on behalf of. For the proposition that power to contract is a sufficient but not a necessary condition for agency, see *Vanwyk Textile Sys., B.V. v. Zimmer Mach. America, Inc.*, 994 F.Supp. 350, 369 (W.D.N.C.1997) (jury was presented with evidence sufficient to find agency when sales agent represented manufacturer in negotiations with customers within price ranges set by manufacturer). See also *O'Neill v. Department of HUD*, 220 F.3d 1354, 1362 (Fed.Cir.2000) (federal conflict-of-interest legislation, 18 U.S.C. §§ 203(a)(1) and 207(a)(1), which refers to “acting ... as agent or attorney for, or otherwise representing” a person distinguishes between services of agent and other representational services; in this context an “agent” is a representative authorized to act for another or a business representative empowered to commit principal to third parties).

A distributor who sets resale prices acts as a principal and is, as a consequence, outside the protected category of “commercial agents,” defined by the European Community Directive on Commercial Agents and the implementing regulations in the United Kingdom. See *Am B Imballaggi Plastici SRL v. Pacflex Ltd.*, [1999] 2 All E.R. (Comm) 249 (App.1999).

On trademark licensors' liability for defective products manufactured by licensees, see David J. Franklyn, [The Apparent Manufacturer Doctrine, Trademark Licensors and the Third Restatement of Torts](#), 49 *Case W. Res. L. Rev.* 671 (1999); David J. Franklyn, [Toward a Coherent Theory of Strict Tort Liability for Trademark Licensors](#), 72 *S. Cal. L. Rev.* 1 (1998).

In Illustration 10, P's right to control the quality of footwear manufactured under the license is conventionally understood to be necessary to avoid a "naked license," which is deemed to be an abandonment of the trademark. See 2 J. Thomas McCarthy, [McCarthy on Trademark and Unfair Competition § 18:42](#) (1998). See also [Theos & Sons, Inc. v. Mack Trucks, Inc.](#), 729 N.E.2d 1113 (Mass.2000) (independent dealer's display of manufacturer's trademark sign did not constitute holding out as agent of manufacturer; assumption that dealer had agency relationship with manufacturer for purposes of doing warranty-related work does not create relationship of agency as to nonwarranty work).

The money-transfer business involved in Illustration 12 is subject to federal regulation. The Money Laundering Suppression Act of 1994, 31 U.S.C. § 5330(d)(1), requires all money-transmitting businesses to register with the Department of the Treasury. The Bank Secrecy Act authorizes the Secretary of the Treasury to require financial institutions and their agents to report any "suspicious transaction relevant to a possible violation of law or regulation." See 31 U.S.C. § 5318(g)(1).

Trustees may also be agents, depending on the presence of a right of control and a right to dispose of property. A trustee holds title to property and may or may not be subject to the control of the settlor or, more unusually, the beneficiaries of the trust. See [Restatement Third, Trusts § 2](#); [S.E.C. v. American Bd. of Trade, Inc.](#), 654 F. Supp. 361, 366 (S.D.N.Y.), *aff'd*, 830 F.3d 431 (2d Cir.1987). If title to property is transferred to a trustee and the transferor has a right to control the transferee, the transferee is both an agent and a trustee. See [Chang v. Redding Bank of Commerce](#), 35 Cal.Rptr.2d 64, 70 (Cal.App.1995). Only "in rare cases" will a court remove a trustee at the request of beneficiaries; beneficiaries may not effect removal directly. See George T. Bogert, *Trusts* § 152, at 1541 (6th ed. 1987).

The outcome stated for Illustration 14 is supported by [Clapp v. JMK/Skewer, Inc.](#), 484 N.E.2d 918 (Ill.App.1985). See also [Fasciana v. Electronic Data Sys. Corp.](#), 829 A.2d 160, 170-171 (Del.Ch.2003) (for purposes of corporate-advancement statute, lawyer is not acting as corporation's "agent" when not dealing with third parties); [Cochran v. Stifel Fin. Corp.](#), 2000 WL 286722 (Del.Ch.2000), *rev'd in part on other grounds*, 809 A.2d 555 (Del. 2002) (holding that person who serves as director, officer, or agent of subsidiary is not automatically an "agent" of parent corporation for purposes of 8 Del. C. § 145(c), which obligates corporation to indemnify agent to extent agent is successful in defense; and holding that suit brought by wholly owned subsidiary is not brought "by or in the right of" the parent for purposes of 8 Del. § 145(b), which governs claims for indemnity in connection with such actions). Illustrations 15 and 16 are variants on an example in [Restatement Second, Agency § 14H](#), Comment *a*.

In [United States v. O'Hagan](#), 521 U.S. 642 (1997), the Court applied the principle underlying Illustration 18 to explain that a lawyer's purchase of securities on the basis of nonpublic information received by the lawyer's firm from a client constituted a deceptive act for purposes of § 10(b) of the Securities Exchange Act of 1934 because it contravened the agent's duty of disclosure.

h. Intermediaries. On the range of roles that an agent may play in a real-estate transaction, including the provision and clarification of information, see [Rawlinson & Brown Pty. Ltd. v. Witham & Anor](#), [1995] *Austl. Torts R.* 81 (N.S.W.App.1995). For the distinction between "finders" and "brokers," see [Northeast Gen. Corp. v. Wellington Adver., Inc.](#), 624 N.E.2d 129 (N.Y.1993); [Robles v. Consolidated Graphics, Inc.](#), 965 S.W.2d 552, 557-558 (Tex.App.1997).

For the point that a "middleman" is not usually an agent, see [Rauscher Pierce Refsnes, Inc. v. Great Sw. Savs., F.A.](#), 923 S.W.2d 112, 115 (Tex.App.1996). On the respective functions of introducing and clearing brokers, see [Arista Films](#),

[Inc. v. Gilford Sec., Inc.](#), 51 Cal.Rptr.2d 35, 36 (Cal.App.1996). On “manufacturer's representative,” see [L.A.P.D., Inc. v. General Elec. Corp.](#), 132 F.3d 402, 403 (7th Cir.1997). On “soliciting agent,” see [Booker v. United Am. Ins. Co.](#), 700 So. 2d 1333, 1336-1337 n.5 (Ala.1997). If an independent insurance broker is supplied with an application form by an insurer, that fact in itself has been held not to make the broker the insurer's agent. See [Ranger Ins. Co. v. Kovach](#), 63 F.Supp.2d 174, 184 (D.Conn.1999) (noting contrary authority in [Tiner v. Aetna Life Ins. Co.](#), 291 So. 2d 774 (La.1974)).

For a typical example of a state statute applicable to transactions in residential real estate that expressly permits parties to modify the duties conventionally applicable to real-estate brokers, see [Ohio Rev. Code Ann. §§ 4735.51-4735.74](#).

An intermediary who acts only as a person's amanuensis may not be characterized as the person's agent. See [Estate of Stephens](#), 49 P.3d 1093 (Cal.2002) (upholding validity of deed signed at grantor's direction by interested amanuensis). For further discussion, see § 3.02, Comment c.

On the early evolution of stock-brokerage practices, see Stuart Banner, *Anglo-American Securities Regulation* (1998).

The terminology associated with particular intermediary functions may be specific to a particular trade or industry. For example, in the fine-arts and antiquities trades, a “runner” has been characterized as a “private, free lance” dealer, typically reluctant to reveal the sources from which objects are obtained. See Mary McKenna, [Problematic Provenance: Toward a Coherent United States Policy on the International Trade in Cultural Property](#), 12 U. Pa. J. Int'l Bus. L. 83, 116-117 n.160 (1991). A runner may attempt to sell work on behalf of a gallery in exchange for a commission. See [Dark Bay Int'l, Ltd. v. Aquavella Galleries, Inc.](#), 784 N.Y.S.2d 514, 515 (App.Div.2004), leave to appeal denied, 825 N.E.2d 1093 (N.Y. 2005) (no evidence that fugitive from justice acted with actual authority as a runner or otherwise in agreeing to sell Picasso painting allegedly on gallery's behalf; invoice from gallery to fugitive described painting and stated price and terms of sale to fugitive but did not use word “consignment”).

An empirical study of the consequences of the Georgia statute focuses on the encouragement it gives to buyers to retain their own agents. The average time to sell a house fell, suggesting that buyers' agency reduces search costs and enables agents better to match buyers with houses that will appeal to them. Prices of expensive houses fell, while prices of the less expensive houses did not. See Christopher Curran & Joel Schrag, *Does It Matter Whom an Agent Serves? Evidence from Recent Changes in Real Estate Agency Law*, 43 J. Law & Econ. 265, 282-283 (2000). [Ga. Code Ann. § 10-6A-1 et seq. Section 10-6A-7](#) specifies the duties owed by a buyer's broker. A broker does not breach any duty owed the buyer by showing properties to other purchasers, see [§ 10-6A-7\(d\)](#), and the broker may provide defined types of ministerial assistance to the seller, see [§§ 10-6A-7\(C\) and 10-6A-14](#). Section 10-6A-13 permits a brokerage firm to designate individual agents to represent different clients in the same transaction on an exclusive basis and provides that neither the firm nor the designated agents shall be deemed to be dual agents.

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U.S.

U.S.2013. Cit. in diss. op. (general cites); coms. (e) and (f) quot. in sup. and quot. in case quot. in diss. op. Same-sex couples who wished to marry brought suit in federal court against California's governor, attorney general, and other state and local officials, arguing that Proposition 8, a ballot initiative passed by California voters that amended the California Constitution to define marriage as a union of a man and a woman, violated the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution. After defendants refused to defend the law, proponents of the initiative intervened to defend it. Following a bench trial, the district court entered judgment for plaintiffs, and the court of appeals affirmed. Vacating and remanding with instructions to dismiss the appeal for lack of jurisdiction, this court held that intervenors did not have standing to appeal the district court's order declaring Proposition 8 unconstitutional. The court reasoned that intervenors were not agents of the state of California, because the most basic features of an agency relationship were missing: intervenors did not answer to a principal, and lacked a fiduciary obligation. The dissent argued that principles of justiciability did not require California to demand a formal agency relationship in compliance with the Restatement when deciding who was entitled to appear in court to defend an initiative on its behalf if and when its usual legal advocates declined to do so. [Hollingsworth v. Perry](#), 133 S.Ct. 2652, 2666-2668, 2670-2672, 2675.

C.A.1

C.A.1, 2012. Cit. in sup. Monastery brought a copyright-infringement action against archbishop who was a former member of monastery, alleging that archbishop posted on his website monastery's translations of ancient religious texts from their original Greek into English. The district court granted summary judgment for plaintiff. Affirming, this court held, inter alia, that, regardless of whether the law mandated a showing of volitional conduct to establish direct infringement, defendant engaged in sufficient acts of authority and control over the computer server and material actually posted that he could be held liable for direct infringement of plaintiff's works; because priest-monk who personally uploaded plaintiff's works to defendant's website acted as defendant's agent in both building and handling the technical aspects of the website, defendant as principal could be held liable for the authorized acts of monk as his agent. [Society of Holy Transfiguration Monastery, Inc. v. Gregory](#), 689 F.3d 29, 56.

C.A.1, 2011. Cit. in sup. Purchasers whose deals to buy Florida condominium units fell through because they failed to obtain mortgage financing sued developer and its sales representative in Puerto Rico's federal district court, seeking the return of their earnest payments. The district court dismissed plaintiffs' action for want of jurisdiction over defendants. Vacating, this court held that, based on the incomplete record before it, it could not determine whether personal jurisdiction existed; it remanded for a determination of whether an agency relationship existed between developer's sales representative and Puerto Rican real-estate broker who put one plaintiff in touch with representative, and, if so, whether that agency relationship supported plaintiffs' claim of specific jurisdiction. The court noted that an agency relationship existed only if representative manifested its assent to have broker act on its behalf and subject to its control. [Carreras v. PMG Collins, LLC](#), 660 F.3d 549, 556.

C.A.1, 2000. Cit. in ftn. (T. D. No. 1, 2000). Customer-service representative for a truck-rental company sued the company for sex discrimination in violation of Title VII and the Maine Human Rights Act. The district court entered judgment on jury verdict awarding plaintiff compensatory and punitive damages. This court affirmed, holding, inter alia, that the district court properly decided to instruct the jury on the "integrated enterprise" test for determining single-employer status, because defendant forfeited on procedural grounds its argument that common-law agency principles should have determined the single-employer issue. [Romano v. U-Haul Intern.](#), 233 F.3d 655, 662.

C.A.2,

C.A.2, 2013. Quot. in ftn., coms. (f) and (g) quot. in sup. Customers brought a putative class action against online retail vendor of travel accommodations, asserting, among other things, a claim for breach of fiduciary duty arising from defendant's alleged failure to disclose that it would not accept a customer's bid unless it could locate a hotel room satisfying the customer's parameters at a rate lower than the bid amount, with defendant keeping the difference as a profit in addition to its stated service fee. The district court granted defendant's motion to dismiss. Affirming, this court held that, because plaintiffs did not sufficiently allege facts showing that an agency relationship existed between the parties, they failed to state a claim that defendant breached an agent's fiduciary duty of disclosure. The court reasoned that, once defendant's customers chose the reservation date, location, hotel quality, and bid price, they retained no right of interim control over defendant's procurement of the desired reservation, and this right of control was what distinguished an agency relationship from a mere contractual one. [Johnson v. Priceline.com, Inc.](#), 711 F.3d 271, 277-279.

C.A.5

C.A.5, 2016. Com. (c) quot. in sup. Instructor for Junior Reserve Officers' Training Corps who worked at a parish school filed, inter alia, a retaliation claim under the False Claims Act (FCA) against parish school board, alleging that school principal retaliated against plaintiff by criticizing his performance, spreading false rumors, and orchestrating his transfer to another school because plaintiff reported that the school was misappropriating federal funds. The district court granted defendant's motion to dismiss. This court reversed in part, holding that plaintiff pleaded sufficient facts to state an FCA retaliation claim. Citing [Restatement Third of Agency § 1.01](#), Comment c, the court concluded that plaintiff alleged sufficient facts to support his claim that he was defendant's contractor or agent, even though he was on active military duty and was paid by the Marine Corps, because he performed duties similar to school employees and was supervised and evaluated by principal. [U.S. ex rel. Bias v. Tangipahoa Parish School Bd.](#), 816 F.3d 315, 325.

C.A.7

C.A.7, 2014. Quot. in sup. Investors in a real-estate project who lost their loan funds when the project failed and was foreclosed upon by senior lender sued title company, as plaintiffs' putative agent for purposes of escrow and closing, alleging that defendant breached its fiduciary duty to inform them that they were not receiving the first-priority mortgage on the property that they had been promised by the real-estate developers. The district court granted summary judgment for defendant. Affirming, this court held that Illinois law did not impose such a duty on title company under the circumstances of this transaction, rejecting plaintiffs' argument that a principal agency relationship existed between the parties. Referring to the definition of agency set forth in [Restatement Third of Agency § 1.01](#), the court concluded that plaintiffs certainly never manifested their assent to defendant that it should represent their interests in the transaction. [Edelman v. Belco Title & Escrow, LLC](#), 754 F.3d 389, 396.

C.A.7, 2014. Cit. in sup. Former gang leader was indicted by federal authorities based on statements to state authorities in which he confessed to playing a central role in a triple murder. A jury convicted defendant on all counts after the district court denied his pretrial motions to suppress the statements and dismiss the indictment, in which he argued that state authorities violated his due-process rights by prompting federal authorities to prosecute him based on the statements despite a prior immunity agreement, and that the federal government was responsible for the state's actions because it became the state's agent by investigating him and prosecuting him at the state's suggestion. Affirming, this court held that, even if state authorities violated defendant's due-process rights, a principal-agent relationship could not arise without the agent's agreement to be controlled by the principal, and defendant failed to present any evidence that the United States consented to be controlled by the state. [U.S. v. Bryant](#), 750 F.3d 642, 651.

C.A.7

C.A.7, 2011. Quot. in sup. Insurer brought suit for a declaration of its obligations under a nontrucking/bobtail liability insurance policy it issued to insured truck driver, in connection with an underlying tort action brought against insured and others by estate of motorist killed in a vehicle accident with truck driven by insured. The district court granted summary judgment for plaintiff. Affirming, this court held that an exclusion in the policy for rented vehicles applied and barred coverage. The court concluded that insured was the agent of his wife, who was the titular owner of the truck, and that the existence of the agency relationship meant that it was possible for insured, as agent, to have entered into a lease to rent the truck to motor carrier that employed him, and to subject his wife, as principal, to liability by doing so. The court reasoned that, after wife obtained ownership of the truck, she and insured made a family decision to put it in her name but have him drive it; she gave him permission to seek employment, sign a contractor operating agreement with motor carrier, and get an insurance policy; and he received payment for his efforts and deposited it into an account over which she had joint control. [Clarendon Nat. Ins. Co. v. Medina](#), 645 F.3d 928, 935.

C.A.7, 2011. Quot. in sup. Defendant appealed his convictions for wire fraud and aiding and abetting wire fraud arising from his fleecing of investors through fictitious certificates of deposit sold by his financial corporation. This court affirmed the district court's judgment, rejecting defendant's argument that key evidence used against him at trial should have been suppressed as the fruit of a warrantless search because the source of the information, corporation's former corporate secretary, was acting as a government agent. The court saw no evidence to suggest that the government made secretary its agent before she started collecting materials on her own, and government did not direct her, initiate cooperation, or reward her for turning in the materials; further, secretary had a number of reasons why it was in her personal interest to help the government investigate the corporation, including the fact that she was afraid of defendant, who was her husband, and wanted to exonerate herself. [U.S. v. Aldridge](#), 642 F.3d 537, 541.

C.A.9,

C.A.9, 2017. Quot. in sup., quot. in case quot. in sup.; com. (c) quot. in case quot. in sup. Consumers sued seller of vehicle-service contracts, seeking to hold it vicariously liable for telephone calls that a telemarketing vendor made to consumers on seller's behalf in violation of the Telephone Consumer Protection Act. The district court granted summary judgment for seller. This court affirmed, holding that the district court did not err in finding that vendor was seller's independent contractor, rather than its agent, and that seller therefore could not be vicariously liable for vendor's calls. The court reasoned that seller did not have sufficient control over vendor's actions for vendor to be considered seller's agent under the Restatement Third of Agency, noting that vendor sold contracts for multiple companies without seller's direct supervision, provided its own equipment, set its own hours, and only received payment if it actually made a sale. [Jones v. Royal Administration Services, Inc.](#), 866 F.3d 1100, 1105.

C.A.9, 2017. Quot. in disc.; com. (c) quot. in disc.; com. (d) quot. in ftn. Photography company that sold candid photographs of celebrities brought a copyright-infringement action against social-media platform that posted 20 of plaintiff's copyrighted photographs online. The district court granted defendant's motion for summary judgment based on the Digital Millennium Copyright Act's safe-harbor defense. This court reversed, vacated, and remanded, holding that common-law agency principles applied to the determination of whether acts of volunteer moderators who reviewed and approved the photographs and were led by an employee of defendant could be attributed to defendant, and that there were genuine issues of material fact regarding whether the moderators were defendant's agents. The court cited the Restatement Third of Agency in defining "agency" and concluded that, here, factual issues existed, given plaintiff's evidence that users may have reasonably believed that the moderators had authority to act for defendant and that defendant maintained significant control over the platform and its moderators. [Mavrix Photographs, LLC v. Livejournal, Inc.](#), 873 F.3d 1045, 1054.

C.A.9, 2017. Quot. in sup.; com. (c) quot. in sup.; com. (d) quot. in ftn. Owner of copyrighted photographs brought an infringement action against owner of a social-media platform, alleging that defendant posted plaintiff's photographs online after its users submitted the photographs to defendant and a team of volunteer moderators led by defendant's

employee reviewed and approved them. The district court granted summary judgment for defendant, finding that defendant was protected by the safe-harbor provision of the Digital Millennium Copyright Act. Reversing and remanding, this court held that a genuine factual dispute remained regarding whether the moderators were defendant's agents under [Restatement Third of Agency § 1.01](#), such that their acts could be attributed to defendant. The court noted that an agent did not have to receive payment from a principal to be an agent, and pointed to evidence that, unlike other sites where users could independently post content, defendant gave moderators explicit and varying levels of authority to screen posts, as well as express directions about their screening functions, including criteria for accepting or rejecting posts. [Mavrix Photographs, LLC v. LiveJournal, Inc.](#), 853 F.3d 1020, 1029.

C.A.9, 2017. Quot. in sup. Participant in an employee-welfare-benefits plan brought an ERISA action against insurer, after insurer denied her claim for dependent-life-insurance benefits in connection with the death of her husband on the ground that she had failed to submit evidence of insurability as required by the plan. Following a bench trial, the district court entered judgment for insurer. Reversing and remanding, this court held that insurer waived the evidence-of-insurability requirement through the actions of employer, which was insurer's agent for purposes of enforcing the requirement under [Restatement Third of Agency § 1.01](#). The court reasoned that employer had apparent authority, and perhaps even implied actual authority, to enforce the requirement on insurer's behalf, given employer's direct interaction with participant, coupled with insurer's failure to engage with participant about evidence of insurability. [Salyers v. Metropolitan Life Insurance Company](#), 871 F.3d 934, 939.

C.A.9, 2017. Quot. in sup. Purchasers of boat motors brought an action against, among others, company that developed and manufactured the motors in Japan and whose subsidiary imported and marketed the motors in California, alleging that defendant was aware, prior to the sales to plaintiffs, that the motors contained a design defect that caused them to fail early in the engines' expected lifespans. The district court granted defendant's motion to dismiss for lack of personal jurisdiction. This court affirmed, holding that, for purposes of specific jurisdiction, the subsidiary's contacts with California could not be attributed to defendant under an agency theory. Quoting [Restatement Third of Agency § 1.01](#), the court explained that, even if an agency relationship could justify the exercise of specific jurisdiction, plaintiffs failed to establish a prima facie case for an agency relationship between defendant and the subsidiary, because they did not allege or show that defendant had the right to control the subsidiary's activities in any matter. [Williams v. Yamaha Motor Co. Ltd.](#), 851 F.3d 1015, 1024.

C.A.9, 2013. Com. (g) quot. in sup. Consumers brought a putative class action against satellite-television provider and electronics retailer, alleging that defendants violated California's Unfair Competition Law and Consumer Legal Remedies Act by presenting certain satellite-service equipment, such as receivers and digital video recorders, as though they were for sale at retailer's stores, when, in fact, the transactions were leases with oppressive and unfair terms. On reconsideration, the district court granted defendants' motions to compel arbitration. Reversing in part and remanding, this court held, inter alia, that electronics retailer was not entitled to compel arbitration as satellite-television provider's agent, because no agency relationship existed between the two defendants. The court reasoned that, generally retailers were not considered the agents of manufacturers whose products they sold, and retailer in this case presented no evidence that provider controlled its behavior in ways relevant to plaintiffs' allegations. [Murphy v. DirecTV, Inc.](#), 724 F.3d 1218, 1232.

C.A.9

C.A.9, 2011. Cit. in sup., coms. (c) and (f) quot. in sup. Argentinian residents sued German corporation under the Alien Tort Statute and the Torture Victims Protection Act, alleging that defendant's Argentinian subsidiary collaborated with state-security forces to kidnap, detain, torture, and kill plaintiffs and/or their relatives during Argentina's "Dirty War." The district court granted defendant's motion to dismiss for lack of personal jurisdiction. Reversing and remanding, this court held that defendant was subject to personal jurisdiction in California through the contacts of its U.S. subsidiary; defendant had more than enough control over its U.S. subsidiary to establish that U.S. subsidiary was defendant's agent

for purposes of personal jurisdiction, because defendant had the right to control nearly every aspect of U.S. subsidiary's operations. [Bauman v. DaimlerChrysler Corp.](#), 644 F.3d 909, 922-924.

C.A.9, 2010. Cit. and quot. in sup.; com. (c) cit. in disc., cit. and quot. in diss. op., and quot. in ftn. to diss. op.; com. (f) cit. in disc. and quot. in diss. op.; com. (h) quot. in diss. op. United States filed perjury charges against professional baseball player who swore under oath that he had not taken performance enhancing drugs, after a lab was discovered to have recorded, under player's name, positive results of urine and blood tests for the drugs. The district court found inadmissible as hearsay a lab employee's testimony regarding trainer's statements that certain blood and urine samples he brought to the lab came from player. On interlocutory appeal, this court rejected the government's argument that trainer's statements, though not specifically authorized, were admissible because they came within the scope of an agency or employment relationship; trainer was an independent contractor, rather than an employee, and trainer was not player's agent for the limited purpose of the drug testing, because there was no evidence that player directed or controlled any of trainer's activities. The dissent argued that employee's testimony was admissible because player authorized trainer to deal with the lab over the testing, not just to act as a courier, and thus impliedly authorized trainer to identify the origin of the samples he delivered to the lab. [U.S. v. Bonds](#), 608 F.3d 495, 504, 506, 507, 514-517, 519, 527, 528.

C.A.9, 2009. Cit. in diss. op., com. (c) quot. in sup. and quot. in diss. op. Argentinean residents sued German manufacturer of motor vehicles, alleging human rights violations committed in Argentina by manufacturer's Argentinean subsidiary during the 1970's military regime. The district court granted defendant's motion to dismiss for lack of personal jurisdiction. Affirming, this court, conducting a minimum-contacts analysis, held that the contacts of manufacturer's United States subsidiary could not be imputed to manufacturer, because manufacturer's United States subsidiary exercised insufficient control over and did not serve as manufacturer's representative. The dissent argued that, at common law, agents could exercise a considerable amount of discretion in performing their functions, and that a less stringent showing of control was required for the limited purpose of establishing personal jurisdiction. [Bauman v. DaimlerChrysler Corp.](#), 579 F.3d 1088, 1096, 1099.

C.A.9, 2006. Coms. (c) and (d) quot. in ftn. Public-school student and her father sued school district under the Individuals with Disabilities Education Act (IDEA), seeking to recover attorney's fees related to legal services provided by student's mother, an attorney, in a series of disputes over student's educational needs. The district court dismissed the complaint. Affirming, this court held that attorney-parents were not entitled to attorney's fees for the representation of their children in IDEA proceedings. Explaining the policy behind its decision, the court stated that a disabled child represented by his or her parent did not always receive the benefit of an independent third party's judgment, as contemplated by the IDEA, and noted that an attorney-parent relationship could not be analogized readily to the typical agency relationship involved in an attorney's representation of a client. [Ford v. Long Beach Unified School Dist.](#), 461 F.3d 1087, 1090.

C.A.9, 2003. Quot. in disc. (T.D. No. 1, 2000). Attorney sued website operator who had published on his Internet listserv network an e-mail message falsely accusing attorney of being a descendant of a Nazi official and having paintings that had been stolen from European Jews by Nazis. Attorney also sued company that paid website operator for displaying company's logo and advertisements on website and listserv, alleging that company was vicariously liable for plaintiff's reputational injuries. District court granted company summary judgment; this court affirmed in part, holding, inter alia, that company was not vicariously liable for operator's actions because there was no principal-agent relationship between operator and company. Sponsorship agreement did not give company right to control what operator published on website and listserv. [Batzel v. Smith](#), 333 F.3d 1018, 1035, rehearing and rehearing en banc denied 351 F.3d 904 (9th Cir.2003).

C.A.9, Bkrcty.App.

C.A.9, Bkrcty.App.2011. Cit. and quot. in disc., cit. in sup., com. (d) quot. in disc. and cit. in case cit. in disc., coms. (f) and (g) cit. in disc. Debtor objected to proofs of claim filed by party to master repurchase agreements through which

party had sold debtor's loans to buyer, alleging that party failed to show that it had express authority to file the proofs of claim as buyer's authorized agent. The bankruptcy court held that party had authority to file the proofs of claim. Affirming, this court held that the bankruptcy court did not err when it determined that buyer's express authorization for party to pursue buyer's interests in debtor's case necessarily included an authorization to file the disputed claims. [In re Palmdale Hills Property, LLC](#), 457 B.R. 29, 47, 48, 50.

C.A.10,

C.A.10, 2016. Com. (c) quot. in sup. Defendant who was indicted under federal law for conspiracy to distribute methamphetamine moved for dismissal, alleging that, after she was arrested by U.S. Drug Enforcement Administrative (DEA) agents, the Wyoming Division of Criminal Investigation (DCI) had promised her immunity in exchange for her service as a confidential informant for DCI, which she provided. The district court denied defendant's motion. This court affirmed, holding that neither DEA nor DCI had the authority to bind the United States to any such agreement. Citing [Restatement Third of Agency § 1.01](#), Comment *c*, the court noted that, in some cases, the doctrine of estoppel or apparent authority could bind someone to the actions of another, but determined that the DCI agents' alleged promises of immunity were not enforceable against the United States, because only actual authority could bind a federal sovereign. [U.S. v. Lilly](#), 810 F.3d 1205, 1210.

C.A.10, 2013. Com. (c) and (e) quot. in sup. Retailer of replacement contact lenses brought a claim for service-mark infringement under the Lanham Act against competitor, alleging, among other things, that a third-party marketer hired by competitor, known as an affiliate, had purchased keywords resembling plaintiff's 1800CONTACTS mark and was using the mark in the text of its online ads. The district court granted summary judgment for defendant. Affirming in part, this court held, inter alia, that defendant was not vicariously liable for its affiliate's allegedly infringing actions under agency law, because, even if the affiliate was an agent (or, more precisely, a subagent) of defendant, it lacked actual authority from defendant to include plaintiff's mark in ads for defendant, and defendant did not ratify the affiliate's actions. In making its decision, the court noted that proof of a fiduciary relationship was not necessary to show that an agency relationship existed. [1-800 Contacts, Inc. v. Lens.com, Inc.](#), 722 F.3d 1229, 1250, 1251.

C.A.10

C.A.10, 2007. Com. (c) quot. in ftn. Former employee sued former employer, alleging breach of his employment contract and fraud, and employer counterclaimed for breach of loyalty and breach of fiduciary duty, alleging that employee had secretly participated in and owned at least four other businesses that competed or contracted with employer during his employment. The trial court granted employee's motion for judgment as a matter of law on the fiduciary-duty counterclaim. Reversing that portion of the decision and remanding, this court held, inter alia, that employee's agency relationship with employer created a fiduciary obligation. The court rejected employee's argument that his authority to act for employer in his role as senior regional manager was rather limited, noting, among other things, employee's admission that he had the ability to negotiate contracts with third parties on behalf of employer. [Rash v. J.V. Intermediate, Ltd.](#), 498 F.3d 1201, 1208.

C.A.10, 2006. Cit. in ftn. (T.D. No. 2, 2001). Federal prisoner was convicted of assault in federal district court for helping a friend attack a fellow inmate. This court, inter alia, affirmed the district court's denial of prisoner's pre-trial motion to suppress a statement that he made to FBI investigators after prison authorities, at friend's request, placed him in a cell next to friend, who then convinced him to confess. The court held, among other things, that friend was not acting as an agent for prison authorities in violation of prisoner's Fifth Amendment right to remain silent, invoked earlier by prisoner, because, while authorities admittedly facilitated and were incidental beneficiaries of the conversation between prisoner and friend, they did not use coercive tactics or direct or control friend, who acted for his own benefit and independently devised the plan to persuade prisoner to make the statement. [U.S. v. Alexander](#), 447 F.3d 1290, 1295, cert. denied 549 U.S. 933, 127 S.Ct. 315, 166 L.Ed.2d 236 (2006).

C.A.11,

C.A.11, 2017. Com. (c) quot. in sup. Lessor of telecommunications equipment brought an action against the government of Belize, seeking millions of dollars in unpaid rent based on the parties' lease agreement, which was entered into on behalf of defendant by a government minister. The district court granted defendant's motion to dismiss; the court of appeals vacated and remanded. On remand, the district court denied defendant's motion to dismiss. Affirming, this court held that defendant was bound by a sovereign-immunity waiver contained in the agreement. Citing [Restatement Third of Agency §§ 1.01 and 4.01](#), the court explained that, regardless of whether the minister had actual authority to enter into the agreement, defendant ratified his action by making payments in accordance with the lease schedules for two concurrent five-year leases and by retaining its benefits under the agreement. [GDG Acquisitions LLC v. Government of Belize](#), 849 F.3d 1299, 1308.

C.A.D.C.

C.A.D.C.2016. Com. (c) quot. in sup. Family members and estate of U.S. national who was killed in a shooting attack in Jerusalem brought an action against the Palestinian Interim Self-Government Authority ("PA") and the Palestine Liberation Organization, alleging claims under the Anti-Terrorism Act and related common-law theories. The district court granted defendants' motion for summary judgment. This court affirmed, holding that the district court did not abuse its discretion in excluding a passage from a nonfiction book that recounted a journalist's prison interview with a Palestinian prisoner who implicated a former soldier in the shooting. Citing [Restatement Third of Agency § 1.01, Comment c](#), the court explained that the district court did not abuse its discretion by concluding that the prisoner was not an employee of PA and that the prisoner's statement in the book was not a party admission, because plaintiffs did not offer any evidence that, at the time of the statement, PA had a right to control prisoner's conduct. [Gilmore v. Palestinian Interim Self-Government Authority](#), 843 F.3d 958, 970.

C.A.D.C.2013. Coms. (f) and (g) cit. in sup. City, which managed a port on lands granted to it by the state subject to a public trust benefiting the people of the state, petitioned for judicial review of an order issued by the Federal Maritime Commission, in which the Commission concluded that city was not entitled to sovereign immunity in defending a Shipping Act claim filed against it by an occupant of berths in the port. This court denied city's petition for review, rejecting city's port agency's argument that it was entitled to the immunity granted to states by the Eleventh Amendment on the basis that it functioned as a subordinate governmental agency of the state, and the state exercised virtually complete control over the port agency's administration of the tidelands pursuant to the public trust doctrine. The court reasoned that, far from establishing an agency relationship, the state's relationship with port agency — its ability to control city's management of the port only to the extent that city violated the public trust or tidelands grant — suggested the opposite. [City of Oakland ex rel. Bd. of Port Com'rs v. Federal Maritime Com'n](#), 724 F.3d 224, 229.

C.A.D.C.2011. Cit. in sup. Indonesian villagers sued U.S. energy corporation, alleging that Indonesian military forces hired by defendant to guard its natural-gas facility committed genocide, extrajudicial killing, torture, and other human-rights abuses in violation of the Alien Tort Statute (ATS), as well as related common-law torts. The district court dismissed the complaint. Reversing in part and remanding, this court rejected defendant's claim of corporate immunity, holding that corporations could be found liable under the ATS. The court concluded that the source of law on the question of corporate liability under the ATS was supplied by federal common law, rather than customary international law, and that corporate liability was consistent with the purpose of the ATS, with the federal common law of agency (under which corporations could be held liable for the torts committed by their agents), and with sources of international law. [Doe v. Exxon Mobil Corp.](#), 654 F.3d 11, 51.

C.A.D.C.2009. Quot. in sup. Non-vessel-operating common carrier (NVOCC) — an intermediary between a shipper and an ocean carrier — petitioned for review of an order of the Federal Maritime Commission that the use of unlicensed agents

to assist with providing NVOCC services was unlawful under the Shipping Act. Vacating the order and remanding, this court held that the plain language of the Act's licensing requirement did not extend to agents of NVOCCs. The court noted that common-law agency principles provided members of the public with adequate safeguards in their dealings with unlicensed agents of an NVOCC, because, if an agent breached a contract or committed a tort, the disclosed NVOCC principal in whose name the agent acted was subject to liability. [Landstar Exp. America, Inc. v. Federal Maritime Com'n](#), 569 F.3d 493, 497.

C.A.D.C.2001. Quot. in sup. (T.D. No. 1, 2000). Company that bought and sold produce petitioned for review of a Department of Agriculture order adjudging it guilty of commercial bribery and revoking its license to sell produce under the Perishable Agricultural Commodities Act (PACA). This court denied the petition, holding, inter alia, that petitioner committed commercial bribery, because the individuals to whom petitioner made payments were produce dealers' purchasing agents, rather than their principals. The court rejected petitioners' argument that the payees were independent brokers and, as such, were principals because they were subject to PACA, stating that PACA defined brokers as negotiating "for or on behalf of the vendor or the purchaser," and that agents, not principals, acted on another's behalf. [JSG Trading Corp. v. Department of Agriculture](#), 235 F.3d 608, 616.

C.A.Fed.

C.A.Fed.2016. Quot. in sup.; coms. (c) and (e) quot. in sup.; com. (f)(1) quot. in sup., quot. in case quot. in sup.; com. (h) cit. in sup. Investor-owned utilities brought a breach-of-contract action against the United States, seeking a refund for alleged overcharges for electricity by federal agencies that sold electricity as part of its wholesale markets, which were operated by nonprofit public utilities that acted as middlemen between producers and consumers. The trial court dismissed the claims. This court affirmed, holding that plaintiffs lacked privity of contract or a relationship with the government that would confer standing. Relying on [Restatement Third of Agency §§ 1.01 and 1.02](#), the court rejected plaintiffs' argument that tariffs, which were agreed to by the public utilities and market participants, created an agency relationship between all consumers and all producers, with the public utilities acting as an agent for both, and explained that the alleged principals lacked meaningful control over the public utilities. [Pacific Gas and Electric Company v. United States](#), 838 F.3d 1341, 1359, 1360.

C.A.Fed.2012. Quot. in diss. op. In two separate actions, owners of method patents sued alleged infringers, asserting that defendants were liable for induced infringement of plaintiffs' patents. The district courts entered judgment for defendants. Reversing and remanding, this court held that, while all of the steps of a claimed method had to be performed in order to find induced infringement under the Patent Act, it was not necessary to prove that all of the steps were committed by a single entity. A dissent argued that direct infringement was required to support infringement under the Patent Act, and properly existed only where one party performed each and every claim limitation or was vicariously liable for the acts of others in completing any steps of a method claim, such as when one party directed or controlled another in a principal-agent relationship. [Akamai Technologies, Inc. v. Limelight Networks, Inc.](#), 692 F.3d 1301, 1348.

C.A.Fed.2010. Quot. in sup., com. (c) quot. in disc., com. (f) quot. in sup. Patent holder sued competitor, alleging infringement of its patents regarding content delivery over the Internet. The district court entered a judgment as a matter of law for defendant, overturning a jury verdict for plaintiff. Affirming, this court held that plaintiff failed to prove infringement based on the actions of defendant and its customers as joint parties, because there was nothing to indicate that defendant's customers were performing any of the steps of the claimed method as agents for defendant; an essential element of agency was the principal's right to control the agent's actions, and, here, defendant's customers decided what content, if any, they would like delivered by defendant's service and then performed the step of "tagging" that content. [Akamai Technologies, Inc. v. Limelight Networks, Inc.](#), 629 F.3d 1311, 1319-1321.

Ct.Int'l Trade,

Ct.Int'l Trade, 2017. Cit. in disc. (erron. cit. as § 101). Surety that issued single-entry bonds to importers to cover customs duties sued the United States, seeking refunds of amounts it paid on the bonds on the ground that the bond forms had not been completely and accurately filled out by importers or their customs brokers. This court granted in part the government's motion for summary judgment, holding that the bonds were valid and enforceable as a matter of law, and that surety failed to show that its suretyship rights had been impaired. The court accordingly declined to consider the government's alternative argument that surety had ratified the actions of its sub-agents with respect to the bonds under [Restatement Third of Agency § 1.01](#) by accepting the benefits of the bonds. [Hartford Fire Insurance Company v. United States](#), 254 F.Supp.3d 1333, 1362.

Ct.Fed.Cl.

Ct.Fed.Cl.2011. Sec. and com. (c) quot. in sup. Civilian supervisory employee of the Department of the Army sued the United States, alleging that the Army improperly calculated his wages while he was deployed in Iraq. Granting in part and denying in part defendant's motion to dismiss, this court held, among other things, that plaintiff was an agent of the United States, within the meaning of the court's jurisdictional statute, by virtue of his position as a federal employee. The court reasoned that the term "agent" in the statute had to be construed in light of its well-settled common law meaning, that the Restatement Third of Agency explained that the elements of common-law agency were present in the relationship between employer and employee, and that it was undisputed that plaintiff was a civilian employee of the Army. [Striplin v. U.S.](#), 100 Fed.Cl. 493, 498.

Ct.Fed.Cl.2008. Quot. in sup., subsec. (1) and com. (c) cit. in sup. Federal inmate who designed a calendar for the federal government under the auspices of a work program for inmates sued United States for infringement pursuant to the Copyright Act. Dismissing for lack of jurisdiction, this court held that plaintiff could not pursue his claim, because, while not "in the employment ... of the United States," he was "in the ... service of the United States" when he prepared the calendar, and thus fell within a proviso to the controlling statute waiving government immunity; plaintiff's alleged status as an employee could not be established under the general common law of agency, because the relationship between plaintiff, an inmate at a federal correctional institution, and defendant, plaintiff's "custodian," was anything but consensual, and plaintiff was powerless to end his "association" with defendant. [Walton v. U.S.](#), 80 Fed.Cl. 251, 274.

U.S.Tax Ct.

U.S.Tax Ct.2012. Quot. in sup. Taxpayer, a U.S. citizen who claimed to be a partner of a Virgin Islands limited-liability company (LLC), petitioned for a redetermination of tax deficiencies assessed against him by the Internal Revenue Service (IRS), alleging, among other things, that, under the Tax Equity and Fiscal Responsibility Act (TEFRA), the IRS should have issued a notice of final partnership administrative adjustment to the LLC's tax matters partner, as opposed to issuing him a notice of deficiency. This court denied petitioner's motion to dismiss based on lack of jurisdiction, holding, inter alia, that TEFRA did not apply, because the LLC, which was classified as a foreign corporation for federal tax purposes, did not file a federal partnership return with the IRS. The court rejected taxpayer's argument that the LLC's filing of a partnership return with the Virgin Islands Bureau of Internal Revenue (BIR) constituted the filing of a federal partnership return with the IRS because the BIA was essentially an agent of the IRS under the Tax Implementation Agreement Between the United States of America and the Virgin Islands (TIA) and the BIR had forwarded copies of the LLC's partnership returns to the IRS. The court concluded that the TIA did not establish an agency relationship between the United States and the Virgin Islands or their respective tax departments, and that the BIR was not under the control of the IRS or vice versa. [Huff v. C.I.R.](#), 138 T.C. 258, 266.

D.Ariz.

D.Ariz.2014. Cit. and quot. in sup., cit. in cases cit. and quot. in sup. After insurance providers signed a settlement agreement with victim of a car accident involving a rental car, insurance providers brought an action against rental-car company, seeking, among other things, equitable indemnification for the money plaintiffs paid pursuant to the settlement agreement. Denying in part defendant's motion for summary judgment, this court held that there was a genuine issue of material fact regarding defendant's status as plaintiffs' agent. Citing [Restatement Third of Agency § 1.01](#), the court concluded that plaintiffs presented sufficient evidence to support their argument that an agency relationship existed between plaintiffs and defendant, and therefore defendant was not entitled to summary judgment for that claim. [KnightBrook Ins. Co. v. Payless Car Rental System, Inc.](#), 43 F.Supp.3d 965, 978.

D.Ariz.2013. Com. (g) quot. in sup. Seller of vision-enhancement products sued former employee and his new company, alleging, inter alia, that employee breached his common-law fiduciary duties of confidentiality and loyalty to plaintiff. Granting plaintiff's motion for entry of a default judgment against employee, this court held, among other things, that the allegations in plaintiff's complaint, taken as true on employee's default, established that employee breached his fiduciary duty of loyalty to plaintiff by soliciting plaintiff's customers for the rival business that he was forming while still employed by plaintiff, and by using plaintiff's property including product kits, company communication resources such as email and phones, company time, and the company name to gain access to plaintiff's clients, strengthen his relationships with them, and entice them to join his new business venture. [HTS, Inc. v. Boley](#), 954 F.Supp.2d 927, 946.

D.Ariz.2011. Adopted in case cit. in sup., quot. in sup. Property owners who refinanced their loan and paid for lender title insurance sued title insurer for unjust enrichment, alleging that title agency through which they bought their insurance improperly charged them the basic rate, rather than the discounted refinance rate. This court granted summary judgment on liability for plaintiffs, holding that title agency was an agent of defendant for purposes of plaintiffs' transaction, and that payment to an agent was payment to the principal; because the undisputed facts showed an absence of justification for charging plaintiffs the full basic rate, plaintiffs established that defendant was unjustly enriched. [Perez v. First American Title Ins. Co.](#), 810 F.Supp.2d 986, 992.

D.Ariz.2010. Quot. in case quot. in sup. Consumer who fell from a ladder and was injured brought negligence and products-liability claims against manufacturer of the ladder and its corporate parent. While denying parent's motion to dismiss for lack of personal jurisdiction, this court held that parent was not subject to jurisdiction as manufacturer's principal. The court reasoned that consumer failed to allege an express or implied agency agreement between parent and manufacturer; the licensing agreement between parent and manufacturer authorizing manufacturer to use parent's intellectual property regarding the ladder, without more, was insufficient to establish an agency relationship; and consumer pointed to nothing in the record indicating that parent intentionally or inadvertently induced consumer or anyone else to believe that manufacturer was its agent. [Patterson v. Home Depot, USA, Inc.](#), 684 F.Supp.2d 1170, 1180-1181.

D.Ariz.Bkrcty.Ct.

D.Ariz.Bkrcty.Ct.2010. Cit. in sup. Former employer of Chapter 7 debtor brought an adversary proceeding against debtor, seeking a determination that debtor's debt to employer for misappropriating employer's money or property was nondischargeable. Granting summary judgment for debtor, this court held, as a matter of first impression, that the exception to discharge for defalcation while acting in a fiduciary capacity did not include employer-employee relationships; while debtor was employer's general manager, he was never an officer, member, partner, or principal, and, while Arizona law imposed a fiduciary duty on a general manager of a company in some cases, there was no controlling precedent holding that an employer-employee relationship such as the one between the parties created a fiduciary relationship that was actionable under the bankruptcy code. [In re Chavez](#), 430 B.R. 890, 895.

W.D.Ark.Bkrcty.Ct.

W.D.Ark.Bkrcty.Ct.2014. Cit. and quot. in sup. In bankruptcy proceedings for food manufacturer, supplier of carrots and potatoes filed a proof of claim against debtor under the Perishable Agricultural Commodities Act; debtor objected to the allowed amount of supplier's claim. This court overruled debtor's objection that supplier charged a secret profit and might have breached its fiduciary duty as debtor's agent by marking up freight charges and charging for other non-produce items, holding that supplier did not act as debtor's agent under [Restatement Third of Agency § 1.01](#) when it provided freight services for debtor's benefit. The court reasoned that supplier was not subject to debtor's control when it procured the freight services for debtor, and there was no evidence that supplier had the authority to act for or on behalf of debtor or that either party manifested an intent to create an agency relationship or assented to that relationship, which was also required under the Restatement Third of Agency. *In re Veg Liquidation, Inc.*, 515 B.R. 555, 559, 560.

C.D.Cal.

C.D.Cal.2010. Quot. in sup., illus. 10-14 quot. in ftn. Malian children, who were allegedly forced by Ivorian farmers to labor on cocoa fields in Cote d'Ivoire, and California human rights organization that promoted social justice filed a class action against American, European, and Ivorian cocoa corporations that purchased the farmers' cocoa and assisted in its production, claiming that defendants aided and abetted violations of international norms that prohibited slavery, forced labor, child labor, torture, and cruel, inhuman, or degrading treatment. Granting defendants' motion to dismiss, this court held, among other things, that defendants were not directly liable as the principals of the Ivorian farmers who allegedly violated plaintiffs' human rights. The court rejected plaintiffs' argument that defendants' "long-term" and "exclusive" buyer-supplier relationship with farmers transformed an arms-length commercial relationship into an agency relationship in which the buyer was liable for the supplier's actions. *Doe v. Nestle, S.A.*, 748 F.Supp.2d 1057, 1113.

N.D.Cal.

N.D.Cal.2016. Com. (g) quot. in sup. Creator of an internet-based hot-water-management system filed suit against its former vice-president, its former lead operations technician, and a competing business allegedly formed while individual defendants were still employed by plaintiff and which utilized plaintiff's management-system technology, asserting, inter alia, a claim for breach of duty of loyalty. This court denied technician's motion to dismiss, holding that plaintiff had adequately pled a claim for breach of duty of loyalty. Rejecting technician's argument that only employees with managerial duties owe a duty of loyalty, the court noted that, under [Restatement Third of Agency § 1.01](#), Comment g, all employees, as agents, owed a duty of loyalty to their employers. *E.D.C. Technologies, Inc. v. Seidel*, 216 F.Supp.3d 1012, 1016.

N.D.Cal.2016. Quot. in ftn. Provider of natural gas sued utility that provided its billing-and-connections services, alleging that utility was liable under a theory of respondeat superior for the actions of three employees who defrauded provider and its customers. This court denied defendant's motion to dismiss, holding that plaintiff sufficiently pleaded that employees' acts occurred within the scope of their employment with defendant, and that their acts were motivated at least in part by a purpose to serve defendant. The court declined to address plaintiff's claim that defendant was liable under an agency theory, noting that plaintiff did not make any allegations to show the existence of an agency relationship under [Restatement Third of Agency § 1.01](#). *United Energy Trading, LLC v. Pacific Gas & Electric Co.*, 177 F.Supp.3d 1183, 1190.

N.D.Cal.2015. Quot. in sup. Holder of a patent for a method of correcting errors in data transmissions brought an infringement action against manufacturer of communications processors that used the method. After a jury rejected plaintiff's claims of contributory infringement, inducing infringement, and willful infringement, but found that defendant was liable for direct infringement, this court granted defendant's motion for judgment of no direct infringement as a matter of law, holding that plaintiff failed to prove that defendant used the claimed method in the United States. While plaintiff presented evidence that a nonparty conducted field testing of defendant's processors in the United States, plaintiff failed to establish that an agency relationship existed between defendant and the nonparty under [Restatement](#)

[Third of Agency § 1.01](#), or that defendant ratified the nonparty's actions. [France Telecom S.A. v. Marvell Semiconductor Inc.](#), 82 F.Supp.3d 987, 995.

N.D.Cal.2015. Quot. in sup., com. (f)(2) and Rptr's Notes to com. (f)(2) quot. in sup. Former employee brought a whistleblower claim against former employer and individual members of employer's board, contending that he was wrongfully terminated in violation of the Sarbanes-Oxley Act in retaliation for investigating and reporting possible violations of the Foreign Corrupt Practices Act. This court granted in part defendants' motion to dismiss, holding that, while individual members of employer's board were potentially liable for engaging in retaliatory conduct under the Sarbanes-Oxley Act, plaintiff's claims against all but one of the individual members were untimely. The court noted that, although [Restatement Third of Agency § 1.01](#), Comment *f*(2) indicated that directors were neither the shareholders' agents nor the corporation's agents, the Reporter's Notes to § 1.01 also acknowledged that some commentators characterized directors as agents and that some corporation statutes treated directors as agents for specific purposes. [Wadler v. Bio-Rad Laboratories, Inc.](#), 141 F.Supp.3d 1005, 1016, 1017.

N.D.Cal.2009. Cit. in sup. Computer-equipment manufacturer sued numerous DRAM manufacturers, alleging that defendants engaged in a conspiracy to control DRAM production capacity and raise DRAM prices. This court denied summary judgment for one defendant and its wholly owned subsidiary, rejecting defendant's claim that it had a separate legal existence from its subsidiary and that it had not itself engaged in any direct sales of DRAM within the United States following subsidiary's incorporation in 1998. The court held that disputed issues of material fact existed as to whether subsidiary was defendant's agent such that defendant was vicariously liable for the overarching conspiracy alleged by plaintiff more specifically, whether defendant desired that subsidiary undertake DRAM pricing on its behalf, whether subsidiary viewed its role as such, and/or whether defendant controlled subsidiary with respect to DRAM pricing. [Sun Microsystems Inc. v. Hynix Semiconductor Inc.](#), 622 F.Supp.2d 890, 899.

D.Conn.

D.Conn.2014. Quot. in ftn. Former employee of the state department of environmental protection, who attended a police academy run by the state's police-officer-standards-and-training council as part of his employment, brought an employment-discrimination action against the state, the department, and the council in connection with his termination, alleging illegal discriminatory practices by the department and the council. This court denied the council's motion for summary judgment, holding, among other things, that employee could assert a Title VII claim against the council, because there was a genuine issue of fact as to whether the department delegated a core duty under Title VII the training of its employee police officers to the council when it required such employees to attend the council's police academy, and whether the council, through its police academy, was functioning as the department's agent. The court noted that, although no one factor was determinative of whether an agency relationship existed, under [Restatement Third of Agency § 1.01](#), the common-law element of control was the principal guidepost that had to be followed. [Pathan v. Connecticut](#), 19 F.Supp.3d 400, 417.

D.Conn.2013. Cit. in sup. After Somali pirates seized a foreign tanker off the coast of Yemen and detained it at sea for eight months while they sought ransom and tortured the Indian sailors that staffed the tanker, two of the sailors sued, among others, tanker and British shipping company that managed a shipping pool of which the tanker was a part, asserting claims under tort and regulatory compliance theories pursuant to the Jones Act and general maritime law. This court granted defendants' motion to dismiss for lack of personal jurisdiction, rejecting plaintiffs' argument that British shipping company was the tanker's agent, and thus company's allegedly tortious actions could be attributed to tanker. The court reasoned that, even if plaintiffs established that tanker controlled British shipping company, they did not allege that tanker's control extended beyond company in Britain to encompass company's Connecticut-based affiliate office so as to establish personal jurisdiction over tanker under Connecticut's long-arm statute. [Chirag v. MT MARIDA MARGUERITE SCHIFFARHRTS](#), 933 F.Supp.2d 349, 353.

D.Del.Bkrcty.Ct.

D.Del.Bkrcty.Ct.2013. Quot. in case quot. in sup. Trustee for the liquidating trust of Chapter 11 debtor/mortgage lender objected to a proof of claim filed by borrowers to recover damages on the basis that, among other things, debtor was responsible, under the New Jersey Consumer Fraud Act, for their injuries caused by the allegedly misleading or fraudulent acts and statements of their mortgage broker in inducing them to enter into a loan that they could not afford. Sustaining in part trustee's objection, this court held, inter alia, that debtor was not liable for broker's fraudulent acts, because broker did not act with the express or apparent authority of debtor, and thus no agency relationship existed between them. The court reasoned that there was no evidence that broker was required to submit borrowers' loan to debtor or that debtor controlled any of broker's actions, and, while borrowers asserted that they believed that broker was acting on behalf of debtor, they failed to show that debtor gave them any indication that broker could act as its agent, and thus it was not reasonable for them to believe that broker had authority to act on debtor's behalf. [In re New Century TRS Holdings, Inc., 495 B.R. 625, 643-644.](#)

D.Del.Bkrcty.Ct.2010. Cit. in ftn. in sup. Official committee of unsecured creditors established for Chapter 11 corporate debtors filed a motion against informal committee of one debtor's bondholders, seeking an order compelling informal committee to comply with certain disclosure requirements under the bankruptcy rules applicable to any "committee representing more than one creditor." Denying the motion, this court held, inter alia, that informal committee was not a committee representing more than one creditor within the meaning of the bankruptcy rules, because it did not represent any persons other than its members by either consent or operation of law; the plain meaning of "represent" contemplated an active appointment of an agent to assert disputed rights, and it was black letter law that a person could not establish itself as another's agent such that it bound the purported principal without that principal's consent, unless the principal ratified the agent's actions. [In re Premier Intern. Holdings, Inc., 423 B.R. 58, 65.](#)

D.Del.Bkrcty.Ct.2000. Cit. in disc. (T.D. No. 1, 2000). Medical services provider that filed for Chapter 11 bankruptcy sued its former employees and a competitor, alleging breach of duty and tortious interference with debtor's business. This court granted in part debtor's motion for preliminary injunctive relief, holding, inter alia, that it was likely that, at final hearing, debtor would prevail on the merits against its former manager, since even without a separate agreement that prohibited working for competitors, a senior employee such as the manager had a duty of loyalty that precluded him from soliciting debtor's employees and customers on behalf of a competitor while employed by debtor. [In re Integrated Health Services, Inc., 258 B.R. 96, 102.](#)

D.D.C.

D.D.C.2015. Com. (c) quot. in sup. and in ftn. Hospital petitioned for review of an order by the National Labor Relations Board, which found that hospital committed an unfair labor practice by refusing to bargain with a union that had been elected to represent its security officers. Denying hospital's petition, this court held that the Board's regional director maintained his authority to conduct the election and certify its results even though the U.S. Supreme Court had determined that the Board lacked authority to act during the relevant period because three of its five members held office via appointments that violated the Recess Appointments Clause. The court rejected hospital's argument that the regional director lacked authority under a prior decision that relied on [Restatement Third of Agency §§ 1.01, 3.04, and 3.07](#) to conclude that the Board could not delegate its final authority to a panel of some of its members; the court reasoned that the prior decision was not relevant to this case, which involved the Board's delegation of its nonfinal authority, rather than its final authority. [UC Health v. N.L.R.B., 803 F.3d 669, 679, 680.](#)

D.D.C.2014. Com. (c) cit. in disc. Construction company that contracted to build water and wastewater subprojects in Honduras asserted jurisdiction under the "arbitration exception" to the Foreign Sovereign Immunities Act in a claim against the Republic of Honduras, seeking to enforce a Honduran arbitration award for plaintiff against a subentity of defendant that was a party to the contract. This court granted defendant's motion to dismiss, holding that defendant

was entitled to sovereign immunity because it was not a party to the contract that contained the agreement to arbitrate. The court rejected plaintiff's argument that the presumption of the entity's separate identity from defendant could be overcome by agency principles under [Restatement Third of Agency § 1.01](#), and explained that plaintiff failed to overcome the presumption by showing that defendant exercised its right to control the subentity. [DRC, Inc. v. Republic of Honduras](#), 71 F.Supp.3d 201, 216.

D.D.C.2012. Quot. in sup. Former employees of the District of Columbia Public Schools Division of Transportation (DOT) sued the District of Columbia under the Fair Labor Standards Act (FLSA), inter alia, alleging that their DOT supervisor illegally denied them overtime hours unless they paid her kickbacks. Denying in part defendant's motion to dismiss, this court held, inter alia, that plaintiffs sufficiently alleged under D.C. law that supervisor's scheme was executed within the scope of her employment and that her actions were attributable to DOT; while plaintiff's complaint recognized that supervisor's scheme was designed to extract money, rather than to benefit DOT, the process that she followed for assigning overtime hours, corrupted as it was by kickback requirements, could fairly be said to have been undertaken on DOT's behalf and to serve DOT. [Saint-Jean v. District of Columbia](#), 846 F.Supp.2d 247, 256.

D.D.C.2012. Cit. in sup. Commercial real estate broker brought a breach-of-contract action against limited-liability company (LLC) and its sole member, alleging that defendants failed to pay it certain commissions pursuant to a brokerage agreement. Granting in part plaintiff's motion for summary judgment, this court held that, because LLC's sole member entered into the brokerage agreement as LLC's agent, and acted within the scope of his actual authority as LLC's agent, LLC was a party to the agreement, and was legally bound by its terms. [Uhar & Co., Inc. v. Jacob](#), 840 F.Supp.2d 287, 290.

D.D.C.2011. Com. (c) quot. in sup. Purported sub-subcontractor on a transit-authority-bridge project sued contractor for breach of a construction contract, alleging that subcontractor's principal had actual authority from contractor to hire plaintiff for dredging work. This court granted summary judgment for defendant on the ground that plaintiff breached the sub-subcontract by failing to purchase insurance; it also concluded that subcontractor's principal did not have actual authority to enter into the sub-subcontract with plaintiff. The court explained that subcontractor and its principal were explicitly prohibited from further contracting out subcontractor's responsibilities under its subcontract with contractor without first obtaining contractor's written permission, and contractor's principal asserted that he neither provided prior written permission nor otherwise consented to plaintiff's sub-subcontract purportedly signed on contractor's behalf. [A-J Marine, Inc. v. Corfu Contractors, Inc.](#), 810 F.Supp.2d 168, 176.

D.D.C.2011. Quot. in case quot. in sup. National passenger railroad sued regional rail competitor, alleging that defendant aided and abetted three of plaintiff's former employees in breaching their fiduciary duty to plaintiff by extending the employees offers of employment contingent on the success of defendant's bid for a contract that plaintiff was also bidding on, including employees' names on its bid, and inducing them to exclude their names from plaintiff's bid. Denying the parties' cross-motions for summary judgment, this court held, among other things, that while all three employees were at-will employees, they were nonetheless agents of plaintiff who owed plaintiff a general fiduciary duty of loyalty, given their job responsibilities and management-level status. [National R.R. Passenger Corp. v. Veolia Transp. Services, Inc.](#), 791 F.Supp.2d 33, 47.

D.D.C.2011. Com. (c) quot. in ftn. Litigant brought claims under the Fair Credit Reporting Act (FCRA) against opposing party's attorney in underlying litigation, alleging that a process server working for attorney impermissibly accessed plaintiff's credit report. This court granted summary judgment for defendant, holding that there was no employer-employee relationship between defendant and process server, and therefore defendant was not vicariously liable for any violations of the FCRA that process server might have committed. The court pointed to defendant's uncontested evidence that he did not hire server (who was already employed by a process-serving company), he retained server for the limited purpose of obtaining plaintiff's address, he was billed by server for the services at an hourly rate, and he did not direct server how to obtain the address; further, there was no evidence that defendant, as a regular part

of his business, obtained the addresses of other individuals in other litigation matters. [Okeke-VonBatten v. Greater Washington Mortg. LLC](#), 766 F.Supp.2d 43, 47.

D.D.C.2010. Quot. in sup. Chapter 11 debtor initiated arbitration proceeding against creditor/public international organization, and petitioned for a subpoena summoning third party International Bank for Reconstruction and Development (IBRD) to testify at a deposition. Granting IBRD's motion to quash the subpoena, this court held that it lacked subject-matter jurisdiction over this discovery dispute; creditor was not acting as an agent of IBRD when creditor waived its own immunity in the bankruptcy proceeding by filing a proof of claim, and thus creditor's waiver of immunity was not imputed to IBRD. The court reasoned that IBRD did not exercise the requisite amount of control over creditor to establish agency; the fact that creditor was a subsidiary or affiliate of IBRD was not sufficient to create a principal-agent relationship. [In re Kaiser Group Intern., Inc.](#), 730 F.Supp.2d 247, 251.

D.D.C.2010. Quot. in sup. Estate and family members of an American citizen killed in a suicide bombing in a restaurant in Tel Aviv, Israel, sued Chinese bank under the Anti-terrorism Act, alleging that defendant intentionally and knowingly provided financial services to an agent of the terrorist organization that carried out the bombing. Denying defendant's motion to dismiss, this court held that plaintiff adequately pled intentional misconduct on the part of defendant by alleging that its provision of financial services to the terrorist organization's agent constituted the provision of financial services to organization as principal, and that China had been informed by Israel of the nature of the wire transfers to and from the agent's account. [Wultz v. Islamic Republic of Iran](#), 755 F.Supp.2d 1, 50.

D.D.C.2008. Quot. in ftn. Local counsel that was hired by law firm to represent law firm's client, a limited-liability company, in an underlying action sued, among others, two former members of client, seeking to hold them jointly and severally liable for client's unpaid legal fees under theories of quantum meruit and unjust enrichment. Dismissing plaintiff's quantum meruit claim, this court held that plaintiff did not have a reasonable expectation of payment from members; while members were named as defendants along with client in the underlying action, plaintiff failed to show that it was authorized to represent members in that action, or that members manifested the requisite assent or consent to have plaintiff represent them or act as their agents in that action. [Flemming, Zulack and Williamson, LLP v. Dunbar](#), 549 F.Supp.2d 98, 108.

D.D.C.2008. Cit. in ftn. Relator brought qui tam action under the False Claims Act against various corporations and their principals, alleging that they colluded to secure and overcharge on certain government contracts. After a jury found in favor of plaintiff and awarded the government damages, this court denied one corporate defendant's motion for judgment as a matter of law, holding, inter alia, that plaintiff presented sufficient evidence of the moving defendant's liability based on the actions of another defendant's agent. While the agent lacked actual authority on behalf of the moving defendant, plaintiff introduced evidence that the agent had apparent authority, noting that the moving defendant had allowed the agent to hire employees on its behalf and maintain an office at its headquarters, and had designated him as a signatory on its bank account. [Miller v. Holzmann](#), 563 F.Supp.2d 54, 122.

D.D.C.2006. Quot. in sup. Law firm that suffered multiple e-mail server attacks that originated from internet protocol addresses registered to company brought federal statutory claims against company and an unidentified "John Doe" defendant, in his purported capacity as company's employee or agent, for allegedly carrying out the attacks. This court, inter alia, dismissed plaintiff's claims against company, holding, inter alia, that plaintiff failed to adduce any facts showing intentional conduct by company, a requirement of all three statutes relied upon by plaintiff. The court noted that the only hint in plaintiff's complaint of an affirmative allegation that company itself initiated or authorized the attacks, namely, that John Doe was acting as company's agent, was similarly unsupported. [Butera & Andrews v. International Business Machines Corp.](#), 456 F.Supp.2d 104, 111.

M.D.Fla.

M.D.Fla.2014. Quot. in case quot. in sup. Consumer filed an action against sellers of resort and timeshare products, and against telemarketer that contracted with sellers to place telephone calls to potential customers using an automatic telephone dialing system, alleging that defendants violated the Telephone Consumer Protection Act by calling his cellular telephone number without his consent. Denying defendants' motion to dismiss, this court held that, although plaintiff did not allege that he received any calls directly from sellers, plaintiff sufficiently alleged that sellers were liable for telemarketer's actions under three theories of vicarious liability—formal authority, apparent authority, and ratification. The court pointed out that, in regard to formal authority under [Restatement Third of Agency § 1.01](#), plaintiff alleged that sellers contracted with telemarketer to market to potential consumers on its behalf, and approved scripts used by telemarketer in the course of making the telemarketing calls. [Wagner v. CLC Resorts and Developments, Inc.](#), 32 F.Supp.3d 1193, 1196.

M.D.Fla.2010. Quot. in sup. Shipyard employee sued the United States, alleging that he was injured while performing contract repair work for a steel renewal project aboard a vessel owned by defendant. After a bench trial, this court found in favor of defendant, holding, among other things, that the conduct of the project's port engineer, who had been retained by defendant's managing agent for the vessel, was not attributable to defendant. The court reasoned, in part, that, even assuming that port engineer was an agent of defendant's managing agent, he was not a subagent of defendant, because managing agent did not have either actual or apparent authority to appoint him as a subagent; plaintiff produced no evidence that defendant authorized managing agent to delegate its responsibilities or that defendant authorized port engineer to act on its behalf. [Green v. U.S.](#), 700 F.Supp.2d 1280, 1301.

M.D.Fla.2010. Cit. in sup., com. (g) quot. in sup. Wheelchair-using resident of recreational vehicle resort sued resort's owner under federal statutes, claiming that defendant discriminated against her based on her sex and her handicap, after an unincorporated neighborhood association formed by the resort's residents allegedly refused to let her participate in a men's billiards tournament and required her to sit at a separate table at bingo night. Granting in part defendant's motion for summary judgment, this court held that association was not defendant's agent, because neither association nor defendant manifested assent to an agency relationship, and, although defendant advertised association's events, defendant did not schedule, organize, or otherwise control the events. The court noted that the mere fact that the events benefited defendant's property failed to create an agency relationship, as mutual benefit alone was insufficient. [Haynes v. Wilder Corp. of Delaware](#), 721 F.Supp.2d 1218, 1225.

S.D.Fla.

S.D.Fla.2013. Cit. in case quot. in sup. Federal Deposit Insurance Corporation, as receiver for a failed bank, sued title insurer that served as closing agent on five mortgage loans made by bank, asserting, inter alia, a claim for breach of fiduciary duty. Denying defendant's motion for summary judgment, this court held that a genuine issue of material fact existed as to whether defendant breached the fiduciary duty that it owed to bank as bank's closing agent. The court noted that the evidence, if true, showed that defendant failed, at a minimum, to disclose that the loan transactions were not negotiated at arm's length. [F.D.I.C. v. Floridian Title Group Inc.](#), 972 F.Supp.2d 1289, 1297.

S.D.Fla.2013. Cit. in sup., quot. in case quot. in sup. Golf-equipment store that purportedly received an unsolicited faxed advertisement for a dental practice brought a putative class-action suit against dental practice, alleging, inter alia, violations of the Federal Telephone Consumer Protection Act (TCPA). Granting summary judgment for defendant, this court held that plaintiff failed to prove that defendant was vicariously liable under the TCPA on a theory of formal agency for a third-party marketer's alleged transmission of the fax, because plaintiff could not demonstrate that defendant controlled the content of the fax. The court noted that, pursuant to [Restatement Third of Agency § 1.01](#), formal agency liability required a showing that a principal manifested assent to an agent that the agent acted on behalf of the principal and subject to the principal's control. [Palm Beach Golf Center-Boca, Inc. v. Sarris](#), 981 F.Supp.2d 1239, 1249, 1251.

S.D.Fla.2007. Com. (b) quot. in ftn. After Colombian airline's passenger aircraft crashed en route from Panama to Martinique, killing all passengers aboard, plaintiffs, who, like decedents, were residents of Martinique, sued Florida corporation that chartered the aircraft and crew. This court, finding that corporation was a "contracting carrier" pursuant to the Montreal Convention, ordered the parties to brief the issue of whether the cases should be dismissed on the ground of forum non conveniens, which was applicable pursuant to the Convention. The court rejected defendant's contention that it could not be a "principal" under the Convention because it merely assigned the aircraft's seating capacity to a Martinique travel agency, and thus there was no corresponding "agent"; the term "principal" under the Convention did not contemplate the necessity of an agency relationship but was specifically used to clarify that those acting solely as agents could not qualify as contracting carriers. [In re West Caribbean Airways, S.A., 619 F.Supp.2d 1299, 1307.](#)

C.D.Ill.

C.D.Ill.2017. Quot. in sup.; com. (c) cit. in case cit. in sup. United States and various states sued provider of satellite-television services, alleging that provider caused its authorized retailers to initiate outbound telemarketing telephone calls to persons who had previously stated to provider or retailers that they did not wish to be called by or on behalf of provider, in violation of the Federal Trade Commission's Telemarketing Sales Rule. After a bench trial, this court held that provider was responsible for retailers' actions under [Restatement Third of Agency § 1.01](#), because it had the authority to exert control over the marketing of its services conducted by retailers. The court noted that the fact that provider may have rarely exercised its authority was irrelevant. [United States v. Dish Network LLC, 256 F.Supp.3d 810, 920-922.](#)

C.D.Ill.2014. Cit. and quot. in sup. United States and several individual states sued seller of satellite-television programming and related services, alleging that defendant violated federal and state laws by causing telemarketers to initiate outbound telemarketing calls to recipients who had previously stated that they did not wish to receive calls made by or on behalf of defendant. This court granted in part plaintiffs' motion for summary judgment, establishing defendant's liability for calls it made to recipients whose telephone numbers were on its internal do-not-call lists, but held that issues of fact remained as to whether defendant's authorized retailers were agents of defendant such that it was obligated to honor do-not-call requests that recipients made to the retailers. The court reasoned that defendant's agreements with retailers contained inconsistencies and did not clearly indicate whether the parties intended to establish agency relationships under [Restatement Third of Agency § 1.01](#). [United States v. Dish Network, L.L.C., 75 F.Supp.3d 942, 1016.](#)

N.D.Ill.

N.D.Ill.2016. Quot. in sup., cit. in ftn. Recipients of unsolicited prerecorded telephone calls sued telemarketer that made the calls, business that marketed and sold vacation packages through the calls, and business's subsidiary, alleging that defendants made the calls in violation of the Telephone Consumer Protection Act. This court denied in part defendants' motion for summary judgment, holding that plaintiffs produced sufficient evidence to permit a reasonable jury to find that business and subsidiary were vicariously liable for unlawful calls made by telemarketer because telemarketer made the calls as an "agent" of business and subsidiary within the meaning of [Restatement Third of Agency § 1.01](#). [Aranda v. Caribbean Cruise Line, Inc., 179 F.Supp.3d 817, 830.](#)

N.D.Ill.2016. Cit. and quot. in sup. The Federal Trade Commission and the Attorney General of Florida brought an action against, among others, corporation that provided personal medical-alert monitoring systems to elderly and disabled customers, alleging that defendant violated federal and state laws by making material misrepresentations to consumers and engaging in deceptive and abusive telemarketing practices. This court granted plaintiffs' motion for a preliminary injunction, holding, among other things, that defendant was responsible for the conduct of the telemarketers it hired to conduct sales of its products and services to consumers, because the telemarketers were defendant's agents

under the federal common law of agency, Illinois agency law, and [Restatement Third of Agency § 1.01](#), which were all in accord on general agency principles. [Federal Trade Commission v. Lifewatch Inc.](#), 176 F.Supp.3d 757, 773.

N.D.III.2016. Cit. in ftn. As part of a series of matters concerning the disposition of decedent's revocable living trust, this court noted that it had previously dismissed an adversary proceeding filed by decedent's daughter, as putative successor trustee and beneficiary of the trust, against Chapter 7 debtor, who was decedent's son and a former trustee and beneficiary of the trust; and the court rejected daughter's argument that the assets of the trust were not property of debtor's estate on the ground that daughter had previously instructed debtor to represent to third parties that he owned the trust's assets. In making its decision, the court noted that, under [Restatement Third of Agency § 1.01](#), principals were bound by their agent's authorized conduct. [In re Sharif](#), 549 B.R. 485, 512.

N.D.III.2015. Com. (f)(1) quot. in sup. After recipient of unsolicited, pre-recorded telemarketing calls that promoted company's products and services filed a class action against company under the Telephone Consumer Protection Act, company sought contractual indemnification from telemarketer whose affiliate hired the lead provider that purportedly made the calls to recipient on company's behalf. This court granted in part company's motion for summary judgment, holding that affiliate was a telemarketing agent for telemarketer, and that company was contractually entitled to indemnification from telemarketer for affiliate's actions. The court reasoned, in part, that telemarketer provided "interim instructions" to affiliate that were the hallmark of a principal-agent relationship under [Restatement Third of Agency § 1.01](#) by, among other things, training affiliate's employees on how they were supposed to market company's products and services, providing affiliate's employees with company's call-scrubbing instructions and a call script to follow, and performing quality assurance on affiliate's calls. [Desai v. ADT Security Systems, Inc.](#), 78 F.Supp.3d 896, 903.

N.D.III.2014. Quot. in sup., cit. in ftn., com. (f)(1) quot. in sup. Consumers filed a class action against insurers, alleging that insurers marketed their services through the use of a lead-generator marketing company whose telemarketing calls to consumers violated the Telephone Consumer Protection Act. Denying in part insurers' motion to dismiss, this court held that consumers had alleged sufficient facts to plead a plausible basis for holding one insurer vicariously liable for marketing company's actions under a subagency theory consistent with [Restatement Third of Agency §§ 1.01](#) and [3.15](#). The court pointed out that plaintiffs sufficiently alleged that that insurer's local insurance agents acted as its legal agents with respect to telemarketing, and that it had suggested to several of its insurance agents that telemarketing through marketing company was a good way to obtain new customers; in contrast, the remaining insurers had not granted their local insurance agents actual authority to appoint additional agents such as marketing company to advertise or telemarket on their behalf. [Smith v. State Farm Mutual Automobile Insurance Company](#), 30 F.Supp.3d 765, 775, 776.

N.D.III.2014. Quot. in sup. and cit. in ftn., com. (f)(1) quot. in sup. Consumer filed a class action against business and telemarketer, alleging that business hired telemarketer to make unsolicited calls to her cellular telephone number in violation of the Telephone Consumer Protection Act. This court denied in part defendants' motion to dismiss, holding that consumer made sufficient allegations to support her claim that business was vicariously liable for the alleged misconduct of telemarketer under a theory of actual agency, as set forth in the Restatement Third of Agency. The court pointed to consumer's allegations that business and telemarketer entered into a written agreement pursuant to which telemarketer agreed to make calls to consumers for the purpose of entering into contracts with recipients on behalf of business, and that business exercised a level of control over telemarketer's activities so as to make the existence of an agency relationship plausible. [Toney v. Quality Resources, Inc.](#), 75 F.Supp.3d 727, 742.

N.D.III.2013. Quot. in sup. Borrower's brother brought a putative class action against lender and debt collector, alleging that debt collector violated the Telephone Consumer Protection Act by using an automatic dialer to call his cell phone multiple times without his consent in an attempt to collect borrower's debt to lender. Lender moved to stay this action while it petitioned the Federal Communications Commission (FCC) for guidance as to whether it was vicariously liable for debt collector's actions under FCC regulations. Denying lender's motion to stay, this court held that lender failed to present any evidence that a stay would materially affect this case, since FCC regulations held a principal liable for

calls placed by its agent, and debt collector appeared to have acted as lender's agent under principles of federal agency law. The court pointed out that lender did not dispute, and thus conceded, that it received the benefit of the calls placed by debt collector, as it received the money (or a percentage thereof) obtained in connection with those calls. [Jamison v. First Credit Services, Inc.](#), 290 F.R.D. 92, 100.

N.D.Ill.2006. Quot. in sup., com. (c) cit. in sup. Consumer who defaulted on a debt filed a putative class action against creditor and debt collector, alleging that debt collector sent him two debt-collection letters in violation of the Fair Debt Collection Practices Act (FDCPA). Denying creditor's motion for summary judgment, this court held that, while it was undisputed that creditor did not draft, print, or mail the letters at issue, creditor could be held vicariously liable for debt collector's FDCPA violations based on a principal-agent relationship. The court pointed out that, under the contract between creditor and debt collector, creditor retained ownership of the debts and the ability to recall them from debt collector, and thus had a right to control the contents of the letters sent by debt collector and otherwise control debt collector's activities. [Schutz v. Arrow Financial Services, LLC](#), 465 F.Supp.2d 872, 877.

N.D.Ill.2005. Quot. in sup., com. (c) quot. in ftn. (T.D. No. 2, 2001). Debtor sued purchaser of defaulted credit-card debt and its collection contractor for alleged violation of the Fair Debt Collection Practices Act, after she received an allegedly unclear and confusing collection letter from contractor demanding payment on her defaulted debt. Granting purchaser's motion for summary judgment, this court held, inter alia, that purchaser was not vicariously liable for contractor's dunning letter because contractor was not purchaser's agent under traditional agency principles; purchaser did not control contractor's drafting of the letter or other routine interactions with debtors, and, although an independent contractor could be an agent, here, no such agency relationship arose. [Scally v. Hilco Receivables, LLC](#), 392 F.Supp.2d 1036, 1040, 1041.

N.D.Ill.2001. Cit. in disc. (T.D. No. 1, 2000). Corporation that developed interactive video games sued Illinois shareholder for breach of contract after shareholder failed to provide corporation with capital for business ventures as agreed. Parties filed motions and cross-motions for summary judgment. The court denied shareholder's motion in part, holding, inter alia, that: corporation could recover compensatory damages upon proof that shareholder breached agreement; evidence existed from which a jury could determine that shareholder had apparent authority to enter into contract with corporation; shareholder could reasonably have believed that he had actual authority to enter agreement with corporation; the parties' actions could be examined to clarify ambiguities in the contract; and corporation's fiduciary-duty claim could be the basis for punitive damages. [Kinesoft Development Corporation v. Softbank Holdings, Inc.](#), 139 F.Supp.2d 869, 899.

N.D.Ill.Bkrcty.Ct.

N.D.Ill.Bkrcty.Ct.2017. Cit. in ftn. In a Chapter 7 bankruptcy proceeding, trust beneficiaries sought, inter alia, a declaratory judgment that trust assets were not property of debtor's estate; the bankruptcy court ordered, inter alia, beneficiaries and attorney to show cause why they should not be sanctioned for violating [Federal Rule of Bankruptcy Procedure 9011\(b\)\(1\)-\(3\)](#) by submitting motions to harass the bankruptcy court, cause unnecessary delay, and increase the cost of litigation. This court entered judgment against beneficiaries and attorney, holding that the imposition of [Rule 9011](#) sanctions was warranted. Citing [Restatement Third of Agency § 1.01](#), the court noted that principals were bound by their agents' authorized conduct, and explained that, in testifying that debtor acted as beneficiary's agent, beneficiary was bound by the conduct of debtor in previous proceedings and could not relitigate the issues resolved in those proceedings. [In re Sharif](#), 564 B.R. 328, 353.

N.D.Ill.Bkrcty.Ct.2014. Com. (c) quot. in sup. After creditors filed their petition for an involuntary Chapter 7 bankruptcy against alleged debtor/real-estate developer, debtor filed an answer objecting to creditors' standing. After trial was held, this court overruled debtor's objections, holding that creditors were entitled to bring an involuntary petition against it. In making this decision, the court concluded that certain creditors that were owed payment by debtor through an

independent contractor that provided particular administrative services for it pursuant to a management agreement did not qualify as petitioning creditors. Referring to [Restatement Third of Agency § 1.01](#), Comment *c*, the court noted that the delegation of specific tasks, together with a provision disclaiming agency, generally led to the conclusion that there was no actual authority, and, without an agency relationship, the existence of an internal agreement for reimbursement did not make contractor's creditors into debtor's creditors. [In re 35th & Morgan Development Corp.](#), 510 B.R. 832, 853.

N.D.Ill.Bkrcty.Ct.2011. Cit. in sup. Chapter 7 debtor's sister, in her purported capacities as successor trustee and successor beneficiary of revocable trust, brought an adversary proceeding against bankruptcy trustee and debtor, as former trustee of the trust, seeking a declaratory judgment that the assets being held by bankruptcy trustee were not property of the bankruptcy estate, and that she was the legal and equitable owner of the assets pursuant to a trust amendment. Dismissing with prejudice this portion of plaintiff's adversary complaint, this court held that, because plaintiff allowed debtor to act as her agent and claim ownership of the assets when it suited her interests in prior litigation, and because she, like debtor, refused to cooperate in discovery related to the trust, she would not be permitted to claim that she or the trust owned the assets. The court noted that principals were bound by their agent's authorized conduct. [In re Sharif](#), 457 B.R. 702, 728.

D.Kan.

D.Kan.2017. Quot. in case quot. in sup.; com. (c) cit. in sup.; com. (d) quot. in sup. Cattle seller sued buyer, seeking payment for cattle that buyer's purported agent purchased on behalf of buyer at seller's livestock auction. This court denied buyer's motion to dismiss, holding that seller's allegations that buyer sent the agent to seller's auction for the purpose of purchasing certain types of cattle on buyer's behalf, and that the agent actually attended seller's auction and purchased cattle for buyer provided a sufficient basis to support a plausible inference that buyer and agent assented to a principal-agent relationship. The court noted that, under [Restatement Third of Agency § 1.01](#), a principal's manifestation of assent to an agency relationship could be informal, implicit, and nonspecific. [Rezac Livestock Commission Company, Inc. v. Pinnacle Bank](#), 255 F.Supp.3d 1150, 1160, 1161.

D.Kan.2015. Quot. in case quot. in sup. and cit. in ftn. Nonprofit organization, on behalf of its members, who included a mayor of a Kansas city, brought an action against Kansas governor and other state actors, seeking to enjoin the enforcement of the Kansas Second Amendment Act, which prohibited the application of some federal gun-control laws to firearms made and kept within Kansas borders. This court granted defendants' motion to dismiss, holding that plaintiff did not have standing, as it did not allege that the statute inflicted an actual or imminent threat on any of its members. Citing the definition of "agent" in [Restatement Third of Agency § 1.01](#), the court rejected plaintiff's argument that the mayor could be prosecuted as a federal agent under the statute if he enforced federal gun regulations, explaining that plaintiff failed to allege that the mayor acted subject to the control of the federal government. [Brady Campaign to Prevent Gun Violence v. Brownback](#), 110 F.Supp.3d 1086, 1101.

E.D.Ky.

E.D.Ky.2013. Cit. in case cit. in sup. Kentucky corporation, its wholly owned Chinese subsidiary, and others sued bank, alleging, inter alia, that bank breached its fiduciary duty when it failed to wire funds to subsidiary as required by a document executed by corporation and bank. Granting summary judgment for defendant as to this claim, this court held that plaintiffs failed to demonstrate a fiduciary relationship with defendant, or any other relationship giving rise to legal liability. The court rejected plaintiffs' argument that, by signing the document, defendant undertook a duty to plaintiffs, and thereby became plaintiffs' agent, pointing out that an agency relationship only existed where the agent consented to the principal's control, and here there was no evidence that defendant consented to plaintiffs' control. [Guangzhou Consortium Display Product Co., Ltd. v. PNC Bank, Nat. Ass'n](#), 956 F.Supp.2d 769, 782.

E.D.La.

E.D.La.2007. Quot. in sup., com. (g) quot. in ftn. Chapter 7 debtor who was defrauded by his partner sued the IRS, seeking a determination that certain income-tax liabilities that he owed with regard to the partnership were discharged under the Bankruptcy Code. On remand, the bankruptcy court ruled, in part, that the IRS was barred from collecting some of the taxes for which partner had signed statute-of-limitations extensions on behalf of the partnership. Affirming, this court held that partner's authority to sign the extensions was extinguished, because he negotiated them under a disabling conflict of interest of which the IRS had knowledge. The court noted that, while debtor had manifested his empowerment of partner to act as agent for the partnership, the IRS was only entitled to rely on partner's actions insofar as that reliance was based on the reasonable belief that partner had the authority to bind the partnership. [U.S. v. Martinez](#), 382 B.R. 285, 297.

D.Me.

D.Me.2017. Cit. in sup.; com. (c) cit. in sup. Student who resided in Maine filed a class action against loan servicer that had its main office in Ohio and its principal place of business in Minnesota and against sub-servicers hired by servicer, alleging that defendants unlawfully pursued her on private student-loan debts that she did not owe. This court denied servicer's motion to dismiss, holding that the exercise of specific personal jurisdiction against it was appropriate, because student sufficiently alleged that it undertook debt-collection activities in Maine through its contractual relationship with sub-servicers. The court reasoned, in part, that, while sub-servicers were characterized as independent contractors in their agreements with servicer, [Restatement Third of Agency § 1.01](#) recognized that the term "independent contractor" was often used to describe parties that were actually in an agency relationship, and, here, it was reasonable to infer the existence of an agency-like relationship that was sufficient to attribute sub-servicer's activities in Maine to servicer for jurisdictional purposes. [Winne v. National Collegiate Student Loan Trust 2005-1](#), 228 F.Supp.3d 141, 150, 151.

D.Mass.

D.Mass.2009. Quot. in sup. Investment firm's clients who were defrauded by firm's principal through a Ponzi scheme sued firm's bank, alleging, inter alia, that bank aided and abetted principal's breaches of fiduciary duties to the investor-clients. This court reserved ruling on clients' motion for summary judgment until after bank filed a motion for summary judgment, holding, inter alia, that a genuine issue of material fact remained as to whether bank had actual knowledge of principal's breach of fiduciary duties owed to the clients, i.e., knew that principal was a fiduciary to firm, and knew that principal's actions constituted a breach of his duties. The court noted that at least one of bank's employees arguably knew that principal was a fiduciary with respect to funds in the account through which principal conducted the fraud, and that principal was commingling firm's funds with clients' funds in that account. [Fine v. Sovereign Bank](#), 634 F.Supp.2d 126, 137.

E.D.Mich.

E.D.Mich.2014. Quot. in case quot. in sup. (general cite). Recipient of unsolicited facsimile advertisements for a restaurant filed a putative class action against restaurant and others, alleging violations of the Telephone Consumer Protection Act. Granting summary judgment for defendants, this court held that defendants were not vicariously liable under the Restatement Second of Agency for the actions of the third-party telemarketer that they hired to conduct the advertising campaign. The court found that the third-party telemarketer acted outside the scope of its authority by, among other things, representing to defendants that its list of prospective recipients was composed of individuals or entities who were willing to accept fax advertisements and by failing to seek or obtain permission from those individuals or entities before faxing the advertisements. [Avio, Inc. v. Alfocino, Inc.](#), 18 F.Supp.3d 882, 893.

E.D.Mich.2012. Quot. in sup., cit. in ftn. Former graduate student of social work at state university brought claims under Title IX and Michigan's Elliott-Larsen Civil Rights Act (ELCRA) against university, adult rehabilitation center where she was placed by university to perform a required field internship, and others, alleging that she was unlawfully dismissed from university's graduate program because she was unwed and pregnant. Granting summary judgment for rehabilitation center, this court held, inter alia, that plaintiff's ELCRA claim against center failed, because, while ELCRA expressly prohibited agents of educational institutions from discriminating based on sex, pregnancy, and marital status, plaintiff could not establish that center was an agent of university for purposes of ELCRA. The court reasoned that plaintiff failed to prove that center could, or did, act on behalf of university; that it owed university any duty, much less a fiduciary duty; or that university controlled the conduct of plaintiff's field instructor or others at the center through university's employees. [Varlesi v. Wayne State University](#), 909 F.Supp.2d 827, 841, 856.

E.D.Mich.2009. Com. (a) quot. in ftn. Retired union employees and their spouses filed a class action against former employer, asserting, among other things, that they were not bound by an agreement between defendant and union that purportedly relieved defendant of any future liability for plaintiffs' vested health insurance benefits. Denying summary judgment for defendant, this court held, inter alia, that union was not acting as plaintiffs' agent. The court noted that two of the essential elements of agency were absent in the relationship between a union and its retired employees the principal's right to control the agent and the agent's fiduciary duty to the principal; while plaintiffs could remain involved in union activities and could "influence" union, they lacked the power to "control" union. [Yolton v. El Paso Tennessee Pipeline Co.](#), 668 F.Supp.2d 1023, 1034.

D.Minn.

D.Minn.2012. Cit. in ftn. Insured under general liability insurance policies brought, inter alia, claims for breach of contract, equitable reapportionment, and bad faith against insurer's parent, alleging that parent was vicariously liable for insurer's conduct in misallocating insured's asbestos claims to a category with an aggregate limit and thereby prematurely exhausting insured's coverage under the insurance policies. Granting summary judgment for parent, this court held that parent was not vicariously liable for insurer's alleged torts, because plaintiff failed to demonstrate either that parent and insurer consented to an agency relationship or that parent had the right to control insurer's handling of insured's claims, the alleged source of insured's injury. [A.P.I., Inc. Asbestos Settlement Trust v. Home Ins. Co.](#), 877 F.Supp.2d 709, 725.

D.Minn.2008. Com. (c) quot. in sup. Owner of patent for stent-cutting machines sued competitor, asserting theft of trade secrets, unfair competition, and other claims. Granting in part defendant's motion for summary judgment, this court held that no reasonable jury could find that defendant had access to plaintiff's trade secrets through defendant's sales representative, who for a time was also a sales representative for plaintiff. Noting that it was undisputed that the sales representative was an independent contractor hired by defendant, not defendant's employee, the court reasoned that, although independent contractors could, under some circumstances, be deemed agents of their contracting partners, plaintiff did not argue that the sales representative was defendant's agent; thus, the knowledge of the sales representative as a nonagent independent contractor could not be imputed to defendant. [Spectralytics, Inc. v. Cordis Corp.](#), 576 F.Supp.2d 1030, 1060.

N.D.Miss.

N.D.Miss.2015. Quot. in sup. Relator brought a qui tam action under the False Claims Act against regional housing authority, alleging, among other things, that defendant's former executive director, fee accountant, and auditor engaged in a conspiracy to embezzle funds from the U.S. Department of Housing and Urban Development (HUD). This court granted in part defendant's motion for summary judgment, holding that there were no genuine issues of material fact. Citing [Restatement Third of Agency § 1.01](#), the court pointed out that defendant's accountant and auditor acted as defendant's agents when they submitted false financial information to HUD, but explained that plaintiff failed to provide

any evidence that they shared a specific intent to defraud the government. [U.S. ex rel. Wuestenhofer v. Jefferson](#), 105 F.Supp.3d 641, 675.

E.D.Mo.

E.D.Mo.2015. Quot. in sup. Supplemental-retirement plan and its sponsor brought an action under ERISA against plan participant, alleging that defendant was required to reimburse plaintiff for pension distributions that were mistakenly paid to her over the course of several years. This court denied in part defendant's motion for summary judgment based on the statute of limitations, in which defendant argued that plaintiffs' claims began to accrue when plaintiffs' administrative-services provider should have discovered the mistake, rather than when it was actually discovered, holding that genuine disputes of material fact remained as to whether provider was plaintiffs' agent under [Restatement Third of Agency § 1.01](#) such that its knowledge could be imputed to plaintiffs. [Pharmacia Corp. Supplemental Pension Plan, ex rel. Pfizer Inc. v. Weldon](#), 126 F.Supp.3d 1061, 1075-1076.

D.Nev.Bkrcty.Ct.

D.Nev.Bkrcty.Ct.2012. Cit. in sup. Trustee for the certificate holders of a trust that held the beneficial interest in a promissory note executed prepetition by Chapter 13 debtor and his nondebtor spouse to finance their home purchase moved for relief from the Bankruptcy Code's automatic stay. After debtor opposed trustee's motion, he objected to a proof of claim filed by loan servicer for trustee, challenging servicer's status as a secured creditor. In granting trustee relief from the stay, and overruling debtor's objection to servicer's proof of claim, this court cited [Restatement Third of Agency § 1.01](#) in explaining that servicer was a subsidiary of mortgage lender, or at least was directly controlled by lender, and their mutual agreement that servicer and lender would act for one another established that servicer was an agent of lender, as demonstrated by, among other things, servicer's use of lender's tracking-and-indexing system for mortgage notes. [In re Stanley](#), 514 B.R. 27, 34.

D.N.J.Bkrcty.Ct.

D.N.J.Bkrcty.Ct.2014. Com. (c) quot. in case quot. in sup. Reorganized debtor requested reconsideration of the allowed claim of purchaser of a tax-sale certificate on property owned by debtor, seeking an order forfeiting the tax-sale certificate pursuant to the New Jersey Forfeiture Statute, and voiding purchaser's lien on the property. Sustaining debtor's objection to purchaser's claim, this court held that the tax-sale certificate was subject to forfeiture, and purchaser's lien was void, because purchaser knowingly charged debtor excessive and improper amounts, by way of purchaser's proofs of claim, in connection with debtor's redemption in its bankruptcy case of the tax-sale certificate. The court found that debtor adequately demonstrated that purchaser's agents knowingly charged debtor excessive and improper amounts, and thus purchaser could be imputed with the knowledge of those agents (in this case, purchaser's employees). [In re Princeton Office Park, L.P.](#), 504 B.R. 382, 396.

E.D.N.Y.

E.D.N.Y.2015. Cit. and quot. in sup.; coms. (f)(1) and (g) quot. in sup, quot. in case quot. in sup. Cell-phone user who received unsolicited text messages filed a putative class action against, among others, cruise line that contracted with advertising corporation, alleging that corporation sent messages on behalf of defendant in violation of the Telephone Consumer Protection Act and defendant was vicariously liable for corporation's violations. This court granted defendant's motion to dismiss, holding that defendant was not vicariously liable for corporation's acts, because plaintiff failed to allege that defendant and corporation had an agency relationship. Citing [Restatement Third of Agency § 1.01](#), the court determined that defendant could not be liable under a theory of vicarious liability, because plaintiff did not

allege facts to support a plausible claim that defendant had the power to control corporation or give interim instructions to corporation. [Jackson v. Caribbean Cruise Line, Inc.](#), 88 F.Supp.3d 129, 138, 139.

S.D.N.Y.

S.D.N.Y.2016. Com. (c) quot. in disc. Music-management company that had entered into an agreement for the sale of rights to songs subject to a valid copyright and had entered into an audit agreement for professional services regarding previously-paid royalties brought an action against, among others, estate of musician who wrote the songs, seeking a declaratory judgment that the agreements were not terminated and would continue in full force and effect. This court granted in part and denied in part defendants' motion to dismiss, holding that the sales agreement was invalid on its face and that it could not conclude as a matter of law whether the audit agreement was terminated. The court quoted [Restatement Third of Agency § 1.01](#), Comment c, in noting that not all relationships in which a person provided services satisfied the definition of "agency." [Artists Rights Enforcement Corp. v. Estate of King](#), 224 F.Supp.3d 231, 237.

S.D.N.Y.2016. Quot. in disc. Purported assignee of rights and interests in supply contracts of a bunker company that had collapsed brought an action against vessel, seeking payment for the value of a bunker that bunker company delivered to vessel before its collapse; physical supplier of the bunker filed an intervening action, alleging that it was entitled to a maritime lien against vessel because it was not paid for its fuel used in supplying the bunker to vessel. This court granted assignee's motion to dismiss supplier's intervening complaint and denied supplier's cross-motion for summary judgment. The court cited [Restatement Third of Agency § 1.01](#) for the definition of "agency" and §§ 2.01 and 2.03 in explaining that an agency relationship could result from either actual or apparent authority, and held, inter alia, that there was no evidence that demonstrated or even suggested that the company that chartered vessel had agreed to be bound by bunker's actions on its behalf or that it had acted in a way that suggested it had so agreed. [ING Bank N.V. Temara](#), 203 F.Supp.3d 355, 363.

S.D.N.Y.2014. Com. (g) quot. in sup. Trustee for the liquidation of broker-dealer filed a motion seeking approval of his decision to deny "customer status" under the Securities Investor Protection Act (SIPA) to certain banks with respect to their long-term repurchase agreements with broker-dealer. The bankruptcy court affirmed trustee's determination. Affirming, this court held, inter alia, that banks failed to establish the indicia of a fiduciary relationship necessary to prove entrustment and thereby to acquire customer status under SIPA. The court explained that, while banks emphasized certain rights that they had with respect to the securities that they delivered to broker-dealer, such as the right to return of the securities at any time and the right to demand return of the exact same securities, these were contractual rights, which did not create a fiduciary relationship. [In re Lehman Bros. Inc.](#), 506 B.R. 346, 356.

S.D.N.Y.2013. Quot. in sup. Wholesaler of over-the-counter healthcare products brought a breach-of-contract action, inter alia, against manufacturer that sold it certain products, after producer of the active ingredient contained in the products initiated a voluntary recall due to possible microbial contamination; manufacturer asserted third-party claims against producer, seeking common-law indemnification on the theory that manufacturer acted as producer's agent in conducting the recall. Granting producer's motion to dismiss the third-party complaint, this court held that manufacturer failed to state a claim for common-law indemnification. The court reasoned that manufacturer failed to allege that it was subject to producer's control in conducting the recall; rather, it merely alleged that producer requested that manufacturer recall the products at issue, and manufacturer complied. These allegations were insufficient to establish an agency relationship between the two parties such that manufacturer could state a claim for indemnification. [Prestige Brands Inc. v. Guardian Drug Co.](#), 951 F.Supp.2d 441, 448.

S.D.N.Y.2011. Com. (f)(2) quot. in case quot. in ftn. Institutional investors sued, among others, successor-in-interest to corporate parent of corporation spun off in an initial public offering (IPO), alleging that defendant was liable for false and misleading statements made about spun-off corporation's environmental-remediation reserves during and following the IPO. This court denied defendant's motion to dismiss plaintiffs' claim that defendant was liable on the basis of respondeat

superior for former parent corporation's primary violation in controlling the reporting of spun-off corporation's reserves. The court found sufficient plaintiffs' allegation that former parent corporation possessed either actual or apparent authority to act on behalf of defendant, specifically that defendant consented to parent corporation's acting on its behalf in implementing the terms of the master separation agreement between parent and spun-off corporation, and that defendant controlled and directed parent corporation's actions in so doing. [In re Tronox, Inc. Securities Litigation](#), 769 F.Supp.2d 202, 209.

S.D.N.Y.2009. Com. (c) quot. in ftn. Extraordinary commissioner of collapsed Italian dairy conglomerate, along with conglomerate's wholly owned subsidiary, brought suit for damages against accountants, banks, and others that allegedly assisted conglomerate's insiders in perpetrating a massive fraud involving the understatement of conglomerate's debt and the overstatement of its net assets. Granting summary judgment for defendants, this court held that plaintiffs' claims were barred by the doctrine of *in pari delicto*, which foreclosed recovery by a claimant that was a participant in the alleged wrong; because conglomerate's corrupt insiders were acting within the scope of their employment when they worked with defendants to defraud debtor, their actions and knowledge could be imputed to plaintiffs. The court noted that corporations could act only through their agents, including their employees and officers. [In re Parmalat Securities Litigation](#), 659 F.Supp.2d 504, 517.

S.D.N.Y.2009. Reporter's Note to com. (f)(2) quot. in sup. and cit. in ftn. (erron. cit. as com. (f)(2)). South African citizens filed class actions against subsidiary corporation and its parent corporation under the Alien Tort Claims Act, alleging that defendants aided and abetted torts in violation of customary international law by supplying the South African government with computers used to implement South Africa's racial pass laws, a crucial component of apartheid. Granting parent's motion to dismiss, this court held, *inter alia*, that plaintiffs failed to allege facts in support of its claim that subsidiary acted as parent's agent. The court noted that the relevant relationship between subsidiary and the South African government predated the relationship between subsidiary and parent, and concluded that plaintiffs' otherwise unsupported assertion that parent's management played "an increasing role in directing subsidiary's business activities" did not suffice to sustain a plausible claim that subsidiary acted as parent's agent in carrying out sales, particularly concerning a preexisting customer relationship. [In re South African Apartheid Litigation](#), 633 F.Supp.2d 117, 121. See case above.

S.D.N.Y.2009. Com. (f)(2) quot. in sup. and cit. in ftn. Black South African citizens brought class actions against multinational automotive, computer hardware and software, banking, and armaments corporations under the Alien Tort Claims Act, alleging that defendants violated customary international law by committing, under direct, aiding and abetting, and/or conspiracy theories, apartheid, extrajudicial killing, torture, and other acts. Denying in part defendants' motion to dismiss and denying defendants' motion for reconsideration, this court rejected defendants' arguments that they could not be held liable for the actions alleged in the complaints because those acts were properly attributed to their subsidiaries, indirect subsidiaries, or affiliates; while a parent corporation was not liable for the acts of its subsidiaries simply because it owned the subsidiary's stock, plaintiffs made substantial allegations to support liability against defendants under agency theories. [In re South African Apartheid Litigation](#), 617 F.Supp.2d 228, 272, 298. See case below.

S.D.N.Y.2007. Com. (d) cit. in disc. Diesel-oil buyer that issued a letter of credit to oil company's broker sued seller and oil company, alleging that oil company initiated a draw-down on the letter of credit after buyer had already paid seller the full amount due for the oil under an amendment to the contract of sale between buyer and seller that decreased the funds that oil company was to receive. Denying buyer's motion to confirm an *ex parte* order of attachment on funds held by the clerk of the court, this court held that buyer was not likely to succeed on the merits of its claim that it had adequately compensated oil company, because it failed to prove that seller was oil company's agent and was acting with apparent authority on behalf of oil company; the court rejected buyer's claim that oil company's alleged status as third-party beneficiary to the original and amended contracts established its awareness of them and seller's role as its agent in making them. [Musket Corp. v. PDVSA Petroleo, S.A.](#), 512 F.Supp.2d 155, 161.

S.D. Ohio

S.D. Ohio, 2016. Quot. in case quot. in disc. Consumer brought a purported class action against corporation, among others, alleging that defendant violated the Telephone Consumer Privacy Act by contracting with telemarketing company that placed telephone calls to a number plaintiff had listed on the national Do Not Call Registry This court granted defendant's motion to dismiss for lack of personal jurisdiction, holding that defendant had demonstrated by unrefuted evidence that there was no principal-agent relationship with telemarketing company where no agreements, arrangements, communications with, or awareness of the company existed and defendant could not have ratified telemarketer's conduct. The court noted that this case bore no resemblance to the classic definition of "common-law agency" as described in [Restatement Third of Agency § 1.01. Johansen v. Homeadvisor, Inc., 218 F.Supp.3d 577, 587.](#)

E.D. Pa.

E.D. Pa. 2013. Quot. in sup. Insurer filed a subrogation complaint against insured's neighbors, alleging that their negligence caused a fire that damaged insured's property; neighbors moved for summary judgment, and insurer, in opposing the motion, asserted that it was entitled to an adverse inference on the fire's causation based on a "vicarious spoliation" theory, because neighbors' insurer acted as neighbors' agent in gutting neighbors' property and failing to preserve evidence. Granting defendants' motion for summary judgment, this court held, among other things, that plaintiff failed to point to any evidence that could lead a reasonable factfinder to conclude that defendants' insurer was defendants' agent at the time the fire scene was allegedly spoliated, but, rather, relied merely on defendants' and insurers' assent to be bound by certain contractual duties in their insurance contract. The court explained that this argument overlooked the well-established principle that first-party insurance claims were adversarial proceedings between an insurer and its insured. Here, defendants' insurer acted on its own behalf to determine whether a covered loss existed for which it would owe defendants a duty to defend and/or indemnify, and defendants had no control over their insurer's actions. [State Farm Fire & Cas. Co. v. Steffen, 948 F.Supp.2d 434, 448.](#)

E.D. Pa. 2010. Com. (c) quot. in sup. Employee of tax-preparation franchisee brought civil-rights action against supervisors, franchisee, and franchisor, alleging that supervisors sexually harassed, assaulted, and threatened her during her employment. Denying in part defendants' motion to dismiss, this court held, inter alia, that plaintiff alleged sufficient facts to raise a plausible claim that she was an employee of franchisor for purposes of federal and state employment laws. The court reasoned, in part, that plaintiff might be able to show that franchisor authorized or ratified franchisee's alleged representations to her that franchisor was her sole or joint employer. The court rejected franchisor's argument that plaintiff could not have reasonably believed that franchisee and franchisor were the same entity; because the separate legal existence of the principal and agent was inherent in any common-law agency relationship, a third party's knowledge that an apparent agent was distinct from the principal could not render unreasonable that party's belief that the apparent agent had authority to act on the principal's behalf. [Myers v. Garfield & Johnson Enterprises, Inc., 679 F.Supp.2d 598, 614.](#)

E.D. Pa. 2007. Cit. in sup. Stock exchange's former seat owners, who, after demutualization of the stock exchange into a private stock corporation, became shareholders in the corporation, brought a securities-fraud class action against members of stock exchange's board of governors and institutional investors, alleging that their ownership interests were diluted as a result of defendants' fraud. Granting defendants' motions to dismiss, this court held that plaintiffs' claim under the securities laws for rescission of the contract consisting of the demutualization transaction and related deals with the investors failed as a matter of law because plaintiffs did not adequately plead privity with the board. The court reasoned that evidence of board chairman's informal memos, which promised a vote on equity rights, was insufficient to show that plaintiffs controlled the board so as to establish an agency relationship providing the requisite privity. [McGowan Investors LP v. Frucher, 481 F.Supp.2d 405, 412.](#)

M.D.Pa.

M.D.Pa.2014. Quot. in sup. After wife of a nursing-home resident who died after allegedly suffering a deep-tissue injury that deteriorated into necrotizing fasciitis sued nursing home in state court, nursing home filed a federal action seeking to stay the state-court proceedings and to compel wife to arbitrate pursuant to the arbitration agreement that she signed on resident's behalf upon his admission. This court granted nursing home's motion to compel arbitration as to wife's survival-action claims only, holding, inter alia, that the arbitration agreement was properly executed when it was signed by wife, rather than resident, because there was sufficient evidence to establish that wife had express authority from resident to sign the agreement on his behalf, pursuant to the agency principles set forth in [Restatement Third of Agency § 1.01](#). The court pointed to undisputed evidence that resident was blind but had no mental infirmities, that he requested that wife sign the arbitration agreement for him, that wife had the opportunity to read and review the documents related to resident's admission and signed all such documents, that resident was present throughout the entire process, and that he took no further action after wife signed the documents. [Northern Health Facilities v. Batz](#), 993 F.Supp.2d 485, 489.

M.D.Pa.2009. Cit. in case quot. in sup. African-American family brought racial-discrimination and other claims against hotel and its front desk clerk after clerk denied father's request for a room for himself, his fiancée, and their minor daughter. Denying summary judgment for defendants, this court held, inter alia, that questions of fact remained as to whether fiancée and daughter had standing to assert a discrimination claim in light of plaintiffs' allegations that father was acting as their agent and attempted to enter into a contract with defendants for a room on their behalf. The court noted that individuals, including minors, had the capacity to act as principal in an agency relationship if, at the time the agent took action, the individual would have had capacity if acting in person, and that the appointment of an agent by a minor was not void, but merely voidable. [Shumate v. Twin Tier Hospitality, LLC](#), 655 F.Supp.2d 521, 531.

W.D.Pa.

W.D.Pa.2016. Cit. in fn. (erron. cite as § 101). Nursing-home resident's son individually and as personal representative of resident's estate brought wrongful-death and survival claims against nursing home, alleging that defendant was negligent in its care of resident, which led to resident's ulcer worsening, additional health complications, and death. This court denied defendant's motion to dismiss on the basis of an arbitration agreement that son signed on resident's admission to the home. Citing [Restatement Third of Agency § 1.01](#), the court explained that son, as resident's agent, contracted away resident's right to a jury trial for his wrongful-death claim, and concluded, however, that resident's claim would not be dismissed, because, under Pennsylvania law, it could not be severed from the survival claim of son, whose right was not contracted away by the agreement. [Grkman v. 890 Weatherwood Lane Operating Company, LLC](#), 189 F.Supp.3d 513, 521.

D.S.D.

D.S.D.2013. Quot. in fn. After owners of Section 8 housing sued the South Dakota Housing Authority (SDHA) for breach of their housing-assistance-payments contracts, SDHA brought a third-party complaint against the U.S. Department of Housing and Urban Development (HUD), alleging, inter alia, that it was entitled to indemnification as HUD's agent in defending the action by plaintiffs. Granting HUD's motion for partial dismissal and judgment on the pleadings, this court held, among other things, that SDHA was not an agent of HUD. The court reasoned that SDHA was created and governed by state law, it was an independent public instrumentality exercising essential public functions, and it was not under federal control in exercising many of its powers. [Cathedral Square Partners Ltd. Partnership v. South Dakota Housing Development Authority](#), 966 F.Supp.2d 862, 872-873.

E.D.Tenn.

E.D.Tenn.2016. Com. (c) quot. in sup. Municipal corporation that ran a 911 call center filed, inter alia, a breach-of-fiduciary-duty claim against telecommunications company, alleging that defendant failed to bill its customers for 911 services and to remit the charges to plaintiff, as required under Tennessee law. This court granted defendant's motion for summary judgment, holding that there was insufficient evidence to support a reasonable jury finding that the parties had an agency relationship. The court rejected plaintiff's argument that the parties had a per se fiduciary relationship because, as set forth in [Restatement Third of Agency § 1.01](#), Comment c, plaintiff had control over defendant, and explained that, under Tennessee law, plaintiff's ability to set the applicable charge and to require defendant to assess that charge on its customers was not sufficient evidence of control. [Hamilton County Emergency Communications District v. BellSouth Telecommunications, LLC](#), 154 F.Supp.3d 666, 688.

W.D.Tenn.

W.D.Tenn.2017. Com. (e) quot. in sup. Insurer sued insurance agents who agreed to sell plaintiff's life-insurance policies in exchange for commissions, alleging that defendants breached the parties' contracts by failing to repay commissions earned on the sale of policies that were later surrendered by policyholders; defendants counterclaimed, alleging that they were entitled to retain some of the commissions based on plaintiff's failure to inform them of certain features of the policies that ultimately resulted in the surrender of all of the policies that defendants sold on behalf of plaintiff. This court granted summary judgment for plaintiff, holding, among other things, that plaintiff did not have a fiduciary duty to disclose the policy features at issue to defendants as a matter of law. The court reasoned, in part, that, while a principal had a duty to deal with its agent fairly and in good faith, that duty was not fiduciary in nature under [Restatement Third of Agency § 1.01](#). [Minnesota Life Insurance Company v. Financial Institution Consulting Corporation](#), 280 F.Supp.3d 1057, 1067.

S.D.Tex.

S.D.Tex.2017. Quot. in sup. After an energy company collapsed due to fraud, investors who participated in company's stock-option program through non-discretionary investment accounts with brokerage firm sued firm, firm's corporate parent, and another subsidiary of parent that provided investment-banking services to company, alleging that defendants breached a fiduciary duty to disclose information about company's fraudulent activities and financial decline to plaintiffs. This court granted defendants' motion to dismiss, holding that, because plaintiffs' accounts with firm were non-discretionary, firm's duty to plaintiffs was restricted to executing plaintiffs' orders, and plaintiffs failed to show that an informal fiduciary relationship of trust and confidence arose between plaintiffs and firm or the other defendants that gave rise to a duty to disclose. The court cited [Restatement Second of Agency § 1](#) and [Restatement Third of Agency § 1.01](#) in noting that, while Texas law provided that the relationship between a broker and its customer was that of principal and agent, the fiduciary duty arising from that relationship was a narrow one that was restricted to the scope of the agency. [In re Enron Corporation Securities, Derivative & "ERISA" Litigation](#), 238 F.Supp.3d 799, 851.

S.D.Tex.2009. Com. (f) cit. and quot. in sup. Provider of pharmacy-care services sued hospitals, seeking to recover payments for services rendered under the parties' pharmacy agreements. Granting summary judgment for provider on hospitals' counterclaim for breach of fiduciary duty, this court held, inter alia, that provider did not owe hospitals a general fiduciary duty because the agreements did not create an agency relationship between the parties. The court reasoned that provider did not perform its contractual obligations subject to hospitals' right to control, because the agreements delegated control of the means and details of the provisions of pharmacy services to provider, and no agency relationship could exist without such a right of control. [Cardinal Health Solutions, Inc. v. Valley Baptist Medical Center](#), 643 F.Supp.2d 883, 887-889.

S.D.Tex.Bkrtcy.Ct.

S.D.Tex.Bkrty.Ct.2012. Quot. in sup. Chapter 13 debtor, who had used a loan broker to assist her in obtaining a loan, objected to lender's proof of claim, arguing that lender and loan broker were not truly independent entities, and that lender therefore was liable for broker's violations of the Texas Credit Services Organization (CSO) Act. This court disallowed lender's claim. The court concluded, however, that, although lender acted as broker's agent in drafting broker's credit services agreement with debtor and thus was liable for false and misleading representations included in that agreement in violation of the CSO Act, debtor was not entitled to have the claim disallowed on the basis of lender's violations of the Act, since she was not aware of lender's misrepresentations and thus could not demonstrate that she was injured by them. [In re Grayson](#), 488 B.R. 579, 589.

W.D.Tex.

W.D.Tex.2009. Com. (c) quot. in sup. Female police officer sued prospective employer, claiming that employer decided not to hire her as an advisor to instructors at an all-female police academy in Afghanistan after a doctor who worked for a contractor of employer allegedly unlawfully discriminated against her by improperly considering her gender when deciding to give her a failing score on a psychological evaluation. Denying summary judgment for employer, this court rejected employer's argument that it could not be liable for relying on the opinion of an independent professional when making its hiring decisions, holding, inter alia, that doctor and contractor were employer's agents for purposes of determining whether plaintiff was psychologically suited to perform her mission in Afghanistan. [Jimenez v. DynCorp Intern., LLC](#), 635 F.Supp.2d 592, 601.

D.Vt.

D.Vt.2015. Com. (f) quot. in sup. After college student hit his head while riding a skateboard-like device known as a longboard and died two days later, student's father, individually and as executor of his estate, brought claims for wrongful death and failure to warn against roommate, who loaned him the longboard, and against a New Hampshire longboard shop that sponsored roommate. While denying on other grounds shop's motion to dismiss for lack of personal jurisdiction, this court held that specific jurisdiction over shop did not lie. The court reasoned that shop did not have an agency relationship with roommate within the meaning of [Restatement Second of Agency § 1](#) or [Restatement Third of Agency § 1.01](#), citing defendants' evidence that there was no contract or employment relationship between shop and roommate, that shop had no control over roommate's actions, and that, on the day of the accident, roommate was not acting in any way as an agent, representative, ambassador, sponsored athlete, or in any other role on behalf of shop. [Cernansky v. Lefebvre](#), 88 F.Supp.3d 299, 307.

E.D.Va.

E.D.Va.2016. Cit. in sup. Former U.S. Special Counsel/head of the U.S. Office of Special Counsel (OSC) who accepted administrative leave under threat of removal from office filed, inter alia, a breach-of-fiduciary-duty claim against former deputy special counsel at the OSC, alleging that defendant was part of a conspiracy to oust plaintiff from the OSC and defendant resigned from his position so that he could be appointed special counsel. This court granted defendant's motion to dismiss, holding that plaintiff failed to state a claim, because there was no evidence that defendant owed plaintiff a fiduciary duty. The court cited [Restatement Third of Agency § 1.01](#) in explaining that if defendant had any fiduciary duties, they ran to the OSC, not to plaintiff. [Bloch v. Executive Office of the President](#), 164 F.Supp.3d 841, 862.

E.D.Va.2013. Quot. in sup. Mortgage insurer, as assignee of property owner's rights, brought a claim for, inter alia, breach of fiduciary duty against owner's insurance broker and agency for allegedly failing to follow owner's instruction to place property insurance on the property, seeking to recover the amount it paid to mortgage lender after the property was destroyed in a fire. Denying defendants' motion to dismiss, this court held that plaintiff sufficiently pled an action for breach of fiduciary duty against defendants. The court reasoned that broker, along with insurance agency, owed

certain fiduciary duties common to all broker-client relationships, and plaintiff alleged that defendants breached their fiduciary duty by failing to place insurance on the property before the previous insurance policy lapsed prior to the fire; moreover, although defendants were correct that the alleged breach did not cause the fire itself, it was certainly the cause of property owner's damages. [Cincinnati Ins. Co. v. Ruch](#), 940 F.Supp.2d 338, 347.

E.D.Va.2013. Quot. in sup. South Korean corporate defendant moved to quash service of process and to dismiss an indictment charging it and five of its officers and employees with violations of federal trade-secret statutes and obstruction of justice. Granting in part defendant's motion to quash service, this court held, inter alia, that the government failed to prove that service of process on defendant's wholly owned New Jersey subsidiary was effective service on defendant under the theory that subsidiary was defendant's managing or general agent, because the government did not present sufficient facts to show that subsidiary had authority (or acted as if it had authority) to take actions with legal consequences for defendant. While subsidiary sold defendant's products to American and Canadian customers, it did so by binding itself, and not defendant, to contracts, and then purchasing the products from defendant and distributing them to the customers. [U.S. v. Kolon Industries, Inc.](#), 926 F.Supp.2d 794, 810.

W.D.Wash.

W.D.Wash.2007. Quot. in case quot. in disc. (T.D. No. 1, 2000). Insured freight corporation under a cargo legal liability insurance policy sued insurer, seeking indemnification for its settlement of two lawsuits against it by customers asserting claims for lost or damaged shipments. On remand, this court granted summary judgment for insurer, holding that, because the facts were insufficient to establish an agency relationship between insured and the United States Postal Service (USPS), with which insured had contracted to make final delivery to consignees, insured was not liable to the customers for the losses at issue, which had occurred after insured had delivered the packages to the USPS; thus, insurer was not obligated to provide coverage under the policy. The court found that an agency relationship was lacking because insured did not control the relevant manner of performance by the USPS. [Airborne Freight Corp. v. St. Paul Fire & Marine Ins. Co.](#), 491 F.Supp.2d 989, 996.

W.D.Wash.Bkrcty.Ct.

W.D.Wash.Bkrcty.Ct.2016. Cit. in case quot. in sup. Trustee for Chapter 7 debtor that was the corporate parent of bank brought an adversary proceeding against receiver appointed for bank, after receiver obtained certain tax refunds owed to bank, seeking to avoid the transfers of the tax refunds pursuant to a tax-allocation agreement between debtor and bank. After a hearing, this court held that the tax refunds were property of the estate. The court based its decision in part on its determination that the language of the agreement created a debtor-creditor relationship, rather than a principal-agent relationship that gave bank any control over debtor's filing of tax returns or over how tax refunds would be handled. The court pointed out that, under the agreement, bank did not exercise any control over debtor's activities, a required element of an agency relationship under [Restatement Third of Agency § 1.01](#). [In re Venture Financial Group, Inc.](#), 558 B.R. 386, 402.

W.D.Wash.Bkrcty.Ct.2014. Quot. in sup. Following debtor's prepetition default on her mortgage loan and the subsequent execution and recording of a notice of trustee's sale, debtor brought an adversary proceeding against mortgage lender, loan servicer, and document custodian, alleging violations of the Washington Deed of Trust Act (Act). Granting defendants' motion for summary judgment, this court held, inter alia, that defendants did not act without lawful authority or materially violate the Act. The court concluded that document custodian was loan servicer's agent for purposes of physically possessing the promissory note, and thus servicer was a "holder" and "beneficiary" of the note for purposes of the Act. Citing [Restatement Third of Agency § 1.01](#), the court reasoned that servicer exercised significant control over the details of document custodian's work, both parties assented to the principal agent relationship, and servicer also directly controlled document custodian with regard to possession of the note. [In re Butler](#), 512 B.R. 643, 654.

N.D.W.Va.

N.D.W.Va.2017. Com. (f) cit. in disc. Consumer advocate brought an action under the Telephone Consumer Protection Act (TCPA) against call center and market-research firm that designed public-opinion survey, alleging that she received an unwanted political survey call. This court denied firm's summary-judgment motion, holding, inter alia, that plaintiff demonstrated sufficient evidence of standing, because unwanted telephone calls caused concrete harm, and material facts existed as to whether firm was vicariously liable for calls made by co-defendant on its behalf. Citing [Restatement Third of Agency § 1.01](#), Comment *f*, the court explained that the essential element of an agency relationship was the principal's control over the agent's actions and, in the context of the TCPA, this was characterized as control over the manner and means of the agent's calling activities. [Mey v. Venture Data, LLC, 245 F.Supp.3d 771, 787.](#)

N.D.W.Va.2016. Cit. in disc., cit. in case quot. in sup. Consumers brought actions under the Telephone Consumer Protection Act against, among others, manufacturers of home-security systems, alleging that manufacturers were vicariously liable for telemarketing calls made by authorized dealers that sold manufacturers' systems. This court granted manufacturers' motions to dismiss, holding that consumers failed to show that dealers were agents of manufacturers under principles of agency law set forth in [Restatement Third of Agency § 1.01](#). The court explained the evidence did not support findings that dealers were subject to the control of manufacturers, that dealers were acting primarily for manufacturers' benefit, or that manufacturers turned a blind eye when they learned of dealers' illegal telephone calls. [In re: Monitronics International, Inc., Telephone Consumer Protection Act Litigation, 223 F.Supp.3d 514, 520, 524.](#)

E.D.Wis.

E.D.Wis.2015. Quot. in sup. Relator brought a qui tam action for violations of the False Claims Act (FCA) against common carrier that received subsidies under the federal Education Rate Program, alleging that defendant fraudulently obtained subsidies by falsely certifying that it was providing telecommunications services to schools and libraries at the lowest rate charged to similarly situated customers. The trial court dismissed the action; the court of appeals reversed and remanded. On remand, this court denied defendant's motion to dismiss, holding that plaintiff adequately pleaded that the government provided defendant with money within the meaning of the FCA. Citing the definition of "agent" in [Restatement Third of Agency § 1.01](#), the court determined that plaintiff could proceed even if the "provided" requirement of the FCA was not met, because plaintiff sufficiently alleged that defendant requested money from an agent of the United States that administered the fund for the program. [U.S. ex rel. Heath v. Wisconsin Bell, Inc., 111 F.Supp.3d 923, 928.](#)

E.D.Wis.2014. Quot. in sup. After employee was terminated on the basis that a random drug test conducted by employer's subsidiary found that her urine sample contained a controlled substance, employee sued provider of independent medical-review-officer services, alleging that the test results were incorrect and that provider had erroneously confirmed the positive results provided by employer's subsidiary. This court denied provider's motion for summary judgment, in which provider argued that employee's claims against it were barred by a settlement that employee had entered into with employer and subsidiary, holding that provider was not an agent of either employer or subsidiary under [Restatement Third of Agency § 1.01](#) such that it was covered by the settlement. The court noted that one of the key roles of medical-review officers was to avoid the level of control that would give rise to an agency relationship and to ensure independence from the employer or the lab. [Kugler v. LexisNexis Occupational Health Solutions, Inc., 16 F.Supp.3d 999, 1003.](#)

Ariz.

Ariz.2015. Quot. in sup.; com. (b) cit. and quot. in sup. Sublessee who was evicted by lessee/airport authority filed claims against county that owned the airport, alleging that defendant was airport authority's principal and was liable for its agent's breach of the sublease, because the statute that allowed defendant to lease the property to airport authority designated airport authority as an agent or instrumentality of defendant. The trial court granted defendant's motion for

summary judgment. This court affirmed, holding that airport authority was not defendant's agent. Citing [Restatement Second of Agency § 1](#) and [Restatement Third of Agency § 1.01](#), the court explained that a statute could use the term "agency," even though the common-law requirements for agency were not met, and determined that the statutory language at issue here did not create an agency relationship. [DBT Yuma, L.L.C. v. Yuma County Airport Authority](#), 238 Ariz. 394, 397, 361 P.3d 379, 382.

Ariz.2009. Quot. in sup. Prospective buyer sued seller, seeking specific performance of a contract for the purchase and sale of 20 acres of land. The trial court denied buyer's request for specific performance, finding that buyer's agent had acted inequitably by, among other things, using his own money rather than buyer's to provide the earnest-money deposit required under the contract, and then lying about it. The court of appeals reversed. Vacating and affirming the trial court, this court held that agent's inequitable acts could be imputed to buyer whether or not buyer knew of agent's misconduct. The court reasoned that, under ordinary principles of agency law, an agent's acts bound the agent's principal, and principals were not entitled to benefit from the inequitable conduct of their agents. [Queiroz v. Harvey](#), 220 Ariz. 273, 205 P.3d 1120, 1122.

Ariz.2007. Coms. (b) and (c) cit. in disc. Homeowner's insurer, as subrogee, brought a strict-products-liability action against seller of water-filtration system and manufacturer of allegedly defective canister component. The trial court entered a default judgment against manufacturer, and denied insurer's motion for partial summary judgment asserting that defendants were jointly and severally liable; the court of appeals affirmed. Affirming, this court held that the legislative abolition of joint and several liability in 1987 extended to strict-products-liability actions. The court rejected insurer's argument that a statutory exception to several-only liability based on an agency relationship between defendants applied in this case; not only did the mere purchase of a product from a supplier not establish an agency relationship between buyer and seller, but also such a relationship could not be imputed here because the various participants in the chain of distribution were liable only for their own actions in distributing the defective product. [State Farm Ins. Companies v. Premier Manufactured Systems, Inc.](#), 217 Ariz. 222, 172 P.3d 410, 414.

Ariz.App.

Ariz.App.2013. Com. (c) quot. in sup. Defendant was convicted in trial court of sexual abuse and sexual conduct with a minor based on acts he had committed against his 15-year-old stepdaughter. On remand, this court affirmed, holding, inter alia, that the trial court did not abuse its discretion in denying defendant's motion to suppress his statements to police. The court rejected defendant's argument that a police detective enlisted defendant's wife as an agent of the state in an effort to elicit the statements from defendant, despite his invocation of the right to counsel several days earlier. The court reasoned that wife initiated the contact with the detective, and only then did the detective suggest that defendant voluntarily submit to a polygraph test; that the detective neither ordered nor coerced wife to relay any information to defendant; and that the detective offered wife no reward apart from the possibility of closing the investigation, which, if defendant were innocent and if stepdaughter's recantation were true, would have been in her own family's interests. [State v. Yonkman](#), 312 P.3d 1135, 1138.

Ariz.App.2011. Quot. in sup, cit. in ftn. Real estate developer sued surveying firm for breach of contract, inter alia, after firm, which was hired by developer's general contractor, staked an apartment building in a location inconsistent with developer's site plan, thereby violating setback and floodplain requirements. The trial court entered judgment on a jury verdict for plaintiff. Reversing and remanding, this court held that there was insufficient evidence of the existence of a contract between plaintiff and defendant based upon an agency theory. The court pointed to evidence that plaintiff did not exercise authority over the hiring process or decisions of general contractor, which acted as an independent contractor; moreover, even if contractor had been plaintiff's agent, there was no evidence that contractor ever disclosed to defendant that it was acting in that capacity when it engaged defendant's services, and thus defendant had no notice that plaintiff was a party to defendant's agreement with contractor. [Goodman v. Physical Resource Engineering, Inc.](#), 270 P.3d 852, 856.

Ariz.App.2009. Quot. in sup. Home builders association sued city, seeking a declaration that city's development impact fee ordinances were unlawful under a state statute requiring city to offset the fees with added tax revenues. The trial court denied special action relief for plaintiff. Affirming, this court held, inter alia, that city consultant's testimony was admissible at an evidentiary hearing to determine whether city had complied with the statutory requirement that it give good-faith consideration to future taxes to be collected from development property owners, since it showed consultant's state of mind as he created the plan that city adopted on his advice; under agency principles, city consultant's testimony of his investigation and consideration of relevant future revenues constituted evidence of city's "consideration" of those revenue sources. [Home Builders Ass'n of Cent. Arizona v. City of Goodyear](#), 223 Ariz. 193, 221 P.3d 384, 390.

Ariz.App.2007. Quot. in disc. Estate of nursing-home patient sued nursing home for, in part, negligence and breach of contract. The trial court dismissed the complaint and compelled arbitration. Affirming, this court held, inter alia, that patient had implicitly authorized his wife to act as his agent to bind him to the alternative-dispute-resolution agreement that she signed when patient was admitted to defendant's facility. The court concluded that, absent any contrary evidence, the medical records that defendant produced, revealing a history of wife's acting and making decisions on patient's behalf, reflected that patient intended wife to act as his agent. [Ruesga v. Kindred Nursing Centers, L.L.C.](#), 215 Ariz. 589, 161 P.3d 1253, 1261.

Cal.App.

Cal.App.2017. Com. (c) cit. and quot. in sup. Buyer of a vineyard and building brought an action against sellers after discovering structural and other problems with the building that sellers did not disclose at the time of the sale. The trial court granted defendants' motion for summary judgment. This court affirmed, holding that plaintiff failed to raise a triable issue of material fact regarding the imputation of any knowledge of construction professionals that defendants had employed. The court cited [Restatement Third of Agency § 1.01](#), Comment *c*, in explaining that, while defendants had a contractual relationship with the construction professionals, the evidence showed that any information gained by the professionals would have been gained while they were acting in the role of designers and builders, not in the role of agents. [RSB Vineyards, LLC v. Orsi](#), 223 Cal.Rptr.3d 458, 466, 467.

Cal.App.2011. Cit. in ftn. Association of rental housing owners filed a petition for a writ of mandate challenging city's residential rental inspection ordinance, alleging, among other things, that the ordinance was unconstitutional in that it forced landlords to act as city's "agents" by requiring landlords to exercise good faith in attempting to obtain tenant consent to city inspection. The trial court ruled that the ordinance was unconstitutional on its face. Vacating and remanding, this court held, among other things, that there was no conflict, express or implied, between the ordinance's good faith requirement and the general law of agency. The court explained that the "good faith requirement" was not a bilateral agreement between city and landlords, a necessary prerequisite for creation of an agency relationship. [Rental Housing Owners Assn. Of Southern Alameda County, Inc. v. City of Hayward](#), 200 Cal.App.4th 81, 90, 133 Cal.Rptr.3d 155, 162.

Cal.App.2007. Quot. in sup., coms. (c) and (d) cit. and quot. in sup. Calendar-distribution corporation and its owner sued former owners of the corporation for, in part, breach of the duty of loyalty, alleging that defendants neglected their duties as corporation's managing agents, and misappropriated corporation's customer list and used it to solicit business for a competing company. The trial court granted plaintiffs a preliminary injunction. Affirming, this court held, inter alia, that plaintiffs were likely to succeed in establishing that defendants owed them a duty of loyalty. The court reasoned that defendants' duty of loyalty, particularly the duty not to compete, arose, not from the purchase contract's noncompetition clause, which only prohibited defendants from competing "as an owner," but from the parties' agency relationship, to which defendants assented when they agreed to act as managing agents. [Huong Que, Inc. v. Luu](#), 150 Cal.App.4th 400, 411, 413-415, 58 Cal.Rptr.3d 527, 535, 538, 539.

Colo.

Colo.2012. Com. (g) cit. and quot. in diss. op. Grantor of a deed of trust on a condominium unit in favor of bank sued bank and public trustee that sold the unit at a foreclosure sale, seeking to enjoin the issuance of the deed to the successful bidder and to compel trustee to allow her to redeem. While the trial court determined that bank failed to strictly comply with the notice requirements of the rule governing orders authorizing sales under powers, it declined to declare the sale null and void, and, after a bench trial, dismissed grantor's redemption claim. The court of appeals affirmed in part. Affirming in part, this court held that, because the parties received actual notice and no prejudice resulted, the failure to strictly comply with notice requirements did not mandate setting aside a completed foreclosure sale. The dissent argued that it was error to assume that co-grantor's estate, as an interested party, had constructive notice of the foreclosure proceedings through actual notice to plaintiff, who was also personal representative of co-grantor's estate, since it was not necessarily the case that a fiduciary relationship also involved an agency relationship. [Amos v. Aspen Alps 123, LLC, 2012 CO 46, 280 P.3d 1256, 1267.](#)

Colo.App.

Colo.App.2009. Quot. in sup. Concrete-pumping business sued competitor and former employee who resigned and began working for competitor, alleging, among other things, breach of the duty of loyalty and aiding and abetting such a breach. After a bench trial, the trial court found in favor of defendants. Affirming in part, this court held, inter alia, that, while employee owed plaintiff a duty of loyalty because he was a manager with sufficient authority that the principal/agent analogy was apt, he did not breach his duty to plaintiff. The court noted that permissible pretermination activities included "arranging for space and equipment," and that the extent of employee's conversations with competitor regarding competitor's equipment needs was minimal. [Lucht's Concrete Pumping, Inc. v. Horner, 224 P.3d 355, 360.](#)

Colo.App.2007. Com. (e) quot. in disc. and cit. in sup. Broker that sold insurance protecting ski resorts against the risk of reduced snowfall brought suit for breach of fiduciary duty against insurer that wrote the insurance policies, alleging that defendant, as the principal in an agency relationship with plaintiff, owed it a fiduciary duty, and breached its duty by improperly handling the ski resorts' claims. The trial court entered judgment on a jury verdict for plaintiff. Reversing on this claim and remanding, this court held that defendant did not owe plaintiff any fiduciary duty under the circumstances, since, as a matter of law, a principal was not a fiduciary of an agent; even if a principal could owe such a duty under some circumstances, no such circumstances existed here because plaintiff was an independent broker looking out for its own interests. [MDM Group Associates, Inc. v. CX Reinsurance Co. Ltd., 165 P.3d 882, 889.](#)

Conn.

Conn.2017. Quot. in ftn.; com. (c) quot. in ftn. Building contractor brought a breach-of-loyalty claim against former employee, alleging that defendant simultaneously worked for plaintiff and a competitor and accepted kickbacks from a subcontractor. The trial court entered judgment for plaintiff. This court affirmed in part, holding that the trial court did not abuse its discretion in declining to order defendant to forfeit all of the compensation he had received from plaintiff and competitor during the period in question, and erred in imposing a constructive trust. Citing [Restatement Third of Agency § 1.01](#), the court determined that the trial court considered all of the facts and circumstances, such as defendant's intentional and deliberate disloyal acts and plaintiff's lack of harm suffered as a result, in determining whether to invoke the remedies of forfeiture and disgorgement, and that plaintiff failed to present evidence to infer that defendant deposited kickback funds into the joint account, given that the evidence showed that they were paid to defendant in cash. [Wall Systems, Inc. v. Pompa, 154 A.3d 989, 998.](#)

Conn.App.

Conn.App.2016. Quot. in sup. Contractor brought a breach-of-contract action against condominium's property manager, alleging that defendant failed to pay an outstanding balance for services and repairs to the condominium that plaintiff provided pursuant to the parties' oral agreement. The trial court denied defendant's motion to strike the complaint and entered judgment for plaintiff. This court affirmed, holding that defendant was liable for the debt of its principal, the condominium association, because it failed to disclose the principal's identity to plaintiff. Citing [Restatement Third of Agency § 1.01](#) for the definition of "agency," the court explained that, generally, a principal was liable for the acts of its agent, but an agent could remain personally liable in certain circumstances when dealing with a third party. [Pelletier Mechanical Services, LLC v. G & W Management, Inc.](#), 162 Conn.App. 294, 305, 131 A.3d 1189, 1197.

Conn.App.2010. Com. (c) quot. in sup. Prospective purchaser of commercial property sued seller for breach of contract, breach of the implied covenant of good faith and fair dealing, and violation of the Connecticut Unfair Trade Practices Act (CUTPA), after seller terminated the parties' purchase-and-sale agreement and accepted an offer from a third party to buy the property. The trial court entered judgment for plaintiff. Affirming, this court held that defendant acted in bad faith, for purposes of the implied covenant of good faith and fair dealing, in terminating the agreement; there was ample evidence that it was within the scope of authority of defendant's real-estate agent to conduct contract negotiations with third-party purchaser on behalf of defendant, and that third party's more favorable purchase offer was a motive for defendant's termination of its contract with plaintiff. The court also held that the conduct of defendant's attorney in negotiating with third party could be imputed to defendant for purposes of liability under CUTPA, since attorney was acting within the scope of his authority as defendant's agent. [Landmark Investment Group, LLC v. Chung Family Realty Partnership, LLC](#), 125 Conn.App. 678, 692, 703, 10 A.3d 61, 74, 81.

Conn.App.2010. Quot. in case quot. in disc. In a property dispute between university and limited-liability corporation, the trial court entered a judgment of possession in favor of university based on a settlement agreement between the parties. The trial court subsequently denied university's motion to open and set aside the judgment. Affirming, this court held that the trial court correctly concluded that university's attorney possessed apparent authority to enter into a settlement agreement and bind university to the terms of the agreement; university's vice president, by his failure to indicate that his approval was necessary, caused or allowed limited-liability corporation to believe that university's attorney had the authority to settle the dispute. [Yale University v. Out of the Box, LLC](#), 118 Conn.App. 800, 807, 990 A.2d 869, 874.

Conn.App.2009. Quot. in sup. Prospective sellers of real property sued limited-liability company and principal of company who sought to acquire the property for a proposed auto raceway, after defendants were unable to obtain the necessary zoning approvals and the sale did not take place. After a bench trial, the trial court rendered judgment for defendants. Affirming, this court held, inter alia, that a licensed real-estate agent who was acting as the parties' dual agent for the sale did not have actual authority to bind defendants by accepting certain unilateral changes made by plaintiffs to the contractual closing date. The court cited testimony by both principal and agent that at no time did principal give agent the authority to bind company, and that everyone involved with company understood that no one except principal himself had the authority to bind company. [LeBlanc v. New England Raceway, LLC](#), 116 Conn.App. 267, 274, 976 A.2d 750, 758.

Del.

Del.2011. Quot. in sup. and cit. in ftn. Seller brought breach of fiduciary duty and other claims against real estate agent who represented her in the sale of her house to real estate investor, after learning that agent also represented investor in a second sale of the same house on the same day to a second buyer at a higher price. After a jury trial, the trial court granted agent's motion for a directed verdict. Reversing and remanding for a new trial, this court held that plaintiff raised genuine and disputed issues of material fact as to whether agent breached his fiduciary duties to seller. The court noted that seller and agent manifested the necessary assent to form an agency relationship, under which agent owed seller traditional fiduciary duties, by signing a listing agreement for the house. [Estate of Eller v. Bartron](#), 31 A.3d 895, 897.

D.C.App.

D.C.App.2007. Quot. in sup., com. (e) quot. in sup. Homeowner's brother, on behalf of homeowner, sued real estate agent he hired to sell homeowner's property for, among other things, breach of fiduciary duty. After a bench trial, the trial court entered judgment in favor of plaintiff. Affirming, this court held, inter alia, that there was ample evidence to support the trial court's finding that defendant breached his fiduciary duty to plaintiff by, among other things, failing to memorialize the terms of the parties' oral contract in a written listing agreement. The court stressed that the fiduciary duty owed by a real estate agent required the exercise of the highest fidelity toward the principal and encompassed an obligation to inform the principal of every development affecting his interest. [Jenkins v. Strauss](#), 931 A.2d 1026, 1032, 1033.

Idaho

Idaho, 2016. Cit. in sup. Buyers of real property brought a claim to rescind the sale against seller and seller's son and daughter-in-law, alleging that defendants engaged in fraud and misrepresentation in relation to the disclosure of the sources of water to the property. The trial court granted summary judgment for defendants. Affirming, this court held that summary judgment was proper as to seller's son and daughter-in-law because it found that no agency relationship existed between them and seller with regard to the sale of the property. Looking to the definition of "agency" set forth in [Restatement Third of Agency § 1.01](#), the court noted that the actions of seller's son and daughter-in-law in passing information between seller and seller's real-estate agent, and providing information to both seller and buyer regarding the property, were insufficient to show that they were authorized to act on behalf of seller. [Humphries v. Becker](#), 366 P.3d 1088, 1095.

Ill.App.

Ill.App.2014. Com. (c) quot. in sup. Shareholder of a 50% interest in three companies brought, inter alia, claims for civil conspiracy against other 50% shareholder and other shareholder's wife, alleging that defendants conspired to convert funds belonging to plaintiff by transferring those funds from the companies to a payroll-servicing company wholly owned by other shareholder and by keeping 100% of the rental profits. The trial court granted defendants' motion to dismiss the conspiracy claims. Affirming in part, this court held that plaintiff failed to state claims for civil conspiracy against wife, because his allegations that wife was responsible for issuing checks, initiating transfers from companies to payroll-servicing company where she worked, and making rental payments at her husband's request clearly asserted that wife was acting as husband's agent. The court pointed out that the general rule was that there could be no conspiracy between a principal and an agent, because the acts of an agent were considered in law to be the acts of the principal. [Kovac v. Barron](#), 2014 IL App 121100, 6 N.E.3d 819, 839.

Ill.App.2009. Com. (c) cit. and quot. in sup. Provider of special-education school-bus transportation services brought antitrust claims against one of its officers, competing company owned by that officer, and others, alleging, among other things, that defendants conspired to artificially increase prices and to reduce and restrain competition. The trial court granted defendants' motion to dismiss. Affirming in part, this court held, inter alia, that the claims failed under the Antitrust Act, which did not provide relief for self-inflicted wounds, because plaintiff was essentially alleging that it conspired with defendants against itself; officer was corporation's agent, and the acts of an agent were considered in law to be the acts of the principal. [Alpha School Bus Co., Inc. v. Wagner](#), 391 Ill.App.3d 722, 331 Ill.Dec. 378, 910 N.E.2d 1134, 1150, 1152.

Ind.

Ind.2014. Quot. in sup. Parents of 18-year-old freshman who died of acute alcohol ingestion while pledging a local fraternity brought an action for wrongful death against national fraternity, alleging, among other things, that defendant

was vicariously liable for the negligence of the local fraternity and its members. The trial court granted summary judgment for defendant, and the court of appeals affirmed. Affirming, this court held, as a matter of law, that an agency relationship did not exist between defendant and the local fraternity or its members. The court reasoned that, although the local fraternity and its members were subject to remedial sanctions, in their choice of conduct and behavior, the local fraternity and its members were not acting on behalf of defendant and were not subject to its control. [Smith v. Delta Tau Delta, Inc.](#), 9 N.E.3d 154, 164.

Ind.2014. Quot. in sup., com. (c) cit. and quot. in sup., com. (g) quot. in sup. College freshman/fraternity pledge who resided in a fraternity house owned by college brought a personal-injury action against college, fraternity's local chapter, fraternity's national organization, and another student/fraternity member, alleging that the other student injured him in a hazing incident. The trial court granted summary judgment for defendants. The court of appeals affirmed. Affirming as to college and national organization, this court held that the actions of local fraternity and its members could not, as a matter of law, be imputed to college or national organization under a theory of vicarious liability, because the record established the lack of any agency relationship between local fraternity and college or national organization. While local fraternity operated only with college's permission and subject to college's policies and discipline, mere consent to governance did not equate to agency, and there was no evidence that local fraternity exercised actual management and control over resident members at the direction of and on behalf of national organization. [Yost v. Wabash College](#), 3 N.E.3d 509, 519, 521.

Ind.2012. Cit. in sup. §§ 1.01-1.02. Second mortgagee obtained a default judgment against mortgagor and foreclosed on the mortgaged property without notice to assignee of first mortgagee's nominee. The trial court denied assignee's motion to intervene in the foreclosure proceeding and obtain relief from the foreclosure judgment. This court reversed the trial court's ruling and remanded with instructions to grant assignee's motion to intervene and to amend the default judgment to provide that second mortgagee took the property subject to assignee's lien. The court concluded that, while nominee was indeed a "nominee" only and not a "mortgagee" as elsewhere ambiguously stated in the first mortgage contract, rights under the first mortgage and its own rules indicated that the parties intended to designate it as an agent of the lender, and thus assignee, standing in the shoes of nominee, had a property interest in this case sufficient to entitle it to intervene as of right. [Citimortgage, Inc. v. Barabas](#), 975 N.E.2d 805, 814.

Ind.App.

Ind.App.2018. Cit. in sup. In disciplinary proceedings, attorney was charged with misconduct arising from his solicitation of clients through a nonlawyer intermediary. After an evidentiary hearing, a hearing officer concluded that attorney violated the rules of professional conduct. On attorney's petition for review, this court issued an order suspending attorney from the practice of law for a period of not less than nine months, without automatic reinstatement. The court rejected attorney's argument that the nonlawyer intermediary acted independently and that he merely accepted referrals from the intermediary, holding that the evidence clearly and convincingly established an agency relationship between attorney and the intermediary within the meaning of [Restatement Third of Agency §§ 1.01 and 1.03](#). [Matter of Wray](#), 91 N.E.3d 578, 583.

Ind.App.2016. Quot. in case quot. in ftn. Insurer brought an action against insured lounge and two patrons who were involved in a physical altercation at the lounge, seeking a declaration that it did not have a duty under insured's policy to make payments according to a consent judgment in which injured patron and insured agreed that patron's injuries were caused by insured's negligence or that insured was vicariously liable for the attacking patron's negligence. The trial court granted plaintiff's cross-motion for summary judgment. This court affirmed, holding that plaintiff established by clear and convincing evidence that the consent judgment was the product of bad faith or collusion, and thus the trial court did not err in finding that collateral estoppel did not require plaintiff to be bound by the consent judgment. Citing [Restatement Third of Agency § 1.01](#) for the definition of "agency," the court determined that there was no rational basis

to conclude that the attacking patron was plaintiff's agent or that he was acting within the scope of his agency at the time of the altercation. [Carpenter v. Lovell's Lounge and Grill, LLC](#), 59 N.E.3d 330, 341.

Ind.App.2015. Com. (d) quot. in ftn. Real-estate investor filed, inter alia, a breach-of-fiduciary-duty claim against realtor, alleging that defendant purchased property that investor had been trying to purchase for years through realtor. The trial court granted defendant's motion for summary judgment; the court of appeals reversed and remanded. On remand, the trial court entered judgment for plaintiff. This court affirmed in part, holding that the trial court's finding that plaintiff and defendant had an agency relationship was not clearly erroneous. Citing [Restatement Third of Agency § 1.01](#), the court explained that an agency relationship could be formed without consideration or an enforceable contract, and the evidence in this case supported that defendant had agreed to act as plaintiff's agent for the purpose of acquiring the property and that plaintiff exerted sufficient control over defendant. [Bunger v. Demming](#), 40 N.E.3d 887, 893.

Iowa

Iowa, 2016. Cit. in conc. and diss. op.; com. (c) quot. in conc. and diss. op. Defendant was convicted of first-degree murder after a trial in which an informant testified against defendant regarding information that he obtained from defendant while they were in jail together; the court of appeals affirmed in part. This court reversed and remanded, holding that the state violated defendant's Sixth Amendment right to counsel by using the informant when defendant was represented by counsel. The dissent argued, citing [Restatement Third of Agency § 1.01](#), that a generic cooperation agreement was insufficient to confer government-agent status on an individual, and that, here, the informant was not acting as a government agent, because there was no evidence that a detective directed or controlled the informant's activities. [State v. Marshall](#), 882 N.W.2d 68, 119.

Iowa,

Iowa, 2014. Quot. in sup. Following estate's sale of decedent's residential real estate over the objections of decedent's common-law wife, who contended that the property was her home, the trial court, on remand, concluded that wife should, at her election, receive either the proceeds from the sale or the real estate itself upon payment to the purchasers of a substantial part of the cost of the improvements made by them. Affirming as modified and remanding, this court held, inter alia, that the purchasers of the real estate were good-faith purchasers at a judicial sale for purposes of the occupying claimants' statute, entitling them to compensation for their improvements. Citing [Restatement Third of Agency § 1.01](#), the court concluded that purchasers' good-faith was not negated by the knowledge of their alleged agents, including purchaser-husband's stepfather, of the selling officers' want of authority to sell decedent's house, declining to find that recurring contact and familial relationship alone created an agency relationship. [In re Estate of Waterman](#), 847 N.W.2d 560, 574.

Iowa

Iowa, 2011. Quot. in ftn. Plaintiff sued husband-and-wife homeowners, alleging that he broke his leg while helping them move their furniture using a rented moving truck. The trial court granted summary judgment for defendants, finding that a release that plaintiff had signed with truck-rental company's liability insurer barred plaintiff's claims against defendants. The court of appeals reversed. Vacating and remanding, this court held, among other things, that fact questions precluded summary judgment for wife, since husband alone signed the rental agreement and was identified by name in the release. The court concluded that a genuine issue of material fact existed as to whether husband and wife were in an agency relationship within the meaning of the release such that her liability was also discharged. [Peak v. Adams](#), 799 N.W.2d 535, 547.

Kan.

Kan.2014. Quot. in sup., com. (c) quot. in sup. Health insurer sought judicial review of a decision of the Kansas Insurance Department that imposed sanctions on insurer for unfair claim-settlement practices based on its denial of coverage to an insured for treatment of a preexisting condition that was not disclosed in her application. The trial court affirmed. The court of appeals reversed, concluding that the licensed insurance intermediary who submitted insured's insurance application to insurer was not acting as insurer's soliciting agent. Reversing in part, this court held, inter alia, that substantial evidence supported the existence of an agency relationship between insurer and intermediary such that insurer was bound by intermediary's acts. The court pointed to evidence that the contract between intermediary and insurer authorized intermediary to solicit applications for insurance and to collect premiums in exchange for commissions paid by insurer, stated that intermediary was prohibited from engaging in any act not expressly authorized by insurer, and bound intermediary to a confidentiality agreement, thus demonstrating insurer's control of his behavior and its delineation of the limits of his authority. The court cited [Restatement Third of Agency § 1.01](#) for the definition of "agency," and quoted Comment *c* to that section in noting that agency encompassed a wide and diverse range of relationships and circumstances. [Golden Rule Ins. Co. v. Tomlinson](#), 335 P.3d 1178, 1188.

Ky.

Ky.2010. Cit. in sup. Members of a workers' compensation self-insurance group sued group's accounting and auditing firm, alleging that, as a result of misrepresentations, omissions, and false statements contained in firm's audits of group, they were required to pay assessments to cover group's financial deficits. The trial court denied firm's motion to enforce arbitration provisions in group's engagement letters with firm. While reversing upon finding that members were bound by the provisions, this court held that members were not bound on the basis that group acted as their agent when it executed the engagement letters. The court reasoned that group procured the audits from firm for itself, not as an agent on behalf of members, because the state's statutory auditing requirements pertained only to group, and thus members had no duty to obtain the audits and no need of an agent in obtaining them. [Ernst & Young, LLP v. Clark](#), 323 S.W.3d 682, 694.

Ky.2003. Illus. 14 cit. in disc. (T.D. No. 2, 2001). After two intoxicated high school students left school together during school-sponsored activity in order to buy more alcohol, student passenger was killed in car accident. His parents and estate sued state Department of Education (DOE) for negligence and wrongful death. Trial court affirmed board of claims' dismissal of suit, and appeals court affirmed. This court affirmed dismissal for loss of consortium but reversed dismissal for wrongful death, holding that DOE could be held vicariously liable, because statutory relationship between DOE and local school board was more akin to that of principal-agent than to that of coagents. Legislative intent was to vest management, operation, and control of schools in DOE, with local boards acting as agents to implement DOE's policies at local level. [Williams v. Kentucky Dept. of Educ.](#), 113 S.W.3d 145, 152.

Mass.

Mass.2017. Quot. in sup.; com. (f) quot. in sup. Decedent's siblings, as personal representatives of decedent's estate, filed a complaint against email provider, seeking access to decedent's email account. The trial court granted summary judgment for defendant, finding that defendant was prohibited from disclosing the contents of the email account to plaintiffs under the Stored Communications Act. While vacating and remanding on other grounds, this court held that the Act's agency exception did not apply, because plaintiffs were not decedent's agents. The court explained that, under [Restatement Third of Agency § 1.01](#), an agency relationship was created when there was mutual consent that an agent was to act on behalf of and for the benefit of a principal, and subject to the principal's control; here, plaintiffs were appointed by and were subject to the control of the Probate and Family Court, rather than decedent. [Ajemian v. Yahoo!, Inc.](#), 84 N.E.3d 766, 772.

Mass.2017. Cit. in disc. Borrower sued private lender for negligence, after lender's purported agent defaulted on a side loan that the agent had, without lender's knowledge, persuaded borrower to extend to the agent out of the proceeds of borrower's loan from lender. Following a bench trial, the trial court found in favor of borrower on the ground that the agent acted with apparent authority from lender. The court of appeals affirmed. Reversing, this court held that the agent lacked apparent authority to bind lender with respect to the side loan, because the trial court did not find any conduct of lender that related specifically to his acquiescence to, or ratification of, the agent's conduct regarding the side loan. The court noted that, under [Restatement Third of Agency § 1.01](#), an agency relationship was generally created by an express or implied mutual consent that an agent would act on behalf of and for the benefit of a principal and subject to the principal's control. [Fergus v. Ross](#), 79 N.E.3d 421, 425.

Mass.2017. Com. (f)(2) cit. in ftm. Former president and CEO of dissolved startup biotechnology company brought an action under Massachusetts' Wage Act against two former board members, seeking unpaid wages. Following a jury trial, the trial court entered judgment for plaintiff. This court reversed and granted defendants' motion for judgment notwithstanding the verdict, holding that the evidence was insufficient to impose personal liability on defendants, because they were not designated as company officers, they had limited authority to enforce plaintiff's employment agreement, and plaintiff, rather than individual board members, had expressly held management powers, including payroll functions. In explaining that an individual director of the board was not an agent of the corporation, the court noted that [Restatement Second of Agency § 14C](#) was more on point than [Restatement Third of Agency § 1.01](#), Comment *f(2)*. [Segal v. Genitrix, LLC](#), 87 N.E.3d 560, 570.

Mass.2008. Cit. in sup., coms. (c) and (g) cit. in sup. Current trustees and beneficiary sued former trustees, alleging that defendants breached their fiduciary duties in 1972 by converting a number of stock shares that were being held in trust for beneficiary. The trial court granted summary judgment for defendants on limitations grounds. Vacating in part and remanding, this court held that, even though the trust's successor trustee knew in 1984, upon his succession to that position, of potential claims in connection with the alleged conversion in 1972, but did not assert them, the statute of limitations did not begin to run, and thus plaintiffs' claims were not time-barred, because successor trustee had served as attorney for one of the defendants and thus was his agent with respect to that redemption. [O'Connor v. Redstone](#), 452 Mass. 537, 557, 896 N.E.2d 595, 611.

Mass.App.

Mass.App.2013. Cit. in ftm., cit. in cases cit. in ftm., com. (c) cit. in ftm. After corporation was acquired in a merger, shareholders' agent, who was designated under the merger agreement to serve as the representative of corporation's former shareholders, sued company that acquired corporation, seeking a declaration that defendant was not entitled to indemnification from an escrow fund that had been established in connection with the merger. The trial court approved a settlement between defendant and certain former shareholders of corporation who opted to settle directly with defendant. Affirming, this court held, among other things, that the settling shareholders had the power to negotiate the settlement with defendant, because the merger agreement gave plaintiff an express right to negotiate with defendant and to bind corporation's shareholders, but not a contractually exclusive right to do so. The court noted that even an agent holding broad powers held and exercised those powers as a result of a voluntary conferral by the principal. [Bailey v. Astra Tech, Inc.](#), 84 Mass.App.Ct. 590, 596, 999 N.E.2d 138, 144.

Miss.

Miss.2011. Com. (c) quot. in ftm. After minority member of LLC signed a deed purporting to transfer a parcel of LLC's property to his own secretly formed LLC, which then granted a deed of trust to secure a bank loan, defaulted on the loan, filed for bankruptcy, and listed the property as an asset, LLC's majority member filed an objection in secretly formed LLC's bankruptcy proceedings. The bankruptcy court entered judgment for LLC, declaring secretly formed LLC's deed null and void and bank's deed of trust also void. Bank appealed to the district court, which affirmed. Bank

again appealed to the Fifth Circuit Court of Appeals, which certified a question to this court. Answering the question, this court held that, where, as here, no actual or apparent authority existed for an agent to transfer a principal's property, the conveyance was not an effective transfer of title that was voidable, but, rather, void unless and until later ratified. [Northlake Development L.L.C. v. BankPlus](#), 60 So.3d 792, 796.

Miss.2005. Cit. in disc. (T.D. No. 2, 2001). Contractors working on mall-renovation project sued mall owner after construction manager hired by owner misappropriated funds remitted by owner for payment of contractors. The trial court granted summary judgment for owner, finding, inter alia, that there was no agency relationship between owner and manager, because manager acted as an independent contractor. Reversing and remanding, this court held, among other things, that fact issues existed as to whether an agency relationship between owner and manager existed and that, if such a relationship were established, owner's payments to manager would not extinguish owner's debt to plaintiffs. The court noted that the essence of agency was that the agent acted on behalf of the principal and was subject to the principal's control. [Aladdin Const. Co., Inc. v. John Hancock Life Ins. Co.](#), 914 So.2d 169, 175.

Miss.App.

Miss.App.2010. Cit. in case quot. in sup. (T.D. No. 2, 2001). Subcontractors sued property owner, seeking to hold it liable for costs owed them by general contractor for their work on the construction of a building. The trial court found in favor of defendant. Affirming, this court held, inter alia, that the trial court's finding that general contractor was not acting as defendant's agent was supported by substantial evidence. While plaintiffs alleged that defendant gave general contractor actual authority to act as its agent in constructing the building, the contract between defendant and general contractor defined their relationship as one between owner and contractor, and the evidence fell short of establishing that defendant exercised any direct authority over plaintiffs. [Summerall Elec. Co., Inc. v. Church of God at Southaven](#), 25 So.3d 1090, 1095.

Miss.App.2003. Quot. in sup. (T.D. No. 2, 2001) (Erron. cit. as § 1). Landowner brought action to quiet title to two parcels of land allegedly encroached upon by neighboring landowners. Trial court held that defendant landowners adversely possessed two parcels, but later entered supplemental judgment reducing award to one parcel. Affirming, this court held, inter alia, that defendants' emancipated children, who used land for own benefit, were not defendants' agents for purposes of establishing adverse possession where children were not subject to defendants' control and were not acting on defendants' behalf. [Norris v. Cox](#), 860 So.2d 319, 323.

Mo.App.

Mo.App.2014. Quot. in sup. Parents brought a negligence action on behalf of their children against, among others, partner of a company that had owned and operated a lead smelter near their homes, alleging that partner had negligently allowed children to be exposed to lead during periods of time when it was not a partner but its subsidiaries were, because partner had complete and pervasive control over its subsidiaries. The trial court entered judgment on a jury verdict for plaintiffs. Reversing in part and remanding, this court held that an agency relationship was not established, and defendant could not be held liable for the actions of its subsidiary under an agency theory purely on the basis of domination and control. The court quoted the definition of "agency" provided in [Restatement Third of Agency § 1.01](#), and concluded that plaintiffs failed to show the necessary elements to establish that an agency relationship existed. [Blanks v. Fluor Corp.](#), 450 S.W.3d 308, 378.

Mo.App.2013. Com. (c) cit. in ftn. After motorist drove into the wrong lane in a construction zone, causing her car to drop into a large hole, injured passenger and others sued general contractor that was hired to perform the construction work and subcontractor that was hired to provide traffic-control services, alleging that defendants negligently failed either to barricade or cover the hole or to provide traffic controls sufficient to direct motorists around it. The trial court entered judgment on a jury verdict in favor of defendants. Affirming, this court held that the trial court did not

err by permitting defendants to argue before the jury that they acted as ordinary and prudent persons by doing only what was asked of them by contract. The court nevertheless concluded that defendants were not entitled to rely on a defense to liability available to "employee" road contractors, because defendants were independent contractors or "non-agent service providers" rather than employees of the owner of the bridge. [Peterson v. Progressive Contractors, Inc.](#), 399 S.W.3d 850, 866.

Neb.

Neb.2009. Quot. in disc. and cit. in ftn. Son, as mother's next of kin and trustee of her estate, sued nursing home in connection with injuries, pain, and suffering allegedly sustained by mother while she was a patient. The trial court granted defendant's motion to compel arbitration pursuant to an arbitration agreement signed by defendant on behalf of mother as part of the paperwork for her admission. Reversing and remanding, this court held that, while mother authorized defendant to sign the required admission papers, his actual authority did not extend to signing the arbitration agreement, because it was not a condition of admission, and defendant was not justified in relying solely on mother's authorization of defendant to sign admission papers as apparent authority to bind her to an arbitration agreement, because nothing in the record suggested that a reasonable person would have expected an arbitration agreement to be included with admission documents for a nursing home. [Koricic v. Beverly Enterprises Nebraska, Inc.](#), 278 Neb. 713, 718, 773 N.W.2d 145, 150.

N.J.

N.J.2010. Quot. in sup. Lawyers' fund for client protection, as subrogee of attorney's clients whose funds deposited with attorney to close on a new home had been misappropriated by attorney from attorney's trust account, sought to recover the amount of the stolen funds from title insurer from which attorney, after the theft, purchased title insurance for the home. The trial court granted summary judgment for defendant; the appellate division reversed. Reversing and remanding for reinstatement of the original judgment for defendant, this court held that defendant was not liable for the misappropriation by attorney, in part because no agency relationship existed between attorney and defendant at the time the funds were misappropriated; insurer never represented to attorney's clients that attorney had actual or apparent authority to act on its behalf. [New Jersey Lawyers' Fund for Client Protection v. Stewart Title Guar. Co.](#), 203 N.J. 208, 220, 1 A.3d 632, 639.

N.J.Super.App.Div.

N.J.Super.App.Div.2011. Quot. in case quot. in disc. After the roof of its warehouse collapsed, landlord sued, among others, managing general agent of tenant's former liability insurer, alleging that defendant was professionally negligent in causing tenant's policy to be improperly canceled and for failing to reinstate it. The trial court granted summary judgment for defendant. Affirming, this court held, inter alia, that tenant's premium-finance lender had apparent authority to act for tenant in canceling the policy following tenant's default on its payments to lender, and defendant was entitled to rely on that authority to cancel the policy, even if lender's power of attorney authorizing cancellation of the policy for nonpayment did not comply with statutes governing creation of a valid power of attorney; defendant had received no notice that the power of attorney was invalid, and tenant had created the appearance of authority by allowing lender to procure the policy and renew it. [AMB Property, LP v. Penn America Ins. Co.](#), 418 N.J.Super. 441, 454, 14 A.3d 65, 72.

N.M.

N.M.2011. Com. (c) quot. in sup. Undisclosed client that had requested, through its law firm, public records relating to a particular television documentary program brought an enforcement action under the New Mexico Inspection of Public Records Act against multiple public agencies. The trial court dismissed the complaint; the court of appeals affirmed. Reversing in part and remanding, this court held that a principal, whether disclosed or not, could delegate the function

of requesting public records to an agent, such as the principal's attorney, and that either the agent or the principal, even if previously unknown to the public records custodian, could enforce that request if it was denied; thus, in this case, client had standing to enforce the public records request it made through law firm, as its agent. The court noted that the application of agency law was not limited to contracts but instead encompassed a wide and diverse range of relationships and circumstances; for instance, a person could use an agent to take action under the authority of a statute, even when the agent was not the person specifically identified in the statute. [San Juan Agr. Water Users Ass'n v. KNME-TV, 2011-NMSC-011, 150 N.M. 64, 257 P.3d 884, 890.](#)

N.M.2007. Quot. in sup. Insured brought bad-faith action against insurer that denied her property-damage claims under a policy that insurer issued while acting as a servicing insurer for statutory nonprofit underwriting association. The district court denied insurer's motion to dismiss. The court of appeals reversed, ruling that insurer was statutorily immune from suit. Reversing and remanding, this court held that insurer was not immune as an agent of association. The court reasoned that, while insurer and association agreed that insurer would issue policies to persons referred by association, and in return association would reinsure all such policies and reimburse insurer's related costs and expenses, that agreement did not evince the control necessary to form or constitute an agency relationship. [Maes v. Audubon Indemnity Ins. Group, 2007-NMSC-046, 142 N.M. 235, 164 P.3d 934, 939, cert. denied 552 U.S. 1100, 128 S.Ct. 908, 169 L.Ed.2d 730 \(2008\).](#)

N.Y.

N.Y.2011. Cit. in disc. State attorney general sued insurance brokerage firm, alleging that it engaged in repeated fraudulent or illegal acts, was unjustly enriched, committed common-law fraud, and breached its fiduciary duties by entering into incentive arrangements in which insurers rewarded it for bringing them business, and by failing to disclose the arrangements to its customers. The trial court dismissed, and the appellate division affirmed. Affirming, this court held that an insurance broker did not have a common-law fiduciary duty to disclose to its customers incentive arrangements that it had entered into with insurers; while an insurance broker was the agent of the insured, it customarily looked for compensation to the insurer, not the insured, and was sometimes the insurer's agent also for example, when collecting premiums. [People ex rel Cuomo v. Wells Fargo Ins. Services, Inc., 16 N.Y.3d 166, 171, 919 N.Y.S.2d 481, 944 N.E.2d 1120, 1122.](#)

N.Y.Sup.Ct.App.Div.

N.Y.Sup.Ct.App.Div.2009. Cit. in sup. Bicyclist sued property owner and city for personal injuries she allegedly sustained when she rode her bicycle into a hole located in the driveway apron in front of owner's property. The trial court granted summary judgment for city. Affirming, this court held, inter alia, that city did not have an agency relationship with owner. The court noted that, while city had agreed to place a blacktop patch on a cracked portion of the apron if owner cleared out any loose debris from that section of the apron, there was no evidence in the record that owner was acting on city's behalf or under its control when he decided to replace the entire apron and removed not only the loose debris but also a large section of the apron. [Davis v. City of Schenectady, 65 A.D.3d 743, 745, 883 N.Y.S.2d 810, 812.](#)

N.Y.Sup.Ct.

N.Y.Sup.Ct.2011. Quot. in ftn. Purported assignee of promissory note and mortgage brought a foreclosure action against mortgagor. While mortgagor initially defaulted, he later moved to vacate the default and dismiss the foreclosure action. Denying mortgagor's motion, this court held, inter alia, that plaintiff had standing to bring the foreclosure action, where plaintiff held the properly endorsed note and also held the mortgage pursuant to an assignment from the Mortgage Electronic Registration Systems (MERS), which had the authority to assign the mortgage as the underlying lender's

nominee, and was as well a common agent on all mortgages registered by members of the MERS system. [Deutsche Bank Nat. Trust Co. v. Pietranico](#), 33 Misc.3d 528, 928 N.Y.S.2d 818, 832.

Ohio

Ohio, 2009. Cit. in sup. Defendant was convicted in trial court of compelling prostitution in violation of a state statute after he agreed to pay \$500 in exchange for sexual activity involving a woman and her fictitious 11-year-old daughter. The court of appeals reversed. Affirming, this court held, inter alia, that a defendant could not be convicted of compelling prostitution under the statute without the existence of an actual minor whom the defendant paid or agreed to pay. The court reasoned that, although the statute did not explicitly state that an actual minor had to exist, there was a reasonable argument that an actual minor was required under the statute; among other things, the statute addressed payment to a “minor's agent,” and, in order for a minor's agent to exist, it followed that a minor principal also had to exist. [State v. Bartrum](#), 121 Ohio St.3d 148, 2009-Ohio-355, 902 N.E.2d 961, 964.

Okl.

Okl.2010. Cit. in sup. Surety bail bondsmen appealed the decision of the administrative law judge upholding the state insurance commissioner's construction of a provision of the bail-bondsmen statute as allowing a professional bondsman to act as surety on more than 10 bonds a year outside his county of registration by employing a surety bondsman to write bonds on the professional bondsman's behalf pursuant to a power of attorney. The trial court affirmed, and the court of civil appeals affirmed the trial court's judgment. This court reversed the trial court's judgment and remanded, holding that the statute limited a professional bondsman to writing no more than 10 bonds a year in a county where he was not registered; furthermore, he could not circumvent the statute by employing a surety bondsman, because the authority of a surety bondsman acting pursuant to a power of attorney was coextensive with that of the professional bondsman executing the power of attorney. [Surety Bail Bondsmen of Oklahoma, Inc. v. Insurance Com'r](#), 2010 OK 73, 243 P.3d 1177, 1185.

Or.

Or.2016. Quot. in sup. and in ftn. Criminal defendant was convicted of first-degree sexual abuse of his adopted daughter, after his housekeeper spoke with the Department of Human Services (DHS) about her concerns, made statements to the police, and provided them with daughter's underwear that other employees of defendant took, which led police to obtain a warrant, search defendant's house, and arrest defendant; the court of appeals reversed and remanded. This court reversed and remanded, holding that the trial court did not err in denying defendant's motion to suppress evidence obtained through the search and seizure of the underwear, because the actions of defendant's employees constituted private action. Citing [Restatement Third of Agency § 1.01](#), the court noted that courts applied a common-law agency analysis in determining whether a private individual acted as the government's agent and whether his search or seizure should be considered state action, and concluded that defendant's employees did not act as the government's agent. [State v. Sines](#), 379 P.3d 502, 510, 514.

Or.2013. Com. (f) quot. in case cit. in sup. In several federal court cases, homeowners who were threatened with nonjudicial foreclosure under the Oregon Trust Deed Act (OTDA) contended, inter alia, that identification of the Mortgage Electronic Registration Systems, Inc. (MERS) an entity that did not make, service, or invest in loans rather than the lender, as the trust deed's beneficiary was ineffective, because the OTDA required the recording of any assignment of a trust deed by the owner of the beneficial interest in the trust deed. The district court certified questions to this court. In answering the questions, this court held, inter alia, that the OTDA did not allow MERS to hold and transfer legal title to a trust deed as nominee for the lender. As to whether MERS nevertheless had authority as an agent for the original lender and its successors in interest to act on their behalves with respect to the transfer of the beneficial

interest in the trust deed or the nonjudicial foreclosure process, the court explained that MERS's authority, if any, to perform any act in the foreclosure process derived from the original beneficiary and its successors in interest, and there was insufficient evidence in the record to determine the existence, scope, or extent of any such authority. [Brandrup v. ReconTrust Cop., N.A.](#), 353 Or. 668, 707, 303 P.3d 301, 322.

Or.2009. Coms. (f) and (g) quot. in sup. Passenger who was injured while riding an airport shuttle bus brought negligence action against bus driver and driver's employer, which provided shuttle-bus service under a contract with airport. The trial court granted summary judgment for defendants. The court of appeals affirmed. Reversing and remanding, this court held that defendants failed to demonstrate that plaintiff's only permissible tort action was against airport because they were airport's agents within the meaning of the state tort claims act; the contract did not provide that airport had the right to control the physical manner in which the drivers carried out their driving duties, and thus did not support the conclusion that employer or its employees, including driver, were acting as airport's agents for purposes of imposing vicarious liability on airport for their alleged negligence. [Vaughn v. First Transit, Inc.](#), 346 Or. 128, 135, 136, 140, 206 P.3d 181, 186, 189.

Or.App.

Or.App.2009. Com. (f) quot. in case quot. in sup., com. (g) cit. in case quot. in disc. Motorcyclist brought a negligence action against pizza delivery driver, pizza franchisee that employed driver, and franchisor, alleging that he was injured when his motorcycle collided with a vehicle operated by driver. The trial court granted franchisor's motion for summary judgment, and entered a limited judgment for franchisor. Affirming, this court held that the facts were insufficient to establish franchisor's vicarious liability for the negligent driving of franchisee's employee. The court reasoned that franchisee was, at most, a nonemployee agent of franchisor, and that, under the franchise agreement, franchisor did not have the right to control the physical details of the conduct that injured plaintiff—namely, the manner in which driver carried out his driving duties for franchisee. [Viado v. Domino's Pizza, LLC](#), 230 Or.App. 531, 534, 544, 217 P.3d 199, 201, 207.

S.C.App.

S.C.App.2016. Quot. in case quot. in sup. After a fire destroyed borrower's home and borrower defaulted on her mortgage, lender filed a foreclosure action against borrower; borrower filed a third-party complaint against insurer that denied her claim for fire-damage coverage under her homeowners' policy. The trial court granted summary judgment for insurer, finding that the homeowners' policy was not in effect at the time of borrower's loss because insurer mailed a notice of nonrenewal to borrower before the fire. Affirming, this court held that the trial court did not err in determining that lender's mortgage servicer did not renew the policy on borrower's behalf as her agent when it contacted insurer regarding payment of the annual premium. The court cited the definition of “agency” set forth in [Restatement Third of Agency § 1.01](#) in reasoning that, although lender's mortgage servicer submitted annual premiums for borrower's policy to insurer, servicer was not subject to borrower's control and therefore was not her agent. [Bank of New York Mellon Trust Co. v. Grier](#), 785 S.E.2d 208, 212.

S.C.App.2013. Quot. in sup., cit. in diss. op. Investors who took out a home-equity loan from mortgage broker on the advice of investment advisor and then loaned part of the proceeds to advisor for investment in his family's trucking business brought claims for fraud, negligent misrepresentation, and conversion, inter alia, against broker and advisor, among others, after advisor stopped making the promised monthly interest payments to plaintiffs. The trial court granted summary judgment for broker on all but one of plaintiffs' claims, holding that broker was not liable for advisor's acts under theories of agency. Reversing in part and remanding, this court held, among other things, that plaintiffs presented at least a mere scintilla of evidence to create a genuine issue of material fact as to whether an actual agency relationship existed between advisor and broker. The court reasoned that, although broker asserted that it had never employed advisor, advisor admitted in his answer to plaintiffs' complaint that he acted as an agent or employee of broker. The

dissent argued that plaintiffs failed to present any evidence of an agency relationship, because advisor's answer contained only the bare conclusion that he was an agent, with no evidence to support this conclusion. [Froneberger v. Smith](#), 748 S.E.2d 625, 631, 638.

Tenn.

Tenn.2011. Sec. and com. (e) cit. in conc. and diss. op. Beneficiary who was denied benefits under her deceased husband's life-insurance policy sued insurance agents, alleging that defendants breached their contract with plaintiff and her husband by failing to procure a life insurance policy for husband that was not subject to contest. The trial court entered judgment for plaintiff; the court of appeals affirmed in part and remanded. Affirming in part, this court held that the wrongful conduct or omissions of defendants gave rise to a claim for failure to procure. A concurring and dissenting opinion argued that, while defendants were not liable as agents for plaintiff and her husband on plaintiff's contractual failure-to-procure claim, because there was no evidence that husband requested or that defendants offered to obtain immediately incontestable life insurance policies and because it was undisputed that husband received the insurance he requested, plaintiff's recovery of damages could be sustained based on defendants' breach of their fiduciary duties as insurance agents to exercise reasonable skill, care, and diligence in obtaining insurance coverage for plaintiffs as their clients. [Morrison v. Allen](#), 338 S.W.3d 417, 450.

Tenn.App.

Tenn.App.2015. Cit. in case cit. in sup. Former employee of city sued city to enforce a settlement that he purportedly reached with the assistant city attorney, alleging that, although he was never informed that the settlement was contingent on the mayor's approval, the mayor later rejected the settlement, and the city refused to honor it. The trial court granted summary judgment for employee, finding that the assistant city attorney acted with apparent authority to enter the settlement. This court reversed, holding, among other things, that, under [Restatement Third of Agency § 1.01](#), the assistant city attorney did not have actual or implied authority to bind the city to the settlement without the mayor's express approval. While the city's charter provided that the city attorney had independent authority to settle claims against the city for amounts less than \$500, settlements for amounts exceeding \$500 had to be entered into by and with the approval of the mayor, and the purported settlement was for an amount in excess of \$500. [Savage v. City of Memphis](#), 464 S.W.3d 326, 332.

Tex.

Tex.2017. Com. (f) cit. in sup. Former refinery technician who failed a drug test that was required by his employer brought an action against his employer, employer's client, and drug-testing administrator, alleging, inter alia, compelled self-defamation for his placement on an inactive-employee list and negligence in performing drug testing and reporting results. The trial court granted defendants' motion to dismiss and motion for summary judgment; the court of appeals affirmed in part, reversed in part, and remanded. Reversing, this court entered judgment for employer's client on plaintiff's negligence claim, because no evidence existed that client had any right of control over drug-testing administrator. The court cited [Restatement Third of Agency § 1.01](#), Comment *f*, in noting that a principal's right of control presupposed that the principal retained capacity throughout the relationship to assess the agent's performance, provide instructions, and terminate the agency relationship, and determined that, in this case, employer's client had no authority over day-to-day operations of drug-testing administrator and no right to prevent employer from using this particular administrator. [Exxon Mobil Corporation v. Rincones](#), 520 S.W.3d 572, 590.

Tex.App.

Tex.App.2016. Com. (d) quot. in sup. As part of a wider dispute, Bahamian company sued Mexican nonprofit institution, alleging breach of a settlement providing for the distribution between the parties of garnished funds in a New York bank account. The trial court entered judgment on a jury verdict finding, among other things, that the individuals who signed the settlement on behalf of defendant had both actual and apparent authority to enter into the settlement. Affirming, this court held that, although plaintiff admitted that it did not have direct discussions about the settlement with any official of defendant, plaintiff presented significant evidence that people with power in defendant authorized the settlement. The court rejected defendant's argument that certain powers of attorney given to the individuals who signed the settlement were invalid, noting that, under [Restatement Third of Agency § 1.01](#), agency could be proven by direct or circumstantial evidence and did not require a power of attorney. [Petroleum Workers Union of the Republic of Mexico v. Gomez](#), 503 S.W.3d 9, 26.

Tex.App.2014. Com. (f) cit. in case quot. in sup. Insurance agency sued accountant and two related firms that it had hired to assist it in acquiring financing and to represent it in matters before the Texas Department of Insurance, alleging, among other things, that accountant breached his fiduciary duty to plaintiff as a certified public accountant and as plaintiff's agent. The trial court granted summary judgment for defendants on plaintiff's claim for breach of fiduciary duty against accountant. Affirming, this court held that plaintiff failed to meet its burden to show the existence of a fiduciary relationship arising from a principal-agent relationship, because plaintiff had offered no more than a mere scintilla of evidence to prove the existence of its "right to control" defendant. While the record clearly demonstrated that defendant acted on plaintiff's behalf, it was barren of any evidence that plaintiff had the right to control the means and details of the process by which defendant accomplished its tasks, an essential element of agency under [Restatement Third of Agency § 1.01](#). [Fred Loya Ins. Agency, Inc. v. Cohen](#), 446 S.W.3d 913, 920.

Tex.App.2009. Com. (f) quot. in sup. Hotel employee sued hotel franchisor, among others, for wrongful termination, and additionally alleged that defendant was vicariously liable for her supervisor's abusive actions amounting to intentional infliction of emotional distress, and was negligent in its duty to supervise him. The trial court dismissed plaintiff's claims. Affirming, this court held, inter alia, that implementation of standards by defendant through inspections, guest comment cards, and training requirements to ensure guest satisfaction did not evidence express or implied actual authority flowing from defendant pertaining to treatment of hotel employees, and could not be construed to create an agency relationship; there was no evidence that defendant had the right to control or, in fact, did control supervisor's day-to-day supervisory interactions with plaintiff. [Nears v. Holiday Hospitality Franchising, Inc.](#), 295 S.W.3d 787, 796.

Utah,

Utah, 2015. Com. (c) cit. in sup. Former employees of a defunct limited-liability company sued former members of company's board of managers, alleging, inter alia, that defendants breached the Utah Payment of Wages Act by failing to pay plaintiffs past-due wages following their termination. The trial court granted summary judgment for defendants. Affirming, this court held that defendants were not personally liable to plaintiffs for unpaid wages under the Act. The court rejected plaintiffs' argument that the Act imposed liability on all officers and agents of a business entity, reasoning that plaintiffs' proposed interpretation of the Act would lead to absurd results; among other things, plaintiffs themselves would be liable for company's failure to pay their own wages under [Restatement Third of Agency § 1.01](#), which provided that all employees were considered agents of their employer. [Heaps v. Nuriche, LLC](#), 345 P.3d 655, 660.

Utah App.

Utah App.2014. Com. (d) quot. in sup. Superintendent for a construction project brought tort claims against employee of a subcontractor for the project, alleging that he was seriously injured by employee at an adjacent construction project, where the two were helping to move a load of rebar as a favor to the adjacent project's general contractor. The trial court granted summary judgment for employee. Reversing and remanding, this court held that genuine issues of material fact existed as to whether employee was an agent of general contractor for the adjacent project at the time of the incident and

was therefore covered by a release signed by superintendent discharging general contractor and its agents from all claims arising from the incident. While the fact that general contractor asked superintendent to enlist employee to assist him in unloading the rebar was a sufficient manifestation of general contractor's intent for employee to act on its behalf under [Restatement Third of Agency § 1.01](#), Comment *d*, disputed facts existed as to whether employee manifested his intent to act on behalf of general contractor, and whether he was subject to general contractor's control, in light of evidence that he never spoke to general contractor and only helped move the rebar at superintendent's request. [Sutton v. Miles](#), 2014 UT App 197, 333 P.3d 1279, 1282.

Utah App.2012. Cit. in sup., coms. (b) and (c) quot. in sup. Motorcyclist brought a personal-injury action against university and university traffic cadet, among others, alleging that he was struck by an automobile after cadet directed him out of a university parking lot. The trial court dismissed the complaint, holding that, because cadet was directing traffic under color of city's authority, she was an employee of the city and was entitled to governmental immunity under the Governmental Immunity Act of Utah (GIAU). Reversing in part and remanding, this court held that the evidence was insufficient to determine if defendants were acting under city's control and direction while performing traffic-control activities, such that they were agents of the city acting as its employees and were expressly covered by the GIAU. [Mallory v. Brigham Young University](#), 2012 UT App 242, 285 P.3d 1230, 1236, 1237.

Utah App.2011. Quot. in sup. Disability benefits plan administrator sued city police officer for breach of contract, alleging that officer failed to reimburse plan for disability overpayments; officer counterclaimed for breach of contract and filed a third-party complaint against city. The trial court granted city's motion for summary judgment, finding that officer violated the terms of the plan when he failed to arbitrate his claim. Reversing, this court held that administrator waived its right to arbitrate when it filed its complaint; moreover, because administrator was contractually obligated to act on behalf of city, when administrator initiated this suit against officer, it acted as city's agent, and waived not only its own right to arbitrate, but also city's. [Educators Mut. Ins. Ass'n v. Evans](#), 2011 UT App 171, 258 P.3d 598, 614.

Utah App.2007. Quot. in sup. Pedestrian sued university for negligence after she fell down university's stairway and was injured. The trial court granted defendant's motion to dismiss. Affirming, this court held, inter alia, that the trial court properly admitted the responding university emergency medical technicians' (EMTs') report containing certain admissions by plaintiff, because the statements were made for the purpose of medical diagnosis and treatment, and the Utah Rules of Evidence permitted admission, regardless of whether the EMTs were adverse or neutral parties. The court noted that, while the EMTs were volunteers, they were nonetheless adverse to pedestrian as agents of university because they worked under university's name, used equipment supplied by university, and operated from university's buildings. [Fox v. Brigham Young University](#), 2007 UT App 406, 176 P.3d 446, 451.

Vt.

Vt.2009. Cit. in ftn., com. (c) cit. in sup. Former employee sued former supervisor, alleging, among other things, discrimination under the Vermont Fair Employment Practices Act (VFEPa). The trial court granted summary judgment for supervisor, finding that the VFEPa provided a right of action against employers alone, and not against individual employees or supervisors. Reversing and remanding, this court held, inter alia, that, by including the phrase "and any agent" in the definition of "employer," the VFEPa allowed for suits against employees as individuals. The court noted that the employer-employee relationship was a traditional, common-law agency relationship; thus, an ordinary reading of the language "any agent" supported the conclusion that the VFEPa allowed for suits against employees acting as agents for the employer. [Payne v. U.S. Airways, Inc.](#), 2009 VT 90, 186 Vt. 458, 987 A.2d 944, 948, 953.

Wash.

Wash.2017. Cit. in sup. State university filed a declaratory-judgment action against city, seeking a determination that city's landmark-preservation ordinance which restricted a property owner's ability to make changes to property that

had been nominated for designation as a landmark did not apply to university's property. The trial court granted summary judgment for university. Reversing and remanding for entry of judgment in favor of city, this court held that university was a state agency that was required to comply with the ordinance under a state statute. The court reasoned, in part, that, although the statute did not define the term "state agency," university was a state agency within the meaning of [Restatement Third of Agency § 1.01](#), because it was an entity that was authorized to act on behalf of and subject of the control of the state. [University of Washington v. City of Seattle](#), 399 P.3d 519, 526.

Wash.2011. Quot. in sup. Medical-imaging company that retained an independent contractor whose radiologists interpreted images generated by company appealed from the trial court's grant of summary judgment in favor of the department of revenue holding that company had to pay business and occupation tax on the entire amount received from patients/insurers and could not count amounts paid to contractor as "pass-through" payments on which it did not owe tax. The court of appeals reversed. This court reversed the court of appeals and reinstated the trial court's grant of summary judgment, holding that company's payments to contractor did not qualify for pass-through treatment, because company did not make the payments to contractor on behalf of patients as their agent; patients had no obligation to pay contractor, and company did not act in an agent's capacity to pass payments from the patients through to contractor. [Washington Imaging Services, LLC v. Washington State Dept. of Revenue](#), 171 Wash.2d 548, 252 P.3d 885, 892.

Wash.App.

Wash.App.2011. Com. (f)(2) cit. in ftn. Former executive director of nonprofit corporation sued corporation, alleging that he was discharged in retaliation for requesting that defendant's board members provide proof of their legal status, or resign if they were not legally in the United States, in order to avoid compromising corporation's future government funding. After defendant and certain board members refused to respond to plaintiff's requests for discovery regarding the citizenship and immigration status of its board members, the trial court granted plaintiff's motions to compel and, later, to sanction defendant. Although the parties settled and requested dismissal of defendant's interlocutory appeal, rendering the action moot, this court nevertheless held that a corporation could not refuse to respond entirely, as defendant did here, on the basis that relevant facts known to its board members were acquired outside the scope of their official duties and were known to them "personally" rather than "professionally." [Diaz v. Washington State Migrant Council](#), 265 P.3d 956, 968.

W.Va.

W.Va.2010. Quot. in ftn. Customer filed a putative class action in federal court against tax-preparation business that forwarded to lender her application for a loan based on her anticipated income-tax refund, alleging that the loan carried an exorbitant interest rate and was financially unsound, and that defendant received secret payments and concealed profits from lender for arranging the loan. The district court denied summary judgment for defendant on plaintiff's claim that it breached its fiduciary duty to her arising out of an agency relationship, and certified questions to this court for review, including the question of whether contractual agency disclaimers in the refund anticipation loan application were enforceable under West Virginia law. This court remanded, holding that, whether a relationship was characterized as agency in an agreement between parties was not necessarily controlling, and that the nature of the parties' relationship in this case had to be examined in a comprehensive factual analysis in order to determine whether defendant's agency disclaimer was enforceable. [Harper v. Jackson Hewitt, Inc.](#), 227 W.Va. 142, 706 S.E.2d 63, 77.

Wis.

Wis.2016. Quot. in diss. op. Insured brought a breach-of-contract action against insurer, alleging that defendant had a duty to defend plaintiff in an underlying action brought by city and related to work that insured performed on an existing well. The trial court granted defendant's motion for summary judgment; the court of appeals affirmed. This

court affirmed, holding that, based on the four corners of the complaint and plaintiff's entire insurance policy, defendant did not have a duty to defend plaintiff in the underlying action. The dissent quoted [Restatement Third of Agency § 1.01](#) in defining an "agency relationship," and argued that a subcontractor exception to an exclusion provision of the policy applied to reinstate coverage because the complaint's reference to plaintiff's agents as performing the work out of which the damage arose could include a subcontractor. [Water Well Solutions Service Group, Inc. v. Consolidated Ins. Co.](#), 369 Wis.2d 607, 656, 881 N.W.2d 285, 309.

Wis.2011. Com. (c) quot. in conc. op. and cit. in ftn. to conc. op., Rptr's Note cit. in ftn. to conc. op. Automobile purchaser filed a class-action lawsuit against Japanese manufacturer and its American subsidiary, alleging violations of state antitrust and conspiracy laws. The trial court granted defendants' motion to dismiss for lack of personal jurisdiction; the court of appeals affirmed. Affirming, this court held that even assuming subsidiary was the agent of manufacturer, absent control by manufacturer sufficient to disregard the entities' separate corporate identities, the activities of subsidiary were insufficient to subject its parent corporation to general personal jurisdiction. The concurrence opined that the majority opinion was potentially confusing, because it referenced principles applicable to substantive analyses without making a distinction in applying those principles to the jurisdictional analysis; the concurrence explained that evidence of a parent corporation's significant control over the forum contacts of the subsidiary, not the indeterminacy of labeling a subsidiary an agent of the parent corporation, determined whether or not to impute the subsidiary's forum contacts to the parent corporation. [Rasmussen v. General Motors Corp.](#), 2011 WI 52, 335 Wis.2d 1, 803 N.W.2d 623, 644, 645.

Wyo.

Wyo.2011. Cit. in sup. Wyoming dealer of recreational vehicles petitioned for judicial review of the state board of equalization's decision that sales by dealer to out-of-state buyers were subject to Wyoming sales tax. The trial court affirmed the board's decision. Affirming, this court held that transfer of possession and title of vehicles that were sold to out-of-state buyers occurred in Wyoming, rather than in the buyers' home states. The court rejected dealer's argument that out-of-state buyers who picked up their vehicles were acting as their own agent and only had constructive possession for delivery purposes, reasoning that a person could not act as his or her own agent; under established agency law, an agency relationship was established when two parties agreed that one, the agent, would act on behalf of and subject to the control of the other, the principal. [Maverick Motorsports Group, LLC v. Department of Revenue](#), 2011 WY 76, 253 P.3d 125, 133.

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EXHIBIT 272

Dashboard

Independent Review Process - Implementation Oversight Team (IRP-IOT) Home

Created by admin, last modified by Brenda Brewer on Jan 19, 2019

Members:

- 1 Thomas Rickert
- 2 Leon Sanchez
- 3 Becky Burr
- 4 Chris Disspain
- 5 **David McAuley - Lead**
- 6 David Post
- 7 Greg Shatan
- 8 Malcolm Hutty
- 9 Robin Gross
- 10 Samantha Eisner, CANN Sta Liaison
- 11 ijani Ben Jemaa
- 12 Arun Sukumar
- 13 Marianne Georgelin
- 14 Avri Doria
- 15 Olga Cavalli
- 16 Kavouss Arasteh
- 17 Konstantinos Komaitis
- 18 Je LeVee (Jones Day)
- 19 Kate Wallace (Jones Day)
- 20 Kevin Espinola (Jones Day)
- 21 Elizabeth Le, CANN Sta Liaison
- 22 Amy Stathos, CANN Sta Liaison
- 23 Mike Rodenbaugh
- 24 Vinay Kesari
- 25 Sarah Podmaniczky McGonigle (Jones Day)
- 26 Anna Loup
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ICANN Organization Support: Karen Mulberry, Bernard urcotte, Brenda Brewer**Additional ICANN Organization Contacts:** heresa Swinehart**Mailing List:** iot@icann.org**List Archives:** <http://mm.icann.org/pipermail/iot/>**O -list Correspondences:** <https://community.icann.org/x/pcWBg>**Meeting Archives rom WS1:** <https://community.icann.org/x/VZIIAw>**Mission:** he O will review the outcome produced by our legal counsel and report back to the CCWG-Accountability**Documents**

Title	Date	PDF
Updated Dra t nterim CDR Supplementary Procedures Updated Dra t nterim CDR Supplementary Procedures (redline)	25 Sep 2018	<ul style="list-style-type: none"> • 25 Sept 2018 UPDA E Dra t nterim Supplementary Procedures or CANN pd • REDL NE 25 September to 8 May 2018 Versions nterim Supplementary Procedures or nternet Corporation or Assigned Names and Numbers pd • REDL NE - 31 Oct 2017 to 25 Sept 2018 Updated nterim Supplementary Procedures or nternet Corporation or Assigned Names and Numbers pd
CCWG-Accountability-WS2- O - PublicConsultation-June2018-Revised extV1 1B	15 Jun 2018	CCWG-Accountability-WS2- O -Public Consultation June 2018 Revised ext V1 1B
1 May 2018 – Dra t nterim CDR Supplementary Procedures	09 May 2018	8-May-2018-Dra t- N ER M-Supplementary-Procedures- O RP pd <ul style="list-style-type: none"> • https://mm.icann.org/pipermail/iot/2018-May/000390.html
Revised Dra t inal Report on Public Comments on Rules	20 eb 2018	<ul style="list-style-type: none"> • RP- O Report on Public Comments Rules(V2) • RP- O Report on Public Comments Rules(V2) redline
Process Roadmap re Establishment o RP Standing Panel	10 Jul 2017	Process Roadmap re Establishment o RP Standing Panel-v3
RP- O Public Comment-Analysis Signup Sheet	18 May 2017	Google Sign-up Sheet ← sign up here
Certain RP Comments treatment or irst reading	12 May 2017	Certain RP Comments treatment or irst reading
RP Discussion Retroactivity Panel Con lict	04 May 2017	RP discussion retroactivity panel con lict
Jones Day s response to Sidley s input	13 Apr 2017	Jones Day s response to Sidley s input https://mm.icann.org/pipermail/iot/2017-April/000186.html
Samantha Eisner email	30 Mar 2017	Samantha Eisner email to Malcolm https://mm.icann.org/pipermail/iot/2017-March/000178.html
iming ssues	30 Mar 2017	iming ssue
	29 Mar 2017	EO -Standing-Panel-DRA or O Consideration

Title	Date	PDF
DRA or inputs - Call or Expressions of Interest or Standing Panel		
Joiner issues	23 Mar 2017	Joiner issue O 3 23 17
RP Presentation at CCWG 2 in Copenhagen	10 Mar 2017	RP Presentation at CCWG 2 in Copenhagen
RP Draft Supplemental Procedures Public Comment Analysis	01 Mar 2017	RP Procedures Public Comment Analysis
Letcher, Heald & Hildreth Draft Language Comments by Letcher, Heald & Hildreth	27 Feb 2017	RP O Letcher draft language RP Comment Letcher
CCWG 2 Presentation DRA	27 Feb 2017	RP O 3 10 17 DRA
RP-O Public Comment Responses	02 Feb 2017	Index Comments Filed for RP Supplemental Procedures CCWG-Accountability-WS2- RP O -PublicConsultation1-Responses-PD Compendium Email link
Sidley - Response to Certified Questions of RP-O	05 Jan 2017	Sidley - Response to Certified Questions of RP-O https://mm.icann.org/pipermail/iot/2017-January/000136.html
RP-O Open Public Comment Announcement	29 Nov 2016	http://mm.icann.org/pipermail/accountability-cross-community/2016-November/013424.html https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en
Slide Presentation for CCWG ACC 2 - Hy,	02 Nov 2016	WP-O - RP Implementation Oversight Team
Draft Revised Supplementary Procedures Report	31 Oct 2016	Draft Revised Supplementary Procedures Report
Slide presentation for O Meeting	11 Aug 2016	Slide Presentation_11 Aug 16 RP O .pd
Draft Revised Supplementary Procedures	22 Aug 2016 04 Aug 2016 28 Jul 2016 26 Jul 2016	Draft RP Updated Supplementary Procedures_22 Aug Draft RP Updated Supplementary Procedures_04 Aug Draft RP Updated Supplementary Procedures redline 7-29 Draft RP Updated Supplementary Procedures_26 July
Updates to CDR Supplementary Procedures	19 Jul 2016	Redline to CDR Supplementary Procedures
Draft CANN CANN RP Procedural Rules table	06 Jul 2016	WP-O - Procedural Rules table
Supplementary Procedures for CANN RP	06 Jul 2016	Supplementary Procedures for CANN RP
RP O _CCWG Proposal to Bylaws Mapping	01 Jun 2016	RP O CCWG Proposal to bylaws mapping .pd
PR Bylaws Procedural Chart	01 Jun 2016	RP O Bylaw procedure chart1 .pd
RP O Procedural Questions	01 Jun 2016	RP O Procedural QSlide Deck1 .pd
RP O Meeting #2 Slides	25 May 2016	RP O Meeting 2 .pd

Samples / Resources

Title	Document
International Chamber of Commerce Rules of Arbitration	CC Rules of Arbitration .pd
CDR Dispute Resolution Procedures (June 1, 2014)	CDR .pd
Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (as from 1 January 2010)	SCC - Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce .pd
Swiss Civil Procedure Code of 19 December 2008 (Status as of 1 May 2013)	Swiss Civil Procedure Code .pd
Federal Rules of Civil Procedure December 1, 2015	N/A
International Institute for Conflict Prevention & Resolution CPR Procedures & Clauses Administered Arbitration Rules Effective July 1, 2013	CPR arbitration rules .pd
WPO Arbitration Rules (Effective from June 1, 2014)	WPO Arbitration Rules .pd
JAMS Comprehensive Arbitration Rules & Procedures Effective July 1, 2014	JAMS arbitration rules .pd
The Inspection Panel at the World Bank Operating Procedures April 2014 (With Annex 2 Added in February 2016)	Inspection Panel at the WB 2014 Updated Operating Procedures .pd

Correspondence (All IRP-IOT archives can be found here)

DATE	Mail link	Subject
19 Oct 2018	https://mm.icann.org/pipermail/iot/2018-October/000451.html	O - nterim Supplementary Rules

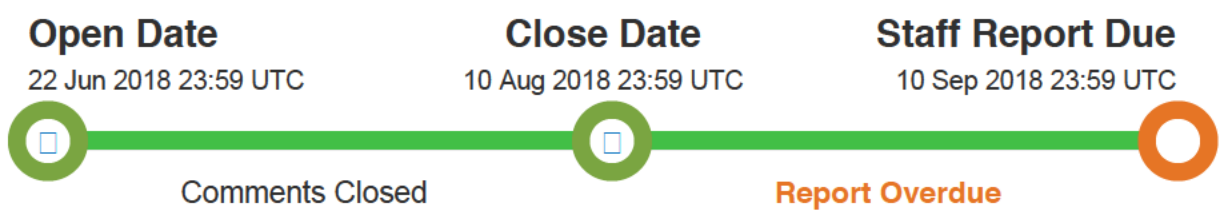
DATE	Mail link	Subject
21 Oct 2018	https://mm.icann.org/pipermail/iot/2018-October/000452.html	O - nterim Supplementary Rules - ollow up)

EXHIBIT 273

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The Independent Review Process Implementation Oversight Team (IRP- IOT) Draft Recommendations



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Originating Organization

Cross Community Working Group on
Enhancing ICANN Accountability
(CCWG-Accountability)

Staff Contact

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- [Section I: Description and Explanation](#)
- [Section II: Background](#)
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Brief Overview

Update on the IRP-IOT Public Consultation September 21, 2018

Please note that a summary of the results of this public consultation cannot be posted until the IOT has completed the analysis of the responses.

The IOT is currently working on approving an interim set of supplementary rules and will then return its focus to the results of the public consultation.

David McAuley
Chair of the IOT

Purpose: The Independent Review Process Implementation Oversight Team (IRP-IOT) is seeking further public comments on the Time for Filing rule (Updated Supplementary Procedure rule #4, Time for Filing).

Current Status: The IOT reviewed the results of the 28 November 2016 public comments on its draft Updated Supplementary Procedures (USP) for the Independent Review Process (IRP) and noted that a significant number of comments did not support the proposed limitations underpinning rule #4. In response to this the IOT is proposing significant amendments to this rule.

Next Steps: Following the public comment period the inputs will be analyzed by the IOT who will consider amending the amended rule in light of the comments received and will publish a report on the results of the public consultation. If significant changes are required as a result of the public consultation the IOT may opt to have a further public comment period on these changes. If there are no significant changes this rule will be included in the USP.

Section I: Description and Explanation

The Updated Supplementary Procedures for the Independent Review Process (IRP) were [submitted](#) for public comment on November 28, 2016. The comment period closed on Feb. 1, 2017, and the staff report on the public comments was [issued](#) [PDF, 401 KB] on August 2, 2017. The public comments submitted are available [here](#).

A number of public comments focused on Updated Supplementary Procedure #4,

Time for Filing. That rule as proposed by the IRP Implementation Oversight Team (IOT) was:

4. Time for Filing

An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 45 days after a CLAIMANT becomes aware of the material affect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.

In order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.

[Footnotes 14 and 15 omitted – they are available at <https://www.icann.org/en/system/files/files/draft-irp-supp-procedures-31oct16-en.pdf> (PDF, 870 KB)]

On the topic of the 45-day aspect of the Time-for-Filing language, 11 of the 19 respondents commented on this portion of the draft and all 11 had issues with this proposal and either opposed it or proposed changes. The modified language now available for comment now provides for a 120-day period for filing after the claimant becomes aware of the material effect (75 days more than was suggested previously).

On the topic of the 12-month limitation to file an IRP, 13 of the 19 respondents to the public consultation commented on this with 11 having issues with this proposal and either opposed it or proposed changes. The modified language now available for comment removes any outside time limit to file an IRP. Under the prior text, a claimant would have had to have filed their IRP within one year of the action/inaction that is being challenged. Under the new text, the only timing requirement that the claimant has to meet is the 120-day requirement above, whether the challenged action/inaction happened 3 months, 3 years or 5 years prior (or more).

All material and comments relating to the public consultation on the IRP held in late 2016 is archived at <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>

Following its deliberations, the IRP IOT proposes amending its original Updated

Supplementary Procedure #4, Time for Filing, in its entirety, to say as follows:

4. Time for Filing

An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 120 days after a CLAIMANT becomes aware, or ought reasonably to have been aware, of the material affect of the action or inaction giving rise to the DISPUTE.

In order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.

Section II: Background

ICANN operates a separate process for independent third-party review of Disputes – the Independent Review Process (IRP). The International Centre for Dispute Resolution (ICDR) currently administers ICANN's Independent Review Processes. ICANN IRPs are governed by the ICDR's International Dispute Resolution Procedures as modified by Supplementary Procedures for ICANN's IRP.

The CCWG-Accountability Work Stream 1 (WS1) in its final report included the following under Implementation for Recommendation 7 concerning the IRP:

"The CCWG-Accountability proposes that the revised IRP provisions be adopted as Fundamental Bylaws. Implementation of these enhancements will necessarily require additional detailed work. Detailed rules for the implementation of the IRP (such as rules of procedure) are to be created by the ICANN community through a CCWG (assisted by counsel, appropriate experts, and the Standing Panel when confirmed), and approved by the Board, such approval not to be unreasonably withheld."

This part of the recommendations on IRP is included in the following section of the new ICANN Bylaws which took effect on 27 May 2016:

"(n) Rules of Procedure

(i) An IRP Implementation Oversight Team shall be established in consultation with the Supporting Organizations and Advisory Committees

and comprised of members of the global Internet community. The IRP Implementation Oversight Team, and once the Standing Panel is established the IRP Implementation Oversight Team in consultation with the Standing Panel, shall develop clear published rules for the IRP ("Rules of Procedure") that conform with international arbitration norms and are streamlined, easy to understand and apply fairly to all parties. Upon request, the IRP Implementation Oversight Team shall have assistance of counsel and other appropriate experts.

(ii) The Rules of Procedure shall be informed by international arbitration norms and consistent with the Purposes of the IRP. Specialized Rules of Procedure may be designed for reviews of PTI service complaints that are asserted by direct customers of the IANA naming functions and are not resolved through mediation. The Rules of Procedure shall be published and subject to a period of public comment that complies with the designated practice for public comment periods within ICANN, and take effect upon approval by the Board, such approval not to be unreasonably withheld."

In early in 2016 the CCWG-Accountability created the IRP IOT which has been working on updating the Supplementary Rules of Procedures.

It is important to note that the IRP IOT was included as part of WS2 for administrative simplicity but is in fact independent of WS2. Current expectations are that the IRP IOT will continue beyond the scheduled completion date for WS2 of June 2018.

Section III: Relevant Resources

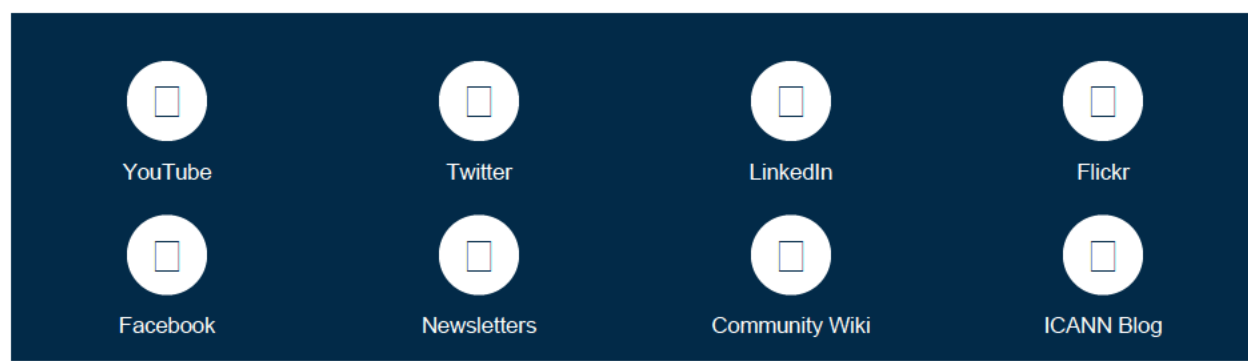
- ICANN BYLAWS - <https://www.icann.org/resources/pages/governance/bylaws-en>
- CCWG-Accountability Work Stream 1 – Final recommendations – Recommendation #7 <https://community.icann.org/pages/viewpage.action?pageId=58723827&preview=/58723827/58726371/Annex%2007%20-%20FINAL-Revised.pdf> [PDF, 277 KB]
- November 2016 Public consultation on the Updated Supplementary Rules - <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>

Section IV: Additional Information

Report and Supporting Documents

- IOT wiki - <https://community.icann.org/display/WEIA/WP-IOT+-+IRP+Implementation+Oversight+Team>

Section V: Reports



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EXHIBIT 274

Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (IRP)²

Revised as of [Day, Month], 2018

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These interim procedures (Interim Supplementary Procedures) supplement the International Centre for Dispute Resolution’s international arbitration rules in accordance with the independent review process set forth in Article 4, Section 4.3 of ICANN’s Bylaws. These procedures apply to all independent review process proceedings filed after 1 May 2018.

In drafting these Interim Supplementary Procedures, the IRP Implementation Oversight Team (IOT) applied the following principles: (1) remain as close as possible to the current Supplementary Procedures or the Updated Supplementary Procedures (USP) posted for public comment on 28 November 2016⁴; (2) to the extent public comments received in response to the

² CONTEXTUAL NOTE: These Interim Supplementary Procedures are intended to supplement the ICDR RULES. Therefore, when the ICDR RULES appropriately address an item, there is no need to re-state that Rule within the Supplemental Procedures. The IOT, through its work, may identify additional places where variance from the ICDR RULES is recommended, and that would result in addition or modification to the Supplemental Procedures.

⁴ See <https://www.icann.org/public-comments/irp-supp-procedures-2016-11-28-en>

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USP reflected clear movement away from either the current Supplementary Procedures or the USP, to reflect that movement unless doing so would require significant drafting that should be properly deferred for broader consideration: (3) take no action that would materially expand any part of the Supplementary Procedures that the IOT has not clearly agreed upon, or that represent a significant change from what was posted for comment and would therefore require further public consultation prior to changing the supplemental rules to reflect those expansions or changes.

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1. Definitions

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In these Interim Supplementary Procedures:

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A CLAIMANT is any legal or natural person, group, or entity including, but not limited to the Empowered Community, a Supporting Organization, or an Advisory Committee, that has been materially affected by a Dispute. To be materially affected by a Dispute, the Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.

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COVERED ACTIONS are any actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers, or Staff members that give rise to a DISPUTE.

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DISPUTES are defined as:

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(A) Claims that COVERED ACTIONS violated ICANN’s Articles of Incorporation or Bylaws, including, but not limited to, any action or inaction that:

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- 1) exceeded the scope of the Mission;
- 2) resulted from action taken in response to advice or input from any Advisory Committee or Supporting Organization that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
- 3) resulted from decisions of process-specific expert panels that are claimed to be inconsistent with the Articles of Incorporation or Bylaws;
- 4) resulted from a response to a DIDP (as defined in Section 22.7(d)) request that is claimed to be inconsistent with the Articles of Incorporation or Bylaws; or
- 5) arose from claims involving rights of the EC as set forth in the Articles of Incorporation or Bylaws;

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(B) Claims that ICANN, the Board, individual Directors, Officers or Staff members have not enforced ICANN’s contractual rights with respect to the IANA Naming Function Contract; and

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(C) Claims regarding the Post-Transition IANA entity service complaints by direct customers of the IANA naming functions that are not resolved through mediation

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EMERGENCY PANELIST refers to a single member of the STANDING PANEL designated to adjudicate requests for interim relief or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for emergency relief (ICDR RULES Article 6).

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IANA refers to the Internet Assigned Numbers Authority

ICDR refers to the International Centre for Dispute Resolution, which has been designated and approved by ICANN’s Board of Directors as the IRP Provider (IRPP) under Article 4, Section 4.3 of ICANN’s Bylaws

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ICANN refers to the Internet Corporation for Assigned Names and Numbers.

INDEPENDENT REVIEW PROCESS or IRP refers to the procedure that takes place upon the Claimant’s filing of a written statement of a DISPUTE with the ICDR

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IRP PANEL refers to the panel of three neutral members appointed to decide the relevant DISPUTE

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IRP PANEL DECISION refers to the final written decision of the IRP PANEL that reflects the reasoned analysis of how the DISPUTE was resolved in compliance with ICANN’s Articles and Bylaws

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ICDR RULES refers to the ICDR’s International Arbitration rules in effect at the time the relevant request for independent review is submitted.

PROCEDURES OFFICER refers to a single member of the STANDING PANEL designated to adjudicate requests for consolidation, intervention, and or participation as an amicus, or, if a STANDING PANEL is not in place at the time the relevant IRP is initiated, it shall refer to the panelist appointed by the ICDR pursuant to its International Arbitration Rules relating to appointment of panelists for consolidation (ICDR Rules Article 8)

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PURPOSES OF THE IRP are to hear and resolve Disputes for the reasons specified in the ICANN Bylaws, Article 4, Section 4.3(a).

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STANDING PANEL refers to an omnibus standing panel of at least seven members from which three-member IRP PANELS are selected to hear and resolve DISPUTES consistent with the purposes of the IRP.

2. Scope

The ICDR will apply these Interim Supplementary Procedures, in addition to the ICDR RULES, in all cases submitted to the ICDR in connection with Article 4, Section 4.3 of the ICANN Bylaws after the date these Interim Supplementary Procedures go into effect. In the event there is any inconsistency between these Interim Supplementary Procedures and the ICDR RULES, these Interim Supplementary Procedures will govern. These Interim Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is commenced. IRPs commenced prior to the adoption of these Interim Supplementary Procedures shall be governed by the Supplementary Procedures in effect at the time such IRPs were commenced.

In the event that any of these Interim Supplementary Procedures are subsequently amended, the rules surrounding the application of those amendments will be defined therein.

3. Composition of Independent Review Panel

The IRP PANEL will comprise three panelists selected from the STANDING PANEL, unless a STANDING PANEL is not in place when the IRP is initiated. The CLAIMANT and ICANN shall each select one panelist from the STANDING PANEL, and the two panelists selected by the parties will select the third panelist from the STANDING PANEL. A STANDING PANEL member's appointment will not take effect unless and until the STANDING PANEL member signs a Notice of STANDING PANEL Appointment affirming that the member is available to serve and is Independent and Impartial pursuant to the ICDR RULES. In addition to disclosing relationships with parties to the DISPUTE, IRP PANEL members must also disclose the existence of any material relationships with ICANN, and/or an ICANN Supporting Organization or Advisory Committee. In the event that a STANDING PANEL is not in place when the relevant IRP is initiated or is in place but does not have capacity due to other IRP commitments, the CLAIMANT and ICANN shall each select a qualified panelist from outside the STANDING PANEL, and the two panelists selected by the parties shall select the third panelist. In the event that the two party-selected panelists cannot agree on the third panelist, the ICDR RULES shall apply to selection of the third panelist. In the event that a panelist resigns, is incapable of performing the duties of a panelist, or is removed and the position becomes vacant, a substitute arbitrator shall be appointed pursuant to the provisions of this Section [3] of these Interim Supplementary Procedures.

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- Deleted: unjust and impracticable to the requesting party and application of the amendments would not materially disadvantage any other party's substantive rights Any party to a then-pending IRP may oppose the request for application of the amended Supplementary Procedures Requests to apply updated amen [5]
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4. Time for Filing¹⁶

An INDEPENDENT REVIEW is commenced when CLAIMANT files a written statement of a DISPUTE. A CLAIMANT shall file a written statement of a DISPUTE with the ICDR no more than 120 days after a CLAIMANT becomes aware of the material effect of the action or inaction giving rise to the DISPUTE; provided, however, that a statement of a DISPUTE may not be filed more than twelve (12) months from the date of such action or inaction.

In order for an IRP to be deemed to have been timely filed, all fees must be paid to the ICDR within three business days (as measured by the ICDR) of the filing of the request with the ICDR.

5. Conduct of the Independent Review

It is in the best interests of ICANN and of the ICANN community for IRP matters to be resolved expeditiously and at a reasonably low cost while ensuring fundamental fairness and due process consistent with the PURPOSES OF THE IRP. The IRP PANEL shall consider accessibility, fairness, and efficiency (both as to time and cost) in its conduct of the IRP.

In the event that an EMERGENCY PANELIST has been designated to adjudicate a request for interim relief pursuant to the Bylaws, Article 4, Section 4.3(p), the EMERGENCY PANELIST shall comply with the rules applicable to an IRP PANEL, with such modifications as appropriate.

5A. Nature of IRP Proceedings

The IRP PANEL should conduct its proceedings by electronic means to the extent feasible.

Hearings shall be permitted as set forth in these Interim Supplementary Procedures. Where necessary, the IRP PANEL may conduct hearings via telephone, video conference or similar technologies. The IRP PANEL should conduct its proceedings with the presumption that in-person hearings shall not be permitted. For purposes of these Interim Supplementary Procedures, an "in-person hearing" refers to any IRP proceeding held face-to-face, with participants physically present in the same location. The presumption against in-person hearings may be rebutted only under extraordinary circumstances, where, upon motion by a Party, the IRP PANEL determines that the party seeking an in-person hearing has demonstrated that: (1) an in-

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¹⁶ The IOT recently sought additional public comment to consider the Time for Filing rule that will be recommended for inclusion in the final set of Supplementary Procedures. In the event that the final Time for Filing procedure allows additional time to file than this interim Supplementary Procedure allows, ICANN committed to the IOT that the final Supplementary Procedures will include transition language that provides potential claimants the benefit of that additional time, so as not to prejudice those potential claimants.

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person hearing is necessary for a fair resolution of the claim; (2) an in-person hearing is necessary to further the PURPOSES OF THE IRP; and (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of an in-person hearing. In no circumstances shall in-person hearings be permitted for the purpose of introducing new arguments or evidence that could have been previously presented, but were not previously presented, to the IRP PANEL.

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All hearings shall be limited to argument only unless the IRP Panel determines that a the party seeking to present witness testimony has demonstrated that such testimony is: (1) necessary for a fair resolution of the claim; (2) necessary to further the PURPOSES OF THE IRP; and (3) considerations of fairness and furtherance of the PURPOSES OF THE IRP outweigh the time and financial expense of witness testimony and cross examination.

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All evidence, including witness statements, must be submitted in writing 15 days in advance of any hearing.

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With due regard to ICANN Bylaws, Article 4, Section 4.3(s), the IRP PANEL retains responsibility for determining the timetable for the IRP proceeding. Any violation of the IRP PANEL's timetable may result in the assessment of costs pursuant to Section 10 of these Interim Supplementary Procedures.

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5B. Translation

As required by ICANN Bylaws, Article 4, Section 4.3(l), "All IRP proceedings shall be administered in English as the primary working language, with provision of translation services for CLAIMANTS if needed." Translation may include both translation of written documents/transcripts as well as interpretation of oral proceedings.

The IRP PANEL shall have discretion to determine (i) whether the CLAIMANT has a need for translation services, (ii) what documents and/or hearing that need relates to, and (iii) what language the document, hearing or other matter or event shall be translated into. A CLAIMANT not determined to have a need for translation services must submit all materials in English (with the exception of the request for translation services if the request includes CLAIMANT's certification to the IRP PANEL that submitting the request in English would be unduly burdensome).

In determining whether a CLAIMANT needs translation, the IRP PANEL shall consider the CLAIMANT's proficiency in spoken and written English and, to the extent that the CLAIMANT is represented in the proceedings by an attorney or other agent, that representative's proficiency

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in spoken and written English. The IRP PANEL shall only consider requests for translations from/to English and the other five official languages of the United Nations (i.e., Arabic, Chinese, French, Russian, or Spanish).

In determining whether translation of a document, hearing or other matter or event shall be ordered, the IRP PANEL shall consider the CLAIMANT’s proficiency in English as well as in the requested other language (from among Arabic, Chinese, French, Russian or Spanish). The IRP PANEL shall confirm that all material portions of the record of the proceeding are available in English.

In considering requests for translation, the IRP PANEL shall consider the materiality of the particular document, hearing or other matter or event requested to be translated, as well as the cost and delay incurred by translation, pursuant to ICDR Article 18 on Translation, and the need to ensure fundamental fairness and due process under ICANN Bylaws, Article 4, Section 4.3(n)(iv).

Unless otherwise ordered by the IRP PANEL, costs of need-based translation (as determined by the IRP PANEL) shall be covered by ICANN as administrative costs and shall be coordinated through ICANN’s language services providers. Even with a determination of need-based translation, if ICANN or the CLAIMANT coordinates the translation of any document through its legal representative, such translation shall be considered part of the legal costs and not an administrative cost to be born by ICANN. Additionally, in the event that either the CLAIMANT or ICANN retains a translator for the purpose of translating any document, hearing or other matter or event, and such retention is not pursuant to a determination of need-based translation by the IRP PANEL, the costs of such translation shall not be charged as administrative costs to be covered by ICANN.

6. Written Statements

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A CLAIMANT’S written statement of a DISPUTE shall include all claims that give rise to a particular DISPUTE, but such claims may be asserted as independent or alternative claims.

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font. All necessary and available evidence in support of the CLAIMANT’S claim(s) should be part of the initial written submission. Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence. The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.

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In addition, the IRP PANEL may grant a request for additional written submissions from any person or entity who is intervening as a CLAIMANT or who is participating as an amicus upon the showing of a compelling basis for such request. In the event the IRP PANEL grants a request for additional written submissions, any such additional written submission shall not exceed 15 pages, double-spaced and in 12-point font.

For any DISPUTE resulting from a decision of a process-specific expert panel that is claimed to be inconsistent with ICANN’s Articles of Incorporation or Bylaws, as specified at Bylaw Section 4.3(b)(iii)(A)(3), any person, group or entity that was previously identified as within a contention set with the CLAIMANT regarding the issue under consideration within such expert panel proceeding shall receive notice from ICANN that the INDEPENDENT REVIEW PROCESS has commenced. ICANN shall provide notice by electronic message within two business days (calculated at ICANN’s principal place of business) of receiving notification from the ICDR that the IRP has commenced.

7. Consolidation, Intervention, and Participation as an Amicus

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A PROCEDURES OFFICER shall be appointed from the STANDING PANEL to consider any request for consolidation, intervention, and/or participation as an amicus. Requests for consolidation, intervention, and/or participation as an amicus are committed to the reasonable discretion of the PROCEDURES OFFICER. In the event that no STANDING PANEL is in place when a PROCEDURES OFFICER must be selected, a panelist may be appointed by the ICDR pursuant to its INTERNATIONAL ARBITRATION RULES relating to appointment of panelists for consolidation.

In the event that requests for consolidation or intervention, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion consistent with the PURPOSES OF THE IRP.

Consolidation

Consolidation of DISPUTES may be appropriate when the PROCEDURES OFFICER concludes that there is a sufficient common nucleus of operative fact among multiple IRPs such that the joint resolution of the DISPUTES would foster a more just and efficient resolution of the DISPUTES than addressing each DISPUTE individually. If DISPUTES are consolidated, each existing DISPUTE shall no longer be subject to further separate consideration. The

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PROCEDURES OFFICER may in its discretion order briefing to consider the propriety of consolidation of DISPUTES.

Intervention

Any person or entity qualified to be a CLAIMANT pursuant to the standing requirement set forth in the Bylaws may intervene in an IRP with the permission of the PROCEDURES OFFICER, as provided below. This applies whether or not the person, group or entity participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)).

Intervention is appropriate to be sought when the prospective participant does not already have a pending related DISPUTE, and the potential claims of the prospective participant stem from a common nucleus of operative facts based on such briefing as the PROCEDURES OFFICER may order in its discretion.

In addition, the Supporting Organization(s) which developed a Consensus Policy involved when a DISPUTE challenges a material provision(s) of an existing Consensus Policy in whole or in part shall have a right to intervene as a CLAIMANT to the extent of such challenge. Supporting Organization rights in this respect shall be exercisable through the chair of the Supporting Organization.

Any person, group or entity who intervenes as a CLAIMANT pursuant to this section will become a CLAIMANT in the existing INDEPENDENT REVIEW PROCESS and have all of the rights and responsibilities of other CLAIMANTS in that matter and be bound by the outcome to the same extent as any other CLAIMANT. All motions to intervene or for consolidation shall be directed to the IRP PANEL within 15 days of the initiation of the INDEPENDENT REVIEW PROCESS. All requests to intervene or for consolidation must contain the same information as a written statement of a DISPUTE and must be accompanied by the appropriate filing fee. The IRP PANEL may accept for review by the PROCEDURES OFFICER any motion to intervene or for consolidation after 15 days in cases where it deems that the PURPOSES OF THE IRP are furthered by accepting such a motion.

The IRP PANEL shall direct that all materials related to the DISPUTE be made available to entities that have intervened or had their claim consolidated unless a CLAIMANT or ICANN objects that such disclosure will harm commercial confidentiality, personal data, or trade secrets; in which case the IRP PANEL shall rule on objection and provide such information as is consistent with the PURPOSES OF THE IRP and the appropriate preservation of confidentiality as recognized in Article 4 of the Bylaws.

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Participation as an Amicus Curiae

Any person, group, or entity that has a material interest relevant to the DISPUTE but does not satisfy the standing requirements for a CLAIMANT set forth in the Bylaws may participate as an amicus curiae before an IRP PANEL, subject to the limitations set forth below. A person, group or entity that participated in an underlying proceeding (a process-specific expert panel per ICANN Bylaws, Article 4, Section 4.3(b)(iii)(A)(3)) shall be deemed to have a material interest relevant to the DISPUTE and may participate as an amicus before the IRP PANEL.

All requests to participate as an amicus must contain the same information as the Written Statement (set out at Section 6), specify the interest of the amicus curiae, and must be accompanied by the appropriate filing fee.

If the PROCEDURES OFFICER determines, in his or her discretion, that the proposed amicus curiae has a material interest relevant to the DISPUTE, he or she shall allow participation by the amicus curiae. Any person participating as an amicus curiae may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP PANEL may request briefing, in the discretion of the IRP PANEL and subject to such deadlines, page limits, and other procedural rules as the IRP PANEL may specify in its discretion. The IRP PANEL shall determine in its discretion what materials related to the DISPUTE to make available to a person participating as an amicus curiae.

8. Exchange of Information

The IRP PANEL shall be guided by considerations of accessibility, fairness, and efficiency (both as to time and cost) in its consideration of requests for exchange of information.

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On the motion of either Party and upon finding by the IRP PANEL that such exchange of information is necessary to further the PURPOSES OF THE IRP, the IRP PANEL may order a Party to produce to the other Party, and to the IRP PANEL if the moving Party requests, documents or electronically stored information in the other Party’s possession, custody, or control that the Panel determines are reasonably likely to be relevant and material to the resolution of the CLAIMS and/or defenses in the DISPUTE and are not subject to the attorney-client privilege, the work product doctrine or otherwise protected from disclosure by applicable law. Where such method(s) for exchange of information are allowed, all Parties shall be granted the equivalent rights for exchange of information.

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A motion for exchange of documents shall contain a description of the specific documents, classes of documents or other information sought that relate to the subject matter of the Dispute

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along with an explanation of why such documents or other information are likely to be relevant and material to resolution of the Dispute.

Depositions, interrogatories, and requests for admission will not be permitted.

In the event that a Party submits what the IRP PANEL deems to be an expert opinion, such opinion must be provided in writing and the other Party must have a right of reply to such an opinion with an expert opinion of its own.

9. Summary Dismissal

An IRP PANEL may summarily dismiss any request for INDEPENDENT REVIEW where the Claimant has not demonstrated that it has been materially affected by a DISPUTE. To be materially affected by a DISPUTE, a Claimant must suffer an injury or harm that is directly and causally connected to the alleged violation.

An IRP PANEL may also summarily dismiss a request for INDEPENDENT REVIEW that lacks substance or is frivolous or vexatious.

10. Interim Measures of Protection

A Claimant may request interim relief from the IRP PANEL, or if an IRP PANEL is not yet in place, from the STANDING PANEL. Interim relief may include prospective relief, interlocutory relief, or declaratory or injunctive relief, and specifically may include a stay of the challenged ICANN action or decision in order to maintain the status quo until such time as the opinion of the IRP PANEL is considered by ICANN as described in ICANN Bylaws, Article 4, Section 4.3(o)(iv).

An EMERGENCY PANELIST shall be selected from the STANDING PANEL to adjudicate requests for interim relief. In the event that no STANDING PANEL is in place when an EMERGENCY PANELIST must be selected, a panelist may be appointed by the ICDR pursuant to ICDR RULES relating to appointment of panelists for emergency relief. Interim relief may only be provided if the EMERGENCY PANELIST determines that the Claimant has established all of the following factors:

- (i) A harm for which there will be no adequate remedy in the absence of such relief;
- (ii) Either: (A) likelihood of success on the merits; or (B) sufficiently serious questions related to the merits; and
- (iii) A balance of hardships tipping decidedly toward the party seeking relief.

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Interim relief may be granted on an ex parte basis in circumstances that the EMERGENCY PANELIST deems exigent, but any Party whose arguments were not considered prior to the granting of such interim relief may submit any opposition to such interim relief, and the EMERGENCY PANELIST must consider such arguments, as soon as reasonably possible. The EMERGENCY PANELIST may modify or terminate the interim relief if the EMERGENCY PANELIST deems it appropriate to do so in light of such further arguments.

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11. Standard of Review

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Each IRP PANEL shall conduct an objective, de novo examination of the DISPUTE.

- a. With respect to COVERED ACTIONS, the IRP PANEL shall make findings of fact to determine whether the COVERED ACTION constituted an action or inaction that violated ICANN’S Articles or Bylaws.
- b. All DISPUTES shall be decided in compliance with ICANN’s Articles and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.
- c. For Claims arising out of the Board’s exercise of its fiduciary duties, the IRP PANEL shall not replace the Board’s reasonable judgment with its own so long as the Board’s action or inaction is within the realm of reasonable business judgment.
- d. With respect to claims that ICANN has not enforced its contractual rights with respect to the IANA Naming Function Contract, the standard of review shall be whether there was a material breach of ICANN’s obligations under the IANA Naming Function Contract, where the alleged breach has resulted in material harm to the Claimant.
- e. IRPs initiated through the mechanism contemplated at Article 4, Section 4.3(a)(iv) of ICANN’s Bylaws shall be subject to a separate standard of review as defined in the IANA Naming Function Contract.

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12. IRP PANEL Decisions

IRP PANEL DECISIONS shall be made by a simple majority of the IRP PANEL. If any IRP PANEL member fails to sign the IRP PANEL DECISION, the IRP PANEL member shall endeavor to provide a written statement of the reason for the absence of such signature.

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13. Form and Effect of an IRP PANEL DECISION

- a. IRP PANEL DECISIONS shall be made in writing, promptly by the IRP PANEL, based on the documentation, supporting materials and arguments submitted by the parties.
- b. The IRP PANEL DECISION shall specifically designate the prevailing party as to each Claim.
- c. Subject to Article 4, Section 4.3 of ICANN’s Bylaws, all IRP PANEL DECISIONS shall be made public, and shall reflect a well-reasoned application of how the DISPUTE was resolved in compliance with ICANN’s Articles and Bylaws, as understood in light of prior IRP PANEL DECISIONS decided under the same (or an equivalent prior) version of the provision of the Articles and Bylaws at issue, and norms of applicable law.

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14. Appeal of IRP PANEL Decisions

An IRP PANEL DECISION may be appealed to the full STANDING PANEL sitting en banc within 60 days of the issuance of such decision. The en banc STANDING PANEL will review such appealed IRP PANEL DECISION based on a clear error of judgment or the application of an incorrect legal standard. The en banc STANDING PANEL may also resolve any disputes between panelists on an IRP PANEL or the PROCEDURES OFFICER with respect to consolidation of CLAIMS or intervention.

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15. Costs

The IRP PANEL shall fix costs in its IRP PANEL DECISION. Except as otherwise provided in Article 4, Section 4.3(e)(ii) of ICANN’s Bylaws, each party to an IRP proceeding shall bear its own legal expenses, except that ICANN shall bear all costs associated with a Community IRP, as defined in Article 4, Section 4.3(d) of ICANN’s Bylaws, including the costs of all legal counsel and technical experts.

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Except with respect to a Community IRP, the IRP PANEL may shift and provide for the losing party to pay administrative costs and/or fees of the prevailing party in the event it identifies the losing party’s Claim or defense as frivolous or abusive.

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unjust and impracticable to the requesting party and application of the amendments would not materially disadvantage any other party's substantive rights. Any party to a then-pending IRP may oppose the request for application of the amended Supplementary Procedures. Requests to

apply updated amended supplementary procedures will be resolved by the IRP PANEL in the exercise of its discretion.

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independent and impartial. An IRP PANEL member's appointment will not take effect unless and until the IRP PANEL member signs a Notice of IRP PANEL Appointment affirming that the member is available to serve and is independent and impartial.

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In the event that requests for consolidation, intervention, and joinder are granted, the restrictions on Written Statements set forth in Section 6 shall apply to all CLAIMANTS collectively (for a total of 25 pages exclusive of evidence) and not individually unless otherwise modified by the IRP PANEL in its discretion.

Discovery Methods¹

¹ There is no existing Supplemental Rule. The [CCWG Final Proposal and] May 2016 ICANN Bylaws recommend that discovery methods be considered by IOT. *See* May 2016 ICANN Bylaws, Article IV, Section 4.3(n)(iv)(D).

EXHIBIT 275

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IRP-IOT Meeting

Thursday, December 7, 2017 – 19:00 to 20:00 UTC

>> DAVID McAULEY: Hello it's 3 minutes past the top of the hour. If I said we would start at 3 but obviously we are struggling to gather a group together. I see Malcolm joined and I would like to say hello to Kate. I would like to gather a five consensus 5 minutes past the hour. Maybe some people have been confused by the change of clocks. In the interim at least in certain countries and our call is one hour earlier than it normally is in those countries. But let's wait until 5 minutes past the hour. Then I will come back on the line at this that point and see where we stand. In the meantime be patient and thank you everyone for being here.

In order to get things moving along, can I ask if there's people on the phone if they are not in the Adobe chat room, would they please identify themselves?

>> DAVID McAULEY: Hello again. It's David McAuley speaking. We did not hear responses and Brenda indicates as well there's nobody on the phone that is not in the room. You see the group is small and we have not achieved the nucleus we normally would need for a call. Nonetheless, I would like the press on and at least make a call record. So could I ask that the recording please be started.

[Meeting now being recorded]

>> DAVID McAULEY: Thanks very much. Hello everyone it's David McAuley speaking I'm sorry to say it's a disappointing turnout so far. As you have seen from the emails I put out there there's much on our agenda and what I have on the agenda is trying to push us to wrap up work on the rules in fairly quick order. Nonetheless there are some of us on the call and I'd like to give people an opportunity the chime in on things and I see Robin

Note: The following is the output resulting from the RTT (Real-Time Transcription also known as CART) of a teleconference call and/or session conducted into a word/text document. Although the transcription is largely accurate, in some cases may be incomplete or inaccurate due to inaudible passages and grammatical corrections. It is posted as an aid to the original audio file, but should not be treated as an authoritative record.

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just joined so we basically do have a nucleus to move forward. So let me ask of knows on the call, if anyone has a change in their statement of interest that they would like to note to the group?

Seeing no hands raised and hearing none, let's move on to agenda number 2. I'm sorry, yes, number 2. That is where do we stand with respect to work on developing the standing panel? That work will involve an expression of interest that needs to be released and then work by ICANN and the SOs and the ACs to select and nominate and then confirm a standing panel. Liz is on the call. I'm going to ask Liz to let us know where things stand and the reason I do that, is while this group, the IOT who is advisory in this capacity the expression of interest is ICANN's and the later work is that of ICANN and SOs and ACs where we will fill in advisory capacity in requested.

Liz, if you can kindly let us know where things stand in respect to expression of interest. And then work on helping the SOs and ACs get organized in this effort.

>> LIZ LE: Thank you David. Back to the call for the expression of interest. That is near completion. As you recall we previously circulated a draft for this group to comment on and we have taken back the comments that were raised during the call and I don't remember any comments that were raised unlisted and there's been a while. Regardless of what the comments were made we took back and revised and the most recent version of the documents. So that is where that stands with the call. With respect to the communication, the work with the SOs and ACs a very detailed communication to the SOs and ACs will be out by the end of the year.

>> DAVID McAULEY: Thanks Liz. And when you say out by the end of the year it's a tough time on year possibly leading to this call having such a small group in that it's the beginning of the holiday period.

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Are you confident that this will be out by the end of the year?

>> LIZ LE: Yep.

>> DAVID McAULEY: Thank you. So we can count on that. By the way, let me make mention of something that I put in the agenda that I ignored so far. That is when speaking please identify yourself. This is David McAuley speaking now and the only other speaker has been Liz Li of ICANN. So when you come on the line identify yourself in each instance it helps with the raw caption notes.

Thank you, Liz, for that. And as you know, this group at least me and I believe others in this group see this as an urgent group. I'm glad there will be movement on this. And we should turn our thoughts, if we get a chance in early January on the next call to seeing when there's anything formal that needs to be done with the SOs and ACs and in the meeting in Puerto Rico that is coming up fairly early in short order.

Moving to the next agenda item. And again we will create a record of this call for the number for the folks that are not here in attend everybody's and I want to move on to substantive things. Let's have a brief discussion about plans to wind our work on the public comments. And I wanted to have a pointed discussion in this respect that's why I sent out an additional email yesterday about this. Dealing with our report and the need or not for additional public comments in this respect.

And what I'm getting at is I wanted to make a note that everyone on the call and in the list understand we do have a call on January 11th that we are nearing what I believe is the end of our discussions, we are close to the end of our discussions on draft supplementary rules we have had a lot of discussion and I think we are to the point where we can close issues down both to the list and on the call. That's what I'm endeavor to do. And that's why I've seen a number of emails on issues in the last several days.

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It's I think it's important to look to the list as being a substantive tool that we are going to be using.

In the process we will be reengaging and I think this is under my initiative, I think it's important that we reengage Sidley. And to do that I believe we will ask Sidley to be on the call in January to get back in the flow of things. As I say that I'm paying attention to two things. The need to be frugal with budget and yet the need also to recognize the importance of what it is that we are working on in the importance of it into the ICANN community.

So I'm of Scottish descent I'm fairly attentive to issue of frugality but I thought it would be good to get Bernie to talk to us about what budget we have and what we can think about in that respect to engage Sidley and use legal budget. Bernie could I turn to you and ask you to talk about what we have.

>> BERNARD TURCOTTE: Yes, basically we are doing quite well on the budget. We have about 150,000 in the legal expenses to the end of this fiscal year which is the end of January. Now this may seem like a large amount of money. But when we engage the Sidley, it can go fast if we don't keep a very tight reign on it. So far we are doing great. We got the money to bring them in and do things. But as usual it needs to be done in a very careful manner I think. Is that okay Dave?

>> DAVID McAULEY: It is. And thank you Bernie. It's David McAuley speaking. I'm employed by Verison. In my first career I was general council for a software company and I understand the burn rate for legal fees for outside council. It's not towards Kate, but we internally working with the budget we need to keep our mind on and keep an eye on and spend the money like it's our own and be careful of it. In that effort we will be

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reengaging Sidley and get Democrat them back in the process and our report will be a direction to Sidley to redraft the rules in light of decisions we have taken.

So thanks very much for that Bernie.

With respect to the work remaining, and as we get closer on these rules I think over the Christmas holiday I may start drafting a report and fairly shortly after I will put it out to the group to look at. We need to come up with a final report and stating the recommendations and the rational behind them I don't think it needs to go into excruciating detail but encouraging contracted there's something I think we should look to start. And I'm always willing to accept volunteer help along the way.

It raises the question that I addressed in yesterday's email. That is the need or not for public comments. And the reason I raised it is it strikes me that our work on the timing issue seems to me to be a material change that may be something that would be require another round of public comments. I know that Malcolm has thoughts in this respect. But before I get to Malcolm or a ask Malcolm to comment I'll ask Bernie to talk to you us a little bit about public comments and second rounds. And Chris just put his hand up. So before we get the Bernie, Chris go ahead and take the floor.

>> CHRIS DISSPAIN: Hi David, thanks, can you hear me okay?

>> DAVID McAULEY: Yes.

>> CHRIS DISSPAIN: I wanted to make a comment about Sidley, speaking as a lawyer. Who is going to be is it you that is going to be negotiating with them on behalf of the working group David in essence?

>> DAVID McAULEY: I'm not sure. I have not thought of it Chris in terms of negotiation. I thought of it in terms of interface basically.

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>> CHRIS DISSPAIN: I'm asking the question because the thing that springs to mind for me if we are going to in effect employ to do some work on behalf of the working group, that's fine. One of the one of the ways of reducing that cost will be to I'll use the word negotiate with them, a reduced cost of what I will call "getting up to speed."

If they they will decide what they need to get up to speed and that could cost an awful lot of money if we don't address it and say to them look, you have to get up to speed and you have to see what is happening and you have to make an upstate so you can buy this property but we want you to agree, reduced amount of doing that. Otherwise I expect we will end up spending a significant amount of money before we get anything less from them. I wanted to flag that as an idea for you guys to think about. I speak as a lawyer so I know how this stuff works and I know you do too David. Thank you.

>> DAVID McAULEY: Thank you very much Chris. Let me just say, two things come to mind. One is we will be working with ICANN legal in this respect. But the other is, beyond ICANN legal the members of the IOT group will be probably mostly me. And I'm quite frugal in this respect at least I pay strict attention to cost. And I take your point. I think there is a getting back up to speed factor maybe involved. On the other hand we are dealing with the draft supplementary rules which is a discrete body of rules that is really not all that long that exists now to which we are going to be making changes.

And I have traded emails with Holly holly several months ago and we will be working on these and we will come back to you and I expect Holly has a fairly descent grasp of things and I think between me and ICANN legal will be able to keep this under control. Is that sufficiently responsive?

Okay thanks Chris.

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Now, I just this is David McAuley again. Now I mentioned the need or not for public comments. And I know Malcolm was going to want to weigh in on that. Bernie I'll ask you first if you can talk to us about the concept of public comments and procedurally what the ins and outs of second rounds are is that something you can do.

>> BERNARD TURCOTTE: You may want to take Samantha cease.

>> DAVID McAULEY: Go ahead.

>> SAM EISNER: ICANN legal. And just wanted to remind people what happened during the work with Sidley on the initial version of the supplemental rule before they wouldn't for public comment. So at that point Sidley had been participating in, through one at a time, two people were attending the calls to stay up to date. They were active on the list, etc. And then give them direction. And then ICANN and Sidley would work on language together because we would help confirm that we had the same understanding of what was going on. At times we had different proposals and these would be presented and this was when Becky was running IOT and we also worked closely with Becky to identify if we had places we were not agreeing. So it wasn't always necessarily that we were presenting the same information and so we tried to leverage having the ICANN experience there to keep the Sidley bills lower. And that's something we would intend to do now. Much I don't know, and I know I joined the conversation late, but we have reached out to Sidley to for them that they have time open in January to address this. And I think one of the things that we had talked about on our call with David and Bernie earlier this week was the need to have very clear instructions. So the clearer instructions and the more limited resubmit that we are asking to take on the less filling we expect. But it's something, that relationship is something that we would work closely with David from the ICANN side to make sure that the IOT's needs are being met but also watching it from the budget perspective to make sure there's not too many billers on it. And it's not just

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work that is spinning out of control. So I think we have a good track record of trying to make this streamline process.

>> DAVID McAULEY: Thank you Sam. So Bernie if you would give us a few pointers on the public comment process.

>> BERNARD TURCOTTE: Thank you. Although we are not officially a Work Stream two project we have been abiding by the CCWG accountability rules. Up until now and I think its worked quite well. So just as a quick reminder, no recommendations can be approved without having gone to public comment at least once. If there are significant changes that are brought as a result of the first comment, meaning material changes, it is usually the practice to go back out for a second round of public comments to see what there is there. Also, though in such cases, it's acceptable to say that we are not throwing the whole thing open. Meaning, we don't necessarily, we can say we don't want comments on things that have not been commented on and we may not except comments on things where there were no material changes and the group has come to a change. So that we don't get into an endless cycle. And this may actually be the best approach in this case. As to focus on the places where may be there's not a 100% agreement or where there have been material changes and go back out for a second public comment as specifically on those points.

Does that answer your question, David?

>> DAVID McAULEY: It does, Bernie, thank you very much. I will now ask Malcolm if he wishes to take the floor and after Malcolm if anyone else has comments on this they put their hands up. Malcolm do you want to make a comment?

>> MALCOLM HUTTY: Thank you David. On the question of how we avoid going around in circles as in the way that Bernie was just referring to.

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Because still it strikes me there's two different types of material changes. That one, the group could come up with. One is we propose something and then we decide to do something quite different. And then we have a public comment then we decide actually you know what? We are not going ahead with what we suggested in the public comment we couple up with a different idea frankly the CCWG in Work Stream 1 did that a couple of times and therefore went through successive rounds of public comment. However, if there's a controversial issue that goes one of two ways and the group proposes one way and then goes out to public comment and the public comment says no that's not right we should do object opposite of that and then suggests best advice is that still a material change but is that no we closed that off now we had public comment and all if the points we wanted to raise on that was made we accepted the input, job done. So that, that I think is really you know where do we take that view or not is crucial on how we see the timing issue. I don't think we could, anyone would say that the issue on the timing issue is not important. It's clearly important. But is the nature that change we made to come up with something new or have we just have we accepted the public comment that we have already received. If it's if we think we have come up with something radically new we come the public comment again. If on the other hand we have accepted the input on the public comment that we received then we actually arguably it is not a material change and it's best to close it out. On the other hand, we forgot other issues. If we pick up some new ideas now coming in from the PM comment from individual commenters and run with them, nobody has had a opportunity to comment on those yet because they were not on the agenda last time around. It hasn't been discussed. So if we would so in that case, maybe we should on issues that have come out of individual comments as proposals. Because the holy novel perhaps we should put them to public comments.

>> DAVID McAULEY: Thank you Malcolm. Let me react to as a partner reaction as a participant I attend to agree with you. You made a very good point in the last comment

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about if there's something new that wasn't on the agenda the first time that people didn't have a chance to comment that may have to go out for public comment. With respect to the reaction of the public commenters who had a chance to comment, my thought would be there would be many people potentially who offered no comment the first time on the timing issue because they saw what the rules said and it was fine with them. And felt no need to make any statements. So I tend to be on the side of the fence right now that a second round will probably be needed.

Is there anyone else that would like the comment on this? Then we can wrap this up on the list keeping in mind what Bernie noted a few minutes ago that the time of the call was moving on. Anyone else have anything else on this? Let's wrap this up on the list. A joinder. In that respect we had text, we have this has been out here a number of times and I put some text out there a number of times much then recently Liz came to the list with some suggested tweaking to it which I personally as a participant thought was fine and I thought we were largely there. But then Malcolm has put another male on the list.

Which I mentioned on the agenda which he wanted to suggest an alternative. To Liz and cures it but states it differently. So I didn't you know I tend to be personally I guess I have a personal preference as a participant with the language we came up with last time that I put on the list as tweaked by Liz but Malcolm if you would like some time, thank you Brenda you're putting it on the screen now with the yellow background. Malcolm if you would like to make the case you're welcome to now.

>> MALCOLM HUTTY: Thank you David. The text I was reacting to I don't know. Maybe it was I mean it rather looked like clearly when you circulated it, it had got lots of mark up on it. And it did rather read to me like it had gone through several stages that had possibly diminished the level of coherency. I found it very hard to pause.

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And there were a couple if on of issues in there that I thought were probably accidental. The first one, was that it appeared to say that a person, if a person was involved in the underlying procedure, if they have standing, then they are only allowed to intervene as a party and not an am cuss. And unless that's intentional and I assume it's not. I haven't imagined may be someone will correct me I have not imagined why we would do that. I suspect that's an artifact of drafting that actually it was intended to give that person the option of being intervening as either a party or a amicus.

And secondly sorry you wanted to come in, please do.

>> DAVID McAULEY: That was a change that Liz suggested and I just simply took that as suggested as intentional. So when you're done speaking Malcolm we would can ask Liz if she wants the weigh in.

>> MALCOLM HUTTY: Second issue was on the paragraph 2 A which said that to the procedures officer may award someone who doesn't have standing, the right to intervene as an Amicus. But the criteria or when they can do so is only amongst those people and it's procedure that has discretion but they can only do so among people where the entity has a material interest at stake in relating to the injury or harm that is claimed by the claimants.

Now actually if you have the material interest, if the criteria for standing. It's never going to be the case that there's going to be someone that doesn't have standing that has a material interest at stake directly relating to the material harm because that person has standing. So that paragraph seems to me to be superfluous. Because it could never be satisfied.

And can simply be removed.

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And the third issue, I had raised this in a previous discussion that we had, I find it difficult to dig out emails, maybe it happened in a meeting I don't know. It's limiting rights to those that intervene that actually have standing we are denying people the right to intervene who would have standing if the claimant was right. If the claimant had said that ICANN should of done this, and it may be that you know somebody has is personally satisfied with what ICANN has done but would not be satisfied with the prevails and that should have a right to review if the claimants case was upheld. So my text there seeks to ensure that the standing rules are preserved but for those that have standing to intervene turned actual facts and actually those that would have standing to intervene turned counterfactual that the claim was upheld so they could intervene rather than having to bring a new IRP case against the outcome of the first IRP case which seems to me to be nobody's interest to delay like that. So that's what the issues that I have identified are.

And then I've set it set out you asked me to produce text. You asked everyone that wanted to make comment produce text to make it capable of being adopted. Maybe it's because I wrote it I found it easy to understand. If you don't find it easy to understand that's fine. To my mind I can pass this wording more easily it seems more clear to me. That's why I recommend it to the group.

>> DAVID McAULEY: Thank you Malcolm. David McAuley speaking again.

First I want to thank you for actually providing text for us to consider. That's extremely important and you did it so thank you very much.

I tend I see that Sam made a comment pretty much in chat the way I was thinking about it. So let me stop talking and recognize Liz. Liz you have the floor.

>> LIZ LE: Thanks, David. So I will address Malcolm's point in the order in which he addressed them. With respect to the first issue which is whether or not it was intentional

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for paragraph 1 a little one to state that the party from underlying procedure only may only intervene as a party and not as an amicus that was not the intent so if it wasn't clear what we can do is clarify that by adding at the end of that provision as a party or as an amicus subject to the following conditions. And then we can make sure that the text flows that we are indicating to correspond to this revision.

With respect to the second point, that he raised about determine maturely reflected in why paragraph 2 a is there and should not be removed this provision was added to address Malcolm's previous concern that an entity would not be able to intervene on behalf of ICANN. I agree the term materially affected language only applies to entities intervening on the claimant but again we added the provision 2 a to allow the opportunities for entities to request an event on amicus on behalf of ICANN. That's why the material interest language is in there.

And then with respect to the issues that Malcolm raised for the third point, I think we that's what we, his concern with respect to his concern that's what paragraph 2 A was aimed to do and not I'm not understanding how it does not, what were he sees the differences in why his concerns are not resolved in paragraph 2 a.

>> DAVID McAULEY: So thank you Liz, it's David McAuley speaking again.

So we have point and counter point that are discussed very cogent comments from you both. Thank you. As you saw what I said in the chat we are not going to be able to make decisions in this call. So I think what I would like to do is ask anybody else here if they have other insights on this particular issue otherwise we can move on and try to close this somehow on the list.

So I'll just wait for a second and sigh if there's any hands coming up on this issue from anyone else that would like to speak.

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Not seeing any, let's go on to the next agenda item which is the ongoing monitoring issue. It's a shame that Avri is not available on this call but I did go through the raw caption notes of the last call and I believe I captured what Avri was saying and she by the way had volunteered to be the lead on this issue and she has carried the water on this issue so far.

The ongoing monitoring be issue extends from a comet from ALAC that the IRP process needs to be reviewed periodically that we mentioned that the bylaws currently provide for ATRT review that is discretionary and Avri and I went back and both had different points of view and on the last call I took Avri's comment and I hope I'm right or she can correct me on the list that she basically came to the assessment that the best way forward would indeed be to suggest a bylaws change to the current language in the bylaws that says under paragraph I forget the number of it but it's section F of whatever subsection F of whatever that section is, IRP maybe reviewed and will change that to will be reviewed every 5 years. And there's a second part of that we will add that the chief panelist will be a member reviewing. And obviously that language would say the chief panelist or his or her panelist could participate so we have analyst from a sitting member of the panel for some kind of irony or lame attempt at humor.

That would roughly be the approach we come to. And Avri can comment if I misinterpret her. Anyone want to comment or suggest something else?

And while I'm doing it, I may ask Brenda if she can put up Malcolm's color text on the next agenda item, the written statements attachment.

>> Not seeing any comments coming forward on ongoing monitoring let's move forward then to the next agenda item which has to do with the discovery topic. It really came down to the written statements. And in that respect we had a series of emails. I own,

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Liz's email and there was discussion in the last call and Malcolm sent an email yesterday which he endeavored to sort of re wrap the draft language on written statements. And used colored text to show that it might be a more economical statement by. I was happy with the approach Liz took. Liz and I went back and forth and wherever that came out I happy with that.

But I also don't I thought Malcolm's approach which is now showing on the screen would be acceptable too. So since Malcolm's an offer to change what we last agreed and Liz, since you were the author of what we last or at least you and I but you most recently was the author of what we were speaking about, could I ask you or Sam if you would like the on comment on the written statements on the screen?

>> LIZ LI: Sorry David I was mute. Yes.

So, I think the I mean, I previously put this in to address the concerns about additional written statement and whether or not there would be a opportunity for additional pages and how a written additional written submissions would be decided by the procedures officer.

I don't think we have necessarily an objection to some of the proposed revisions. But I think as a whole this goes back to the issue, I think it would be good if we do take a step back and once everything is done, we can read for consistency ways to make sure this is consistent with the rest of the rules, this would be good. But just largely as this relates to this specific provision and the proposed revisions, ICANN doesn't have any objections.

>> DAVID McAULEY: Thanks Liz and thank you Malcolm for the suggestion and thank you for the suggested text. That's exactly what we need. To comment what Liz mentioned as a final consistency effort is something I put up in agenda item number 3 and forgot to mention it I think in this end when he with do the draft report it seems inherent

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in doing a final report that we as a group will take a look at the final report to make sure it coheres. And that it pulls together as a in a finer review.

So that's something that we can anticipate obviously. But for now, the language looks okay. And it's out there on the list and people can weigh in. But I think we are going the close this issue down in fairly short order.

So thank you both Malcolm and Liz.

Moving on, next issue on the agenda item has to do with the notice issue. And I put a some thoughts on the e mail a couple cow of days ago. And these comments about notice came from a law firm and, also, from the non commercial stakeholders group. But they were both a making certain points about giving actual notice to other parties. Now that, when we hear the term other parties we are obviously speaking about the review of the expert panels set up under new GTLDs but they are also talking about notice being given to supporting organizations. When there's a challenge that would amount to a challenge against a public against a policy that was developed by one or more supporting organizations. And my recommendation, I think we have done this before, but I did it again on the mail on December 4th was basically that these were sensible comments or sensible requests and they were asking that the notice be contemporaneous with the filing of the claim does include what came along with the filing of the claim. Seems to make sense I think that there shouldn't be a problem in doing this. But I'm opening the floor to see if people have anything they want to say about that or another approach.

Not seeing any, it's out there on the list. So we will let others in the group way in. And we can move on to the next agenda item.

EN

Translation and interpretation. And I mentioned to take a look at my email of October the 25th we discussed it a couple of times in the written, on calls. And I don't think there's any mainly concern. Kavouss mentioned concern about cost and I think that we can take those into account. We in large there was a number of requests or public comments saying we have to provide interpreters and translation. And one went when requested. And it's my recommendation and I stated this many times on the calls on the list that indeed we should provide translation and interpretation in reference to the bylaws but the bylaws speak in terms of need. And I think that's where we should maintain that line. You know the services are available. As needed. And so my recommendation, I don't have it in front of me to read it to you. But my recommendations was, this has to be based on need and the need has to take into account the language skills of the person requesting it. For instance, if it's a corporation with people that speak English or whatever language the arbitration is being held in, then they would speak that language and it's also you know going to default to translation into one of the 6 U.N. languages that ICANN uses, if that would satisfy the need for the claimant or the person asking for the service.

So in other words, if the person asking for the services is fluent in several languages, one of which is one of the 6 U.N. languages and not English that's we would go rather than translating it into a more obscure language. That's my recommendation. It's been out there on the list I guess I don't need to sum it up. Is there anyone else that wants the weigh in on translation or interpretation services otherwise I'm going the try to close this on the list in the next several days.

Not seeing any or hearing any, we can move on. I sent an email yesterday in the AOB, I mentioned that there might be one or two more issue treatment emails. And I did send an email on a couple of standing panel issues. One was with respect to conflict of interest

EN

and the other was respect to renewal of terms. I'm sorry that Greg Shatan is not on this call because I know he had some concerns with these areas especially. We have spoken about conflict of interest, the bylaws even give us the chance to develop the rules, the bylaws further not the bylaws but these provisions further.

One of the comments that came in was from the communique, the center for communication governance for the law university in delhi India. And they pointed us to the international bar association on rules of conflict of interest and I thought they made a good case in respect to some and especially in respect to adding a provision with respect to a panelist stating at the outset of a case and committing that during dependency of the case they would act without conflict and note the conflict if a and as it developed. You see in my email I recommend that we pick that up and do that. If some of the other conflict comments I did not think they needed treatment in the light of the way the bylaws were written right now. On the renewal panelist the panelist undertakes 5-year term. In the final report of the CCWG and accountability Work Stream 1 the language said 5-year term with no renewal. The text on no renewal didn't come in the bylaws by the board. That left the issue to us. What do we want to do? And I thought Malcolm had a creative idea. And addressing the concept that if renewal is based on nomination or something like that, a panelist could, not necessarily would but could have an incentive to be differential to ICANN. So Malcolm's suggestion was one five year term followed by an automatic second five year term if the panelist would want it and that would be it. End of 10 years and out. The way it was constructed was elegant. I'm not sure that 10 years could make sense, I thought maybe a follow on of 3 years or so on. I know that is out there and Greg had follow ups on this. And we can pursue this on the list as well. And I wanted to open it to comments on the conflict side or panel renewal side? And I don't see any. If nobody else does.

EN

>> BERNARD TURCOTTE: Go ahead Malcolm.

>> MALCOLM HUTTY: I'm absolutely fairly extremely unconcerned about the length of time. The he is sense. So when you said maybe it should be 10 years. I'm happy with whatever number comes out. The essence of my proposal is the automatic renewal because I think that cures the problem of the fear of loss of independence. So if it's an automatic renewal for three year term or two year term or five year term I'm happy whatever the group things but automatic renewal is my employee proposal.

>> DAVID McAULEY: Thank you Malcolm and this one will have the sort of close on the list. I want to give Greg a chance to come in on this. I know he had thoughts on it. It's David McAuley speaking then.

So that's where we stand. If anyone has comments on any of these and would like to make them now, please put your hand up. Please freely to make them on the list. As I mentioned I will you move to close these down on the list even on the holidays so please pay attention to the emails. And I'm hoping we can get there in fairly short order.

Bernie we have I don't think we have 20 minutes left on the call but thank you.

So we are almost finished early which is sort of surprising. I am going to ask either if Chris or Cherine has comments as observant board members come on the call and I'll do that in a second but I'll ask if there's others on the call now that want to make comments in respect to anything we have discussed here today? Nothing from Chris, Cherine you're a welcome guest and welcome to make a comment to the group if you wish.

>> CHERINE CHALABY: Thank you David. No real comments other than, we seem to be getting closer to reaching a conclusion on many of these issues so that's quite encouraging. Thank you.

EN

>> DAVID McAULEY: Thank you very much Cherine and thank you too Chris. I want to thank everyone here it's a small group and I want to necessary on, on the list and we have a call on January 11th thank you to Brenda and Bernie I asked them for late support and they have as usually done a stellar job. Thank you and everybody I wish happy holiday to folks I'll see you in January and see you on the list and I encourage us all to weigh in. And I will look forward to it. Thanks very much we can end the call now.

EXHIBIT 276

[IOT] Agenda item #3 - thoughts for our call tomorrow at 19:00 UTC

Malcolm Hutty Contact Information Redacted

Thu Dec 7 16:33:15 UTC 2017

- Previous message: [\[IOT\] Agenda item #3 - thoughts for our call tomorrow at 19:00 UTC](#)
- Next message: [\[IOT\] Standing Panel issues \[renamed forwarded mail\]](#)
- Messages sorted by: [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)

On 06/12/2017 19:58, McAuley, David via IOT wrote:

> I have been of the mind that we may not need another round of public
> comment. On further reflection, while much of what we are doing is
> "tweaking" the draft rules (at least in my opinion as a participant), we
> have made what can reasonably be considered a material change on timing,
> and perhaps will in other areas.
>
> It seems to me that we will need to allow the public to weigh in on
> those changes that we deem material - but not other changes we recommend
> in our report.

On the issue of whether we need another round of public comment, I think there are two different ways of approaching this.

One way, as you suggest, is to ask whether we have made "material" changes, and to consult on those.

Another approach is to ask whether the changes were *foreseeable*, and to only consult on approaches that were.

If we take the former approach, the change on timing is the most significant we have made.

However if we take the latter approach, it looks rather different.

Some of the changes that we have made, perhaps arising from individual comments, may not have been foreseeable: if we've picked up an idea raised in one response to the last comment round, nobody else would have had reason to address that. We don't know what people might think about an issue we didn't consult on last time.

By contrast, the timing issue was not only available for comment in the last round, it was by far the most popular topic that people chose to address. Having considered those replies, we changed our proposal to bring it into line with what people asked of us.

Is there anything about the change that we have made that is actually novel, rather than simply the opposite of our initial proposal? Do we really expect that there might be some point raised we haven't

considered already, or are we just going round in circles?

To my mind, a big part of the point of a consultation is to give people a chance to raise a point we have not properly considered. That would suggest we should focus on the new ideas we've adopted, rather than those have already attracted the most attention.

--

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EXHIBIT 277

[IOT] Status of ICANN staff in IOT

Mike Rodenbaugh Contact Information Redacted

Thu Dec 6 17:32:19 UTC 2018

- Previous message: [\[IOT\] Status of ICANN staff in IOT](#)
- Next message: [\[IOT\] Status of ICANN staff in IOT](#)
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Thank you Malcolm, I wholeheartedly agree that ICANN Legal has had far too much input and 'weight' in this group, and that should never have been allowed to have happened. Frankly it calls into question all of the 'interim' conclusions that have been adopted by the Board already, which should be revisited by a broader team from the community. ICANN should actually do some real outreach and get a representative cross-section of knowledgeable people on this team -- something they utterly failed to do at the outset, and so the group has been far too sparsely populated and attended, with the exception of ICANN Legal reps.

However I do wonder, am I also conflicted? My client now has two CEP processes pending (.PersianGulf and .Islam/halal). As the legal representative of a TLD applicant that has been fighting ICANN since 2012, prevailing already in one IRP, I feel that I am one of the more knowledgeable community members wrt IRP. I have not been very active in this IOT, but have wanted to pay general attention to this group and I have provided input at times. The views I have expressed in the group have been mine personally, not those of my client as I have not consulted with them at all about this group's work.

Curious to hear anyone's thoughts on that.

Best,
Mike

Mike Rodenbaugh
RODENBAUGH LAW
tel/fax: Contact Information Redacted
<http://rodenbaugh.com>

On Thu, Dec 6, 2018 at 4:48 AM Malcolm Hutto Contact Information Redacted wrote:

>
> Dear David,
>
> I write to confirm for the written record my request as raised in our
> last meeting.
>
> When this group was formed, you took the extraordinary step of including
> ICANN staff and external counsel as full members of this group:
>
> - they are listed as full participants on the group membership page

> - they are included in quorum counts
> - they are invited to speak on all issues on an equal basis: that is,
> not merely to describe the practical effects of matters proposed, but
> also to opine on the balance of values
> - they are included in consensus calls
>
> In the Board resolution in Barcelona adopting the Interim Supplementary
> Rules, the Board resolved to urge this group to come to a prompt
> conclusion on final Supplementary Rules of Procedure.
>
> During the Open Forum session, I offered the Board my opinion that we
> would have completed our work earlier had we not been so split, as a
> result of the divergent views of the team from ICANN Legal and Jones
> Day. I asked whether it was normal for ICANN staff and agents to engage
> in community processes like this one as full participants, and whether
> there was guidance available.
>
> Göran answered my question on behalf of the Board. He stated very
> clearly and firmly that staff "are not members of the community" and
> participate as staff support, not a co-participants. He appeared to me
> to be angry that I was even suggesting that staff would overstep such
> bounds, and that he had to defend them from such an accusation which he
> gave every impression as regarding as an unfair accusation of
> impropriety. He was plainly unaware of your decision.
>
> In the light of this response, I request that we revisit the
> classification of ICANN staff and Jones Day.
>
> In my view, it was never proper to regard ICANN Legal and Jones Day as
> co-equal participants in this group. The matter under discussion is the
> procedures that apply in a core process for holding ICANN to account:
> ICANN is plainly irredeemably conflicted.
>
> Moreover, the conflict goes beyond the institutional to the personal. An
> IRP case can only be brought on the basis that ICANN has acted
> inconsistently with the Bylaws. Usually, ICANN will have taken the
> advice of its lawyers before acting in a manner that might give rise to
> such a claim. Accordingly, an IRP case will quite commonly be a direct
> challenge to the advice that Samantha, Elizabeth and the team have
> previously given, personally. It is quite wrong to involve them in
> directly in the decision-making as to how such a challenge can be
> brought. This is not to impugn their professional integrity: any lawyer
> would recognise this as an irreconcilable conflict of interests and
> obligations. Your decision places them in an impossible and untenable
> position, that fundamentally compromises the legitimacy of this group's
> output.
>
> Now that Göran has confirmed that staff should not be regarded as
> members of the community for the purpose of participation in community
> processes, I ask that their status be reclassified as staff support,
> with the following consequences:
>
> - they will not be counted in quorum counts
> - they will not be included in consensus calls
> - they will be permitted to attend meetings, and their input sought on
> factual matters, such as how procedures operate, where that assists the
> group, but their opinion will be not be sought as to the balance of

> expedience.

>

> Kind Regards,

>

> Malcolm Hutto.

>

>

> --

> *Malcolm Hutto* | *tel:* Contact Information Redacted

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EXHIBIT 278

Federal Rules of Civil Procedure

2019 Edition

[FRCP Home](#) » [2019 Federal Rules of Civil Procedure – Table of Contents](#) » [Title IV – Parties \(Rules 17-25\)](#) »
[Rule 24 – Intervention](#)

Rule 24 – Intervention

(a) **Intervention of Right.** On timely motion, the court must permit anyone to intervene who:

(1) is given an unconditional right to intervene by a federal statute; or

(2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

(b) **Permissive Intervention.**

(1) *In General.* On timely motion, the court may permit anyone to intervene who:



⇒ [2019 Federal Rules of Civil Procedure book - Just \\$18.50](#)

[2019 Federal Rules of Civil Procedure – Table of Contents](#)

[Title I – Scope of Rules; Form of Action \(Rules 1 and 2\)](#)

[Title II – Commencing an Action; Service of Process; Pleadings, Motions, and Orders \(Rules 3-6\)](#)

(A) is given a conditional right to intervene by a federal statute; or

(B) has a claim or defense that shares with the main action a common question of law or fact.

(2) *By a Government Officer or Agency.* On timely motion, the court may permit a federal or state governmental officer or agency to intervene if a party's claim or defense is based on:

(A) a statute or executive order administered by the officer or agency; or

(B) any regulation, order, requirement, or agreement issued or made under the statute or executive order.

(3) *Delay or Prejudice.* In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

(c) **Notice and Pleading Required.** A motion to intervene must be served on the parties as provided in [Rule 5](#). The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

Title III – Pleadings and Motions (Rules 7-16)

Title IV – Parties (Rules 17-25)

Title V – Disclosures and Discovery (Rules 26-37)

Title VI – Trials (Rules 38-53)

Title VII – Judgment (Rules 54-63)

Title VIII – Provisional and Final Remedies (Rules 64-71)

Title IX – Special Proceedings (Rules 71-73)

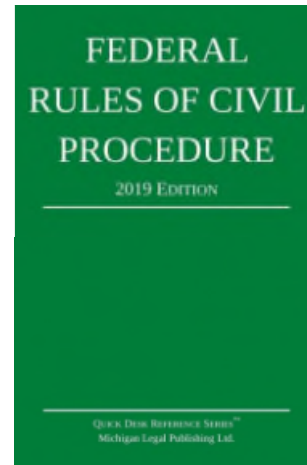
Title X – District Courts and Clerks: Conducting Business; Issuing Orders (Rules 77-80)

Title XI – General Provisions (Rules 81-86)

Title XII – Appendix of Forms [Abrogated]

Title XIII – Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions (Rules A-G)

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007.)



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EXHIBIT 279

 KeyCite by Westlaw
 Distinguished by [King, Nestco & Redick, L.L.C. v. Progress ve Max Insurance Company](#), Ohio App. 8 Dist., March 29, 2008

122 Ohio St.3d 497
 Supreme Court of Ohio.

WEST BROAD CHIROPRACTIC, Appellant,
 v.
 AMERICAN FAMILY INSURANCE, Appellee.

Nos. 2008-1396, 2008-1489.

|
 Submitted April 21, 2009.

|
 Decided July 23, 2009.

Synopsis

Background: Chiropractic clinic that had treated patient for injuries incurred in automobile accident and who received an assignment of the patient's right to future settlement proceeds from the accident brought action against the insurance company that provided liability coverage to the tortfeasor in the accident, seeking payment for the costs of patient's treatment. The Municipal Court, Franklin County, No. 2006 CVH 043353, entered summary judgment in favor of the chiropractic clinic. Insurance company appealed, and the Court of Appeals, 2008 WL 2246653, reversed and remanded. Court of Appeals certified its judgment was in conflict with judgments of other appellate districts.

[Holding:] Upon acceptance of certified conflicts, the Supreme Court, [Lundberg Stratton, J.](#), held that assignment from patient was ineffective to permit chiropractic clinic to compel payment from insurance company, abrogating [Roselawn Chiropractic Ctr., Inc. v. Allstate Ins. Co.](#), 160 Ohio App.3d 297, 827 N.E.2d 331, [Cartwright Chiropractic v. Allstate Ins. Co.](#), 2008 WL 2231651, and [Akron Square Chiropractic v. Creps](#), 2004 WL 840131.

Affirmed.

Moyer, C.J., dissented and filed opinion joined by Pfeifer and Cupp, JJ.

West Headnotes (9)

[1] Assignments

➤ Nature and essentials in general

An "assignment" is a transfer to another of all or part of one's property in exchange for valuable consideration.

5 Cases that cite this headnote

[2] Assignments

➤ Estates or interests in property in general

A vested right in the assigned property is required to confer a complete and present right on the assignee.

Cases that cite this headnote

[3] Assignments

➤ Money due or to become due

Agreement between patient and chiropractic clinic, in which patient purportedly assigned her right to receive or collect any check or monies offered for compensation to her by any person for any injury for which she received treatment from the clinic, did not operate as an assignment because patient had no right in any settlement proceeds stemming from automobile accident to transfer to clinic; at the time patient signed agreement, she had not filed claim against tortfeasor or established liability or the right to damages, and thus, her right to any settlement proceeds was merely a possibility at the time she executed the purported assignment, abrogating [Roselawn Chiropractic Ctr., Inc. v. Allstate Ins. Co.](#), 160 Ohio App.3d 297, 827 N.E.2d 331, [Cartwright Chiropractic v. Allstate Ins. Co.](#), 2008 WL 2231651, and [Akron Square Chiropractic v. Creps](#), 2004 WL 840131.

8 Cases that cite this headnote

[4] Assignments

➤ Nature of right to assign

An assignment occurs only when the fund or property to be transferred exists.

[2 Cases that cite this headnote](#)

[5] Assignments

Money due or to become due

There are no settlement proceeds, for purposes of right to assign proceeds, until the tortfeasor simultaneously pays funds in exchange for a release.

[2 Cases that cite this headnote](#)

[6] Champerty and Maintenance

Operation and effect

Champertous agreements are void as a matter of law.

[Cases that cite this headnote](#)

[7] Assignments

Money due or to become due

A person may not assign the right to the future proceeds of a settlement if the right to the proceeds does not exist at the time of the assignment.

[4 Cases that cite this headnote](#)

[8] Insurance

Assignment of claim or right to sue

Chiropractic clinic could not enforce patient's assignment of prospective claim proceeds against automobile insurer, because patient, who had been injured in motor vehicle collision with insured, had no existing right to compensation from insurer at time assignment was created as he had not brought civil action against insured. [R.C. § 3929.06](#).

[3 Cases that cite this headnote](#)

[9] Insurance

Direct action by injured person, in general

Insurance

Judgment or Settlement Agreement

Statute precluding an injured person from bringing a civil action against the tortfeasor's insurer until the injured person has first obtained a judgment for damages against the insured and the insurer has not paid the judgment within 30 days precludes an assignee of prospective settlement proceeds from bringing a direct action against a third-party insurer after the insurer has distributed settlement proceeds in disregard of the written assignment. [R.C. § 3929.06](#).

[10 Cases that cite this headnote](#)

Attorneys and Law Firms

****1094** [Katz, Teller, Brant & Hild](#) and [James F. McCarthy III](#), Cincinnati, for appellant.

[Frost, Maddox & Norman Co., L.P.A.](#), and [Mark S. Maddox](#), Columbus, for appellee.

[Boehm, Kurtz & Lowry](#) and [John P. Lowry](#), Cincinnati; and [Montgomery, Rennie & Jonson](#) and [George D. Jonson](#), urging reversal for amici curiae Ohio State Chiropractic Association and Ohio Osteopathic Association.

[Roetzel & Andress](#), [Laura M. Faust](#), and [Jerome G. Wyss](#), Akron, urging affirmance for amicus curiae Ohio Association of Civil Trial Attorneys.

Opinion

[LUNDBERG STRATTON, J.](#)

***497** ¶ 1 We must determine whether Kristy Norregard, who was injured in an automobile accident but who did not file suit or obtain a judgment against the tortfeasor, may assign her right to proceeds from a prospective settlement or judgment to appellant, West Broad Chiropractic (“West Broad”), in exchange for medical care she received from West Broad for injuries resulting from the accident.

¶ 2 The Tenth District Court of Appeals refused to enforce the assignment of proceeds. The appellate court certified that its judgment was in conflict with the

judgments of other appellate districts. We agreed and accepted the following two certified conflicts for review:

{¶ 3} “May a person who has been injured in an automobile accident but who has not yet established liability for the accident and a present right to settlement proceeds, but who may have that right in the future, even if the future existence of the proceeds is conditional, assign that right, in whole or in part, to another under Ohio law?”

{¶ 4} “Does R.C. 3929.06 preclude an assignee of prospective settlement proceeds from bringing a direct action against a third party insurer, who had prior notice of such written assignment, after the insurer distributed settlement proceeds in disregard of that written assignment?” *W. Broad Chiropractic v. Am. Family Ins.*, 119 Ohio St.3d 1469, 2008-Ohio-4911, 894 N.E.2d 330.

****1095** {¶ 5} For the reasons that follow, we answer the first question in the negative. A person who has been injured in an accident but who has not yet established liability for the accident and a present right to settlement proceeds may not ***498** assign the right to future proceeds of a settlement if the right does not exist at the time of the assignment.

{¶ 6} We answer the second question in the affirmative. R.C. 3929.06 precludes an assignee of prospective settlement proceeds from bringing a direct action against a third-party insurer after the insurer distributed settlement proceeds.

{¶ 7} Consequently, we affirm the judgment of the court of appeals.

Facts and Procedural History

{¶ 8} Kristy Norregard was injured in an automobile accident on July 6, 2002. Three days later, she sought treatment for her injuries at West Broad Chiropractic. At that time, she executed a document entitled “Assignment of Right to Receive Benefits and/or Proceeds of Settlement or Judgment” to assign her right to receive from the tortfeasor's insurance company compensation for these injuries in exchange for her treatment. Payment was to be made directly to West Broad before any payment was made to Norregard.

{¶ 9} Almost two years later, on April 30, 2004, West Broad gave notice of the assignment to appellee, American Family Insurance (“AFI”), which was believed to have insured the driver of the automobile involved in the accident with Norregard. The notice requested that AFI name West Broad as a co-endorser on any disbursement check issued or to issue a separate check payable to West Broad directly. The notice did not identify the amount due West Broad.

{¶ 10} In January 2006 and prior to filing any lawsuit, Norregard settled her claim for injuries with AFI. AFI disbursed the settlement proceeds directly to Norregard.

{¶ 11} West Broad filed an action against AFI seeking a declaration that the assignment was valid and enforceable and that AFI was obligated to pay West Broad for the treatment provided to Norregard valued at \$3,830. The trial court held that the assignment was enforceable and entered judgment for West Broad.

{¶ 12} The Tenth District Court of Appeals reversed the judgment of the trial court, concluding that Norregard had no “right in being” when she made the assignment. *W. Broad Chiropractic v. Am. Family Ins.*, Franklin App. No. 07AP 721, 2008-Ohio-2647, 2008 WL 2246653, ¶ 6. Instead, West Broad had only a possibility of future settlement proceeds from AFI. *Id.* Furthermore, the court determined that Norregard had no enforceable rights against AFI under R.C. 3929.06 until she obtained a judgment against the tortfeasor. Thus, the court concluded, the assignment was ineffective, and it remanded the cause with instructions to enter judgment in favor of AFI. *Id.* at ¶ 18.

{¶ 13} The appellate court certified that its judgment was in conflict with judgments of the courts of appeals in the First, Ninth, Eleventh, and Twelfth ***499** Districts. We determined that a conflict does exist on both issues. We accepted West Broad's discretionary appeal on the same issues and consolidated the cases. *W. Broad*, 119 Ohio St.3d 1469, 2008-Ohio-4911, 894 N.E.2d 330.

Assignment of Settlement Proceeds

[1] [2] {¶ 14} An assignment is a transfer to another of all or part of one's property in exchange for valuable consideration. *Hsu v. Parker* (1996), 116 Ohio App.3d

629, 632, 688 N.E.2d 1099. A vested right in the assigned property is required ****1096** to confer a complete and present right on the assignee. *Christmas v. Griswold* (1858), 8 Ohio St. 558, 563 564.

{¶ 15} When Norregard entered into the agreement with West Broad, she had a cause of action against the tortfeasor that had accrued at the time of the accident. See *Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co.*, 112 Ohio St.3d 482, 2006-Ohio-6551, 861 N.E.2d 121; *Cincinnati v. Hafer* (1892), 49 Ohio St. 60, 65, 30 N.E. 197. However, Norregard had not filed a claim based on that cause of action. She had not established liability or the right to damages. No settlement proceeds existed at the time of the assignment.

[3] {¶ 16} Nevertheless, Norregard executed a document that purported to assign to West Broad her “right to receive or collect any check or monies offered for compensation to [her] by any person for any injury for which [she] received treatment from West Broad Chiropractic.” Because no settlement proceeds existed at the time of the assignment and Norregard then had no right to any funds, she had no rights to assign. Thus, we hold that the agreement could not operate as an assignment because Norregard had no right in any settlement proceeds to transfer to West Broad.

{¶ 17B West Broad contends that Norregard's expectation of a settlement was assignable even though it was contingent upon proving liability and damages. West Broad, however, relies on cases in which the expected interest was based upon real property or contingent estates of inheritance of a property interest that was in existence. See *Moore v. Foresman* (1962), 172 Ohio St. 559, 565, 18 O.O.2d 123, 179 N.E.2d 349; *Hite v. Hite* (1929), 120 Ohio St. 253, 260 261, 166 N.E. 193. In this case, Norregard had not asserted a claim against the tortfeasor and had not established liability or the right to damages. The right to proceeds of a future settlement was unresolved. Consequently, Norregard's right to any settlement proceeds was merely a possibility at the time she executed the assignment to West Broad.

{¶ 18} In *Pennsylvania Co. v. Thatcher* (1908), 78 Ohio St. 175, 85 N.E. 55, syllabus, the court held that an equitable assignment in the prospective proceeds of a settlement could not be enforced by the assignee against the tortfeasor in a suit at law. In *Thatcher*, the victim

of a railroad accident attempted to assign to ***500** his attorney the proceeds of his claim, although no cause of action had been filed. The court acknowledged that the assignee may have a right to recover from the assignor; however, the assignment was not legally binding in a suit for money damages against a third party who had not agreed to the terms of the assignment. *Id.* at 189, 85 N.E. 55.

[4] [5] {¶ 19} *Thatcher* rejected the notion that notice of an assignment could legally obligate an unrelated third party in the absence of a contractual or other relationship between the parties, particularly when the notice assigned “a portion of whatever may be paid in suit or settlement.” *Id.*, 78 Ohio St. at 175, 85 N.E. 55. The court held that a notice so indefinite was insufficient to reach the funds in the hands of a third-party tortfeasor. *Id.* at paragraph two of the syllabus. *Thatcher* also reasoned that giving effect to such an assignment would introduce the interests of a third party who had not been involved in the accident into settlement negotiations and may compromise a settlement between the injured person and the tortfeasor. *Id.* at 191, 85 N.E. 55. In addition, an assignment occurs only when the fund or property to be transferred exists. However, there are no settlement proceeds until the tortfeasor simultaneously pays funds in exchange for a release. *Id.*

****1097** {¶ 20} We find the legal reasoning of *Thatcher* still persuasive a century later. Consistent with *Thatcher*, because Norregard had no present right to any settlement funds at the time of the assignment, she had no rights to assign. West Broad had a contract that may be enforceable against Norregard, but it is not legally binding upon AFI.

{¶ 21} The conflict cases relied on public policy reasons to justify upholding such assignments. Some districts believed that such assignments would encourage settlement and avoid litigation. See *Roselawn Chiropractic Ctr., Inc. v. Allstate Ins. Co.*, 160 Ohio App.3d 297, 2005-Ohio-1327, 827 N.E.2d 331, ¶ 16; *Cartwright Chiropractic v. Allstate Ins. Co.*, Butler App. No. CA2007 06 143, 2008-Ohio-2623, 2008 WL 2231651, ¶ 9. They also reasoned that the assignments would promote timely medical treatment for injured persons who may not otherwise be able to pay, while at the same time assuring medical-care providers that they will be compensated. *Cartwright* at ¶ 9, 16; *Akron Square Chiropractic v. Creps*, Summit App. No. 21710, 2004-Ohio-1988, 2004 WL 840131, ¶ 12, fn. 2; *Roselawn*, ¶ 19 20.

{¶ 22} On the other hand, there are circumstances under which such assignments might encourage and promote litigation and discourage settlement. A chiropractor or other assignee expects full payment and lacks interest in negotiating the amount of the debt. Likewise, the third-party insurer lacks the ability to dispute the amount or reasonableness of the charges. The insurer must take these factors into account when settling the claim, and the result may be less to *501 the injured party, forcing him or her to litigate in hopes of obtaining a greater recovery. Attorneys may therefore be deterred from taking smaller claims when the proceeds are taken by assignees, leaving little to no funds for the injured party or the attorney's fee.

{¶ 23} Furthermore, if an injured person executes multiple assignments to a variety of creditors, the third-party insurer may be faced with determining the priority of assignments and how to distribute settlement proceeds pro rata among numerous assignees if the debt exceeds the amount of the settlement. Generally, the injured person is represented by counsel, who receives the settlement funds and who may negotiate a lesser payment with his client's creditors. West Broad's proposition, however, places the obligation on the insurer to identify and locate each assignee at the time of settlement to determine the current liability and may subject the insurer to multiple lawsuits.

{¶ 24} Upholding the legality of such assignments opens the door for other creditors to seek debt protection through assignments: the pharmacy, the automobile repair shop, other medical providers. If the injured person executes an assignment to satisfy a debt that is not related to the accident, i.e., a landlord or consumer debt, the insurer would be thrust into a credit situation that is completely unrelated to the underlying accident, and the unrelated third party becomes a de facto collection agent that must prioritize and pay debts to avoid personal liability.

[6] {¶ 25} Finally, we disfavor such assignments based upon their similarities to champertous agreements that are void as a matter of law. See *Rancman v. Interim Settlement Funding Corp.*, 99 Ohio St.3d 121, 2003-Ohio-2721, 789 N.E.2d 217, ¶ 19. Here, West Broad agreed to forgo payment for Norregard's treatment in exchange for an interest in future settlement proceeds. Although Norregard would remain liable for her medical bills if she did not settle, under the circumstances of this case,

West Broad's interest in potential **1098 future proceeds could influence Norregard's interest in resolving her case, including delaying and holding out for a greater settlement because she had no current obligation to pay for her medical treatment.

[7] {¶ 26} Therefore, our answer to the first certified question is no. A person may not assign the right to the future proceeds of a settlement if the right to the proceeds does not exist at the time of the assignment. Norregard had no present right to any settlement funds at the time of the assignment and thus had no rights to assign. West Broad had a contract that may be enforceable against Norregard, but it is not legally binding upon AFI.

Application of R.C. 3929.06

{¶ 27} The second question for review asks whether R.C. 3929.06 precludes an assignee from bringing a direct action against the third-party insurer who had *502 prior notice of the assignment but nevertheless paid the settlement proceeds contrary to the written assignment.

{¶ 28} R.C. 3929.06(B) precludes an injured person from bringing a civil action against the tortfeasor's insurer until the injured person has first obtained a judgment for damages against the insured and the insurer has not paid the judgment within 30 days.

{¶ 29} West Broad contends that R.C. 3929.06 applies only when the insurer does not pay insurance proceeds after liability has been judicially determined. The conflict cases likewise interpreted R.C. 3929.06 more literally. *Akron Square* notes that the statute does not mention assignments, and the court of appeals refused to read into the statute a prohibition on assigning potential settlement proceeds. 2004-Ohio-1988, 2004 WL 840131, ¶ 10. *Cartwright* rejected the application of R.C. 3929.06 because the injured party in that case settled without having to file suit. Thus, that court considered the statute inapplicable to the facts. 2008-Ohio-2623, 2008 WL 2231651, ¶ 18 19.

[8] {¶ 30} The court of appeals in this case acknowledged that the statute does not directly address written assignments. *W. Broad*, 2008-Ohio-2647, 2008 WL 2246653, ¶ 17. Nevertheless, the court, applying the law of assignments to the statute, reasoned that if an injured

person has no direct action against the tortfeasor's insurer until 30 days after judgment and an injured person may assign only those rights that presently exist, then it follows that at the time of the assignment, Norregard had no direct right of recovery against AFI that could be assigned to West Broad. *Id.* at ¶ 16.

{¶ 31} This approach was also applied in *Knop Chiropractic, Inc. v. State Farm Ins. Co.*, Stark App. No. 2003CA00148, 2003-Ohio-5021, 2003 WL 22176668. In that case, a chiropractor filed an action to enforce a patient's assignment of prospective claim proceeds against a third-party automobile insurer. The court in *Knop* concluded, per R.C. 3929.06, that the assignment was not enforceable against State Farm because it was created before the injured person had filed a civil action against the tortfeasor. Thus, the assignment was not founded on a right in being and was not enforceable. *Id.* at ¶ 19, 20.

[9] {¶ 32} The underlying premise of R.C. 3929.06 reinforces our conclusion that Norregard had no existing right in proceeds to assign to West Broad. Therefore, our answer to the second certified question is yes: R.C. 3929.06 precludes an assignee of prospective settlement proceeds from bringing a direct action against a third-party insurer after the insurer has distributed settlement proceeds in disregard of the written assignment.

****1099 Conclusion**

{¶ 33} When Norregard executed the agreement with West Broad, she had no right in proceeds from a prospective settlement or judgment. Because there *503 must be an existing right in order for there to be a valid assignment, Norregard had nothing to assign that would have created a right in the assignee. At most, West Broad had a contractual right against Norregard for medical bills, but no legal right to enforce the agreement against AFI.

{¶ 34} In addition, Norregard had no direct right of action against AFI at the time of the assignment because she had not met the terms of R.C. 3929.06. Thus, because West Broad's rights as assignee are no greater than Norregard's, West Broad was also prohibited from filing a direct action against AFI.

{¶ 35} Consequently, we affirm the judgment of the court on appeals.

Judgment affirmed.

O'DONNELL, J., concurs.

O'CONNOR and LANZINGER, JJ., concur in judgment and the answers to the certified questions only.

MOYER, C.J., and PFEIFER and CUPP, JJ., dissent.

MOYER, C.J., dissenting.

{¶ 36} I dissent from the judgment because I find the assignment between Kristy Norregard and West Broad Chiropractic ("West Broad") to be enforceable. Therefore I would hold that West Broad should be permitted to recover from American Family Insurance for its failure to pay West Broad pursuant to the assignment. Additionally, I would hold that R.C. 3929.06 does not prohibit an assignee of an injured person from filing suit to collect from the insurer on the assignment when the insurer has disregarded the assignment while distributing settlement proceeds.

I

Assignment of the right to contingent future settlement proceeds is permitted as an equitable assignment

{¶ 37} In the first certified-conflict issue, we are asked whether an injured party may assign its right to conditional, future compensation for its injuries when the injured party has not yet established the liability of the tortfeasor or a present right to such compensation. I would answer this question in the affirmative, based upon our prior cases concerning assignments of future interests. Therefore, I dissent from the majority's holding on the first certified-conflict issue.

{¶ 38} The lead opinion states that in order to validly assign a contingent interest, the assignor must have a "property right that [is] in existence." *504 According to the lead opinion, Norregard's assignment of any future compensation for her personal injuries to West Broad for chiropractic care is invalid because Norregard had no present right to settlement proceeds, nor did any proceeds exist. However, in attempting to explain our precedent,

the lead opinion actually imposes requirements for an equitable assignment that do not exist in our case law. These new requirements unduly constrict the ability to assign a future interest.

{¶ 39} A contingent, future property interest is an uncertain right at best. This is so because the existence of the property in question is speculative, its existence depending not only on the occurrence of some specified future condition but also on the caprice of fate. Additionally, contingent interests, by definition, do not vest a present property right in the holder of the interest, although they may give rise to rights enforceable in equity. Therefore, in ****1100** general, such assignments were not enforced as contracts at law because an expectancy was deemed too intangible. *Hite v. Hite* (1929), 120 Ohio St. 253, 262 264, 166 N.E. 193; and *Moore v. Foresman* (1962), 172 Ohio St. 559, 566, 18 O.O.2d 123, 179 N.E.2d 349; *Pennsylvania Co. v. Thatcher* (1908), 78 Ohio St. 175, 188, 85 N.E. 55. However, a right to enforce assignments of future interests was recognized in equity. *Id.* at 188 189, 85 N.E. 55. In order for an assignment to be enforced in equity, we require that the assignor have an “expectancy” in the object of the assignment. *Hite*, 120 Ohio St. at 260 261, 166 N.E. 193. At common law, assignments were held to a stricter requirement: that the assignor have a “right in being” in the object of the assignment. *Needles v. Needles* (1857), 7 Ohio St. 432, 442 443. A right in being is a cognizable expectation, founded on some provision of law or instrument or some legal act, that in the future, the assignor will possess the object of the assignment. *Id.*

{¶ 40} When such an expectancy or right in being exists, certain privileges belong to the holder of the contingent interest, such as the ability to assign the contingent interest. *Id.*; *Hite*, 120 Ohio St. at 260 261, 166 N.E. 193. These assignments will be enforced in equity once the contingency has occurred and property rights to the subject matter of the assignment vest in the assignor. *Hite* at 262 264, 166 N.E. 193; *Moore*, 172 Ohio St. at 566, 18 O.O.2d 123, 179 N.E.2d 349; *Thatcher*, 78 Ohio St. at 188 189, 85 N.E. 55. (Here, Norregard is the “assignor,” West Broad is the “assignee,” and American Family is the “debtor.”)

{¶ 41} In this case, Norregard's expectation of compensation for her injury rested on the cognizable provision at law of the right to seek redress for injuries already sustained. Norregard had an expectancy and

a right in being in the nature of a legally recognized remedy for her injuries. Her future interest was ***505** contingent on her success in pursuing that right. Thus, her expectation is founded in relief recognized in law and may be assigned.

{¶ 42} The premise of the lead opinion that property or a property interest must exist is contradicted by our precedent concerning equitable assignments. In *Gen. Excavator Co. v. Judkins* (1934), 128 Ohio St. 160, 166, 190 N.E. 389, which is ignored by the lead opinion, we enforced an equitable assignment for the future proceeds of a contract, although the work had not yet been performed and no proceeds were due. We held that an equitable assignment is created by “an intention on one side to assign and an intention on the other to accept, supported by sufficient consideration, and disclosing a present purpose to make an appropriation of a debt or fund.” *Id.* at 165, 190 N.E. 389.

{¶ 43} As is apparent from the facts in *Gen. Excavator*, the assignor did not have a present right to the property at issue, nor was the property in existence at the time the assignment was made. *Gen. Excavator Co.*, 128 Ohio St. at 165 166, 190 N.E. 389. No work had been performed on the contract, so the assignor had received no payment and had no right to payment. *Id.* Thus, as to the first element of the assignment the “debt or fund” the assignor had merely an expectation interest. Yet the court in *Gen. Excavator* held that the assignment was valid. *Id.* at 167, 190 N.E. 389. It was apparently sufficient for the court that the property would exist upon the exercise of an expectancy or right in being, namely the assignor's privilege to perform the work specified in a contract. That is, the assignor had an assignable interest in the future proceeds of the contract, although those proceeds would not exist until the ****1101** assignor performed work under the contract and received payment for that work. Thus, as long as the assignor has the present purpose to make an appropriation from a fund even a fund that does not exist and to which the assignor has no present right then the first element of *Gen. Excavator* is met.

{¶ 44} In this case, no one questions the existence of the other elements of a valid equitable assignment under *Gen. Excavator*: the intent of the parties to create an assignment or the underlying consideration. *Gen. Excavator Co.*, 128 Ohio St. at 165, 190 N.E. 389. Rather, the appellee and the majority deny the right of Norregard to the funds at

issue. However, *Gen. Excavator* indicates that the assignor need not have a present right to funds, nor do the funds need to be in existence. *Gen. Excavator* is analogous to this case. There is no meaningful difference between assigning the right to the uncertain proceeds of a future contract and assigning the right to proceeds of a future lawsuit or settlement. In either case, the property depends for its existence on the assignor's successful pursuit of "rights in being." Accordingly, as in *Gen. Excavator*, we have here a valid equitable assignment without a present property *506 interest or property in existence. Therefore, I would hold that the elements of an equitable assignment under *Gen. Excavator* have been met in this case.

{¶ 45} The cases cited in the lead opinion, *Hite*, 120 Ohio St. at 253, 166 N.E. 193, and *Moore*, 172 Ohio St. at 559, 18 O.O.2d 123, 179 N.E.2d 349, do not alter this result. Neither *Hite* nor *Moore* supports the premise of the lead opinion that the only expectations that may be assigned are those in which the future interest is based upon "a property right that was [already] in existence." In fact, both *Hite* and *Moore* recognized that a future interest based on rights and property not in actual existence could be assigned in equity. *Hite* at 260 261, 166 N.E. 193; *Moore*, paragraph one of the syllabus.

{¶ 46} In *Hite*, the assignor assigned his expected inheritance from his mother's estate to his sister, the assignee. *Hite*, 120 Ohio St. at 256, 166 N.E. 193. The *Hite* court held that the assignment was not enforceable at law, but was enforceable in equity, because it would have been inequitable to allow the assignor to retain both the inheritance and the consideration given by the assignee in the event that the assignor actually inherited the res, i.e., the subject matter, of the assignment. *Id.* at 260 261, 166 N.E. 193. The *Hite* court enforced the assignment, even though at the time of the assignment, the assignor had no present rights to the property, the property did not exist when the assignment was made, and the assignor's expectancy had only "potential existence," contingent on the occurrence of a future event. *Id.* Thus, *Hite* is no support for the conclusion that an expectation interest can be assigned only when it is a "property interest [already] in existence."

{¶ 47} In *Moore*, we came to the unsurprising conclusion that because Ohio law recognized a protectable right to equitable or beneficial ownership of property held in trust (although the beneficiary had no present legal ownership),

the beneficiary could assign that interest in equity. *Moore*, 172 Ohio St. at 566, 18 O.O.2d 123, 179 N.E.2d 349. The holding in *Moore* was premised on the already established rule that a contingent future interest was alienable and the widely recognized rule that "[e]quitable or beneficial ownership and interest in securities is alienable and may be conveyed." *Id.* at paragraph two of the syllabus. Simply put, *Moore* did nothing more than recognize that an equitable ownership in securities is alienable **1102 and therefore can be assigned in equity. *Moore* does not affect the issue before us beyond providing another example of the assignability of a contingent future interest.

{¶ 48} The lead opinion reads *Hite* and *Moore* to require a present interest in property or the existence of the property before a contingent interest may be assigned. Yet, as *Hite* and *Moore* illustrate, contingent interest will rarely if ever involve presently existing property rights or property in actual existence. The *Hite* court expressly recognized that the assignor's right to property was *507 based upon a "mere expectancy" of that right, that the assignor had no existing right, and that no property existed at the time of the assignment. *Hite*, 120 Ohio St. at 260 261, 166 N.E. 193. It is hard to imagine which, if any, contingent interests will remain assignable following the majority's holding.

{¶ 49} Furthermore, it is apparent from the number of cases addressing this type of assignment that such an assignment is a common means for injured persons to receive medical treatment while waiting for monetary relief. Injured persons have an expectation of relief that equity recognizes without first requiring instigation of courtroom proceedings.

1 The parties have cited six Ohio court of appeals cases, two cases from the courts of last resort of other states, and several state and federal trial court cases, including the following: *Akron Square Chiropractic v. Creps*, Summit App. No. 21710, 2004 Ohio 1988, 2004 WL 840131; *Cartwright Chiropractic v. Allstate Ins. Co.*, Butler App. No. CA2007 06 143, 2008 Ohio 2623, 2008 WL 2231651; *Fletcher v. Nationwide Mut. Ins. Co.*, Darke App. No. 02CA1599, 2003 Ohio 3038, 2003 WL 21360646; *Knop Chiropractic, Inc. v. State Farm Ins. Co.*, Stark App. No. 2003CA0018, 2003 Ohio 5021, 2003 WL 22176668; *Mt. Lookout Chiropractic Ctr., Inc. v. Motley* (Dec. 1, 1999), Hamilton App. No. C 980987, 1999 WL 1488971; *Roselawn Chiropractic Ctr., Inc. v. Allstate*

Ins. Co., 160 Ohio App.3d 297, 2005 Ohio 1327, 827 N.E.2d 331; *Charlotte Mecklenburg Hosp. Auth. v. First of Georgia Ins. Co.* (1995), 340 N.C. 88, 455 S.E.2d 655; *Hernandez v. Suburban Hosp. Assn., Inc.* (1990), 319 Md. 226, 572 A.2d 144; *Midtown Chiropractic v. Illinois Farmers Ins. Co.* (Ind.2006), 847 N.E.2d 942; *Bernstein v. Allstate Ins. Co.* (1968), 56 Misc.2d 341, 288 N.Y.S.2d 646; and *In re Petry* (Bankr.N.D. Ohio 1986), 66 B.R. 61.

{¶ 50} Therefore, I would hold that the law permits West Broad to enforce its equitable assignment. Courts have historically enforced such assignments once the contingency has occurred and the object of the assignment has come into existence. *Hite*, 120 Ohio St. at 262 264, 166 N.E. 193; *Moore*, 172 Ohio St. at 566, 18 O.O.2d 123, 179 N.E.2d 349; *Thatcher*, 78 Ohio St. at 188, 85 N.E. 55. The question remains whether West Broad may enforce the assignment against American Family Insurance, a third party to the assignment.

After notice, the assignee may sue a third-party debtor who did not pay pursuant to the assignment

{¶ 51} The majority holds that equitable assignments cannot be enforced against third parties who did not consent to the agreements. But this holding is directly contrary to precedent established in *Pittsburg, Cincinnati, Chicago & St. Louis Ry. Co. v. Volkert* (1898), 58 Ohio St. 362, 367, 50 N.E. 924, and *Gen. Excavator*, 128 Ohio St. 160, 190 N.E. 389. Furthermore, the lead opinion's reliance on the reasoning in *Thatcher*, 78 Ohio St. 175, 85 N.E. 55, is misplaced, because *Thatcher* addressed only money damages in an action at law, and the reasoning cited from *Thatcher* is dicta. *Id.* at syllabus.

{¶ 52} In *Volkert*, an attorney had assigned his fee from an unpaid judgment to the assignee, but the judgment debtor disregarded the assignment and paid the *508 attorney's client instead. *Volkert*, 58 Ohio St. at 368, 50 N.E. 924. We held that the attorney's assignment was enforceable in equity. *Id.* at 369 371, 50 N.E. 924. **1103 We also held that equity permitted the assignee to enforce the assignment against the third-party debtor, even though it had not consented to pay pursuant to the assignment. *Id.* at 372, 50 N.E. 924. Indeed, we required the debtor, which knew of the assignment, to pay the assignee, despite having already paid the full debt amount to the client; “the [debtor], while it had a full right to compromise,

was simply required to deal with all parties in interest, including those holding a valid property interest in the judgment, and entitled to a portion of the proceeds.” *Id.* at 377, 50 N.E. 924.

{¶ 53} We applied the rule in *Volkert* in *Gen. Excavator* in an opinion issued well after *Thatcher*, 78 Ohio St. 175, 85 N.E. 55. *Gen. Excavator*, 128 Ohio St. at 165, 190 N.E. 389. In *Gen. Excavator*, we held, “The consent of a debtor, i.e., the one obligated to an assignor, is not required to an assignment, even though it be for only a part of an entire debt or claim. Such assignment will be enforced against the debtor in equity.” *Id.*, citing *Volkert*, 58 Ohio St. at 362, 50 N.E. 924. The majority's holding today improperly displaces the rule of law announced in these cases.

{¶ 54} Moreover, *Thatcher* is not controlling or even applicable. The holding of *Thatcher* that equitable assignments must be enforced in equity and cannot be enforced in actions at law has no bearing on this case, particularly because of the now defunct distinction between actions at law and at equity. See *Thatcher*, 78 Ohio St. at 187, 85 N.E. 55; Civ.R. 2 (“There shall be only one form of action, and it shall be known as a civil action”).

{¶ 55} The *Thatcher* court noted in dicta that under the facts of that case, the suit was “questionable” in equity as well, because of the circumstances of the particular assignment in that case, in which it appeared that a portion of the underlying claim not the proceeds of settlement had been assigned (i.e., the assignor had assigned a “chose in action,” giving the right to pursue a portion of her cause of action to a third party). *Id.* at 192, 85 N.E. 55, citing *Weller v. Jersey City, Hoboken & Paterson Street Ry. Co.* (1904), 66 N.J.Eq. 11, 18 19, 57 A. 730. The *Thatcher* court suggested that under such circumstances, the assignee would have no right in equity to enforce his assigned “portion” of the underlying cause of action against the debtor alone because (1) doing so would interject the interests of an uninjured third party into settlement negotiations, undermining the needs of the injured party; and (2) the fund of the resulting assignment would not come into existence until the tortfeasor had been released from liability. *Id.* at 190 192, 85 N.E. 55.

{¶ 56} This viewpoint likely stems from the then existing rule that although choses in action were generally assignable, choses in action for personal injury *509

were generally not. *Cincinnati v. Hafer* (1892), 49 Ohio St. 60, 66, 30 N.E. 197. And the dicta of *Thatcher* reflect the general policy against champerty and maintenance (i.e., the interference with the maintenance of a lawsuit by a third party who has agreed to assist in the litigation in exchange for a portion of the proceeds) by prohibiting assignments that may undermine the needs of the injured party, needlessly complicate litigation, and frustrate settlement by introducing a self-interested third party to the litigation and settlement process. See, e.g., *Rancman v. Interim Settlement Funding Corp.*, 99 Ohio St.3d 121, 2003-Ohio-2721, 789 N.E.2d 217, at ¶ 10.

{¶ 57} Thus, *Thatcher* addresses, in dicta, the undesirability of permitting equitable assignment of choses in action (or portions of the underlying cause of action) for personal-injury torts. Yet Norregard did not assign her injury or right of action against the tortfeasor; she assigned her **1104 right to settlement proceeds. There is an important difference between assigning a cause of action and assigning the proceeds from future pursuit of that cause of action. The former would insert a self-interested third party into the litigation and raise concerns of champerty. The latter imparts no cognizable right in the litigation of the cause of action to the third party and gives the third party an enforceable right only to the extent that there are proceeds from resolution of the cause of action. This distinction has been recognized as significant by the courts of last resort of at least three other states, as appellant points out. *Charlotte Mecklenburg Hosp. Auth.*, 340 N.C. at 91, 455 S.E.2d 655; *Achrem v. Expressway Plaza Ltd. Partnership* (1996), 112 Nev. 737, 740 741, 917 P.2d 447; *Hernandez*, 319 Md. at 235, 572 A.2d 144. Each of those courts has permitted assignments similar to those in this case.

{¶ 58} Accordingly, the assignment in this case of the proceeds of a future settlement does not raise the concerns noted in *Thatcher* and *Rancman*: the assignee will not have a right to be involved in the litigation of the injury claim or the resulting settlement discussion, and the assignment will not compromise the ability of the tortfeasor to settle with the injured party.

{¶ 59} Therefore, I would hold that the rule in *Volkert* is the proper rule to apply and that West Broad may recover from American Family Insurance, which had notice of the assignment but did not pay according to its terms.

II

R.C. 3929.06 does not bar a lawsuit by an assignee against a third-party insurer who paid settlement proceeds in disregard of an assignment of which it had notice

{¶ 60} With regard to the second certified issue, the lead opinion reasons that R.C. 3929.06 precludes an assignee from suing an insurer who paid settlement *510 proceeds in disregard of an assignment of which it had notice. I disagree. Courts are charged to apply statutes as plainly written. *MedCorp, Inc. v. Ohio Dept. of Job & Family Servs.*, 121 Ohio St.3d 622, 2009-Ohio-2058, 906 N.E.2d 1125, ¶ 9 (“When construing a statute, we first examine its plain language and apply the statute as written when the meaning is clear and unambiguous”). And R.C. 3929.06(B) is plainly inapplicable to the situation at hand.

{¶ 61} R.C. 3929.06 provides:

{¶ 62} “(A)(1) If a court in a civil action enters a final judgment that awards damages to a plaintiff for injury, death, or loss to the person or property of the plaintiff or another person for whom the plaintiff is a legal representative and if, at the time that the cause of action accrued against the judgment debtor, the judgment debtor was insured against liability for that injury, death, or loss, the plaintiff or the plaintiff’s successor in interest is entitled as judgment creditor to have an amount up to the remaining limit of liability coverage provided in the judgment debtor’s policy of liability insurance applied to the satisfaction of the final judgment.

{¶ 63} “(2) If, within thirty days after the entry of the final judgment referred to in division (A)(1) of this section, the insurer that issued the policy of liability insurance has not paid the judgment creditor an amount equal to the remaining limit of liability coverage provided in that policy, the judgment creditor may file in the court that entered the final judgment a supplemental complaint against the insurer seeking the entry of a judgment ordering the insurer to pay the judgment creditor the requisite amount. Subject to division (C) **1105 of this section, the civil action based on the supplemental complaint shall proceed against the insurer in the same manner as the original civil action against the judgment debtor.

{¶ 64} “(B) Division (A)(2) of this section does not authorize the commencement of a civil action against an insurer until a court enters the final judgment described in division (A)(1) of this section in the distinct civil action for damages between the plaintiff and an insured tortfeasor and until the expiration of the thirty-day period referred to in division (A)(2) of this section.”

{¶ 65} R.C. 3929.06(B) is the portion of the statute at issue. That portion of the statute requires an injured party to wait 30 days after judgment against a tortfeasor before filing suit against the tortfeasor's insurer to collect on that judgment. The majority does not dispute this reading of R.C. 3929.06. Thus, the statute confines itself to one type of lawsuit—a suit by an injured person to collect from an insurer after a judicial determination of the liability of a tortfeasor—and the prohibition in the statute pertains only to the filing of a lawsuit to collect on such a judgment after 30 days have passed from the final judgment of damages.

*511 {¶ 66} I cannot follow the rationale that stretches the words of R.C. 3929.06 to preclude a suit by an assignee to collect on an assignment when the insurer distributed settlement money in disregard of the assignment. R.C. 3929.06(B) simply does not apply to such a cause of action.

{¶ 67} Moreover, the statute has no application to the facts of this case. The statute applies to suits to collect on a judgment and has no application unless a civil judgment has been entered as described in R.C. 3929.06(A)(1). In this case, there was no judgment or need to collect on a judgment—the insurer settled with the injured party out of court. When the assignee files suit because the insurer paid in disregard of the assignment, the statute, by its own terms, has no application to such a suit.

{¶ 68} At best, the majority's holding with regard to R.C. 3929.06 is a non sequitur. The lead opinion states that the “underlying premise” of R.C. 3929.06 confirms the conclusion that the assignment was invalid, because Norregard had no existing property or property rights to assign. The majority then answers the second certified question “yes,” concluding that R.C. 3929.06 precludes an assignee from bringing a direct action against a third-party insurer after the insurer has distributed settlement proceeds in disregard of the written agreement. This conclusion is odd because if the majority's reasoning is correct and the assignment was invalid, then West Broad

never had a cause of action, and there is nothing for R.C. 3929.06 to preclude. If the majority's view were carried to its logical conclusion, then we should not reach the second certified question—the statute does not preclude the action; rather, the lack of a valid assignment precludes the action against the insurer, and the second certified question is moot. As argued above, I do not agree that the assignment was invalid; therefore, I cannot agree with the majority's holding with regard to R.C. 3929.06.

{¶ 69} Furthermore, the majority ignores the settled law on suits to collect on an improperly paid assignment. An assignee of an equitable assignment may sue a third-party debtor who had notice of the assignment but did not pay accordingly. *Volkert*, 58 Ohio St. 362, 50 N.E. 924, paragraphs one, two, and three of the syllabus; *Gen. Excavator*, 128 Ohio St. at 165, 190 N.E. 389. We have held that the third-party debtor is liable in such circumstances, even when that debtor did not consent to pay pursuant to the assignment. **1106 *Volkert*, 58 Ohio St. 362, 50 N.E. 924, paragraph three of the syllabus.

{¶ 70} Therefore, I would hold that R.C. 3929.06(B) does not prohibit an assignee from suing an insurer who distributed settlement proceeds in disregard of an assignment of which it had notice.

III

{¶ 71} Norregard had a right in being to seek a remedy for her injuries. Therefore, I would hold that her future interest in the proceeds of a lawsuit or *512 settlement was assignable. West Broad, the assignee, is entitled to enforce the assignment against American Family Insurance, the third-party debtor, under settled law. R.C. 3929.06 does not apply to prohibit West Broad from suing American Family for failure to properly distribute the proceeds under the terms of the assignment.

{¶ 72} Therefore, I dissent.

PFEIFER and CUPP, JJ., concur in the foregoing opinion.

All Citations

122 Ohio St.3d 497, 912 N.E.2d 1093, 2009 -Ohio- 3506

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EXHIBIT 280



Neutral

As of: January 27, 2019 3:10 PM Z

UBU/Elements, Inc. v. Elements Pers. Care, Inc.

United States District Court for the Eastern District of Pennsylvania

June 22, 2016, Decided; June 22, 2016, Filed

CIVIL ACTION No. 16-2559

Reporter

2016 U.S. Dist. LEXIS 80946 *; 2016 WL 3418696

UBU/Elements, Inc., Plaintiff, v. Elements Personal Care, Inc., et al., Defendants.

Subsequent History: Injunction granted at[UBU/Elements, Inc. v. Elements Pers. Care, Inc., 2016 U.S. Dist. LEXIS 110544 \(E.D. Pa., Aug. 19, 2016\)](#)**Core Terms**

assigned, registration, ownership, recording, marks, Trademarks, registered

Counsel: [*1] For UBU/ELEMENTS, INC., Plaintiff: LEIGH ANN BUZIAK, LEAD ATTORNEY, JARED M. DEBONA, BLANK ROME LLP, PHILADELPHIA, PA.

For ELEMENTS PERSONAL CARE, INC., ELEMENTS PERSONAL CARE, LLC, WARREN CHAMBERS, Defendants: TERRY R. CLAYTON, LEAD ATTORNEY, PRO HAC VICE, NASHVILLE, TN; JOSEPH S. MITCHELL, III, PHILADELPHIA, PA.

Judges: Gerald Austin McHugh, United States District Judge.**Opinion by:** Gerald Austin McHugh**Opinion****MEMORANDUM ORDER**

This 22nd day of June, 2016, upon review of Plaintiff's Motion for Temporary Restraining Order, and the Response and Reply thereto, it is **ORDERED** that the Motion is **DENIED** as to the After the Game mark for the reasons expressed herein.

Plaintiff UBU/Elements, Inc. seeks a temporary restraining order against Defendants Elements Personal Care, Inc., Elements Personal Care, LLC, and Warren

Chambers to enjoin their use of certain trademarks. I previously held a hearing on this Motion on June 7, 2016 and granted the Motion in part as it pertains to the Magsoothium mark. Court's June 8, 2016 Order. The parties have now each submitted supplemental briefing on the Motion as it pertains to the After the Game (ATG) mark, and I have considered those pleadings, the exhibits attached thereto, and the evidence [*2] presented at the June 7 hearing. I conclude that UBU/Elements has not submitted sufficient evidence that they are entitled to a TRO for the After the Game mark.¹

To obtain this interim injunctive relief, "a movant 'must demonstrate *both* a likelihood of success on the merits and the probability of irreparable harm if relief is not granted.'" [Frank's GMC Truck Ctr., Inc. v. Gen. Motors Corp., 847 F.2d 100, 102 \(3d Cir. 1988\)](#) (citing [Morton v. Beyer, 822 F.2d 364, 367 \(3d Cir. 1987\)](#)). To succeed on the merits of its Lanham Act claims, Plaintiff will have to prove: "(1) it has a valid and legally protectable mark; (2) it owns the mark; and (3) the defendant[s]' use of the mark to identify goods or services causes a likelihood of confusion." [A & H Sportswear, Inc. v. Victoria's Secret Stores, Inc., 237 F.3d 198, 210 \(3d Cir. 2000\)](#). I am not convinced that Plaintiff has sufficiently demonstrated that it will be able to prove the second of these elements—that it owns the ATG mark.

Plaintiff does not contest that the ATG mark was originally used and registered with the United [*3] States Patent and Trademark Office (PTO) by Defendant Warren Chambers. However, Plaintiff argues that it is now the legal owner of the mark because it

¹ My analysis is limited to the issues in the Motion before me. To the extent the parties wish to make counterclaims against Plaintiff for licensing violations or for defamation, as suggested in the pleadings, those arguments are not before the Court and are not relevant to the question of the ownership of the marks addressed in this Memorandum.

purchased the mark from Chambers "under an Asset Purchase Agreement in 2011 and has continued to use the mark in commerce continuously since that time." Pl. Reply at 2. As evidence that ownership was legally transferred, Plaintiff submits an Abstract of Title from the PTO listing Chambers as the original Registrant of the mark and Plaintiff as the Assignee, and listing the conveyance for the assignment as the Asset Purchase Agreement ("Agreement"). Ex. A to Compl.

Plaintiff claims that this PTO registration is conclusive evidence as a matter of law that it owns the mark. In support of this argument, Plaintiff points to the Lanham Act, which by its terms provides that registration of a particular mark is "conclusive evidence of the validity of the registered mark and of the registration of the mark, of the registrant's ownership of the mark, and of the registrant's exclusive right to use the registered mark in commerce." [15 U.S.C. § 1115\(b\)](#). This analysis is superficial. As the Second Circuit has warned, this clause should not be read so broadly as to preclude [*4] a district court from allowing any challenge to the recorded assignment of an incontestable registration, since that would "improperly conflate[] incontestability with the analytically distinct issue of whether a subsequent transfer of the marks was valid." [Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int'l N.V., 623 F.3d 61, 63 \(2d Cir. 2010\)](#). Rather, "the question of the validity of the assignment is antecedent to the question of incontestability." [Id. at 69](#).

A different section of the Lanham Act governs assignment of registered marks and outlines the procedure for informing the PTO that a registrant or subsequent owner has assigned a mark. See [15 U.S.C. § 1060](#). Under [section 1060](#), the fact that an assignment is recorded with the PTO is "prima facie evidence of execution" of that assignment. [15 U.S.C. § 1060\(a\)\(3\)](#). However,

[p]rima facie evidence of execution is not the same as conclusive evidence of the validity of an assignment. As the PTO has stated, "[t]he mere act of recording [an assignment] document is a ministerial act," and "[t]he Assignment Branch [of PTO] does not examine the substance of the transaction;" rather, it records any assignment "that appears on its face to be an assignment." [In re Ratny, 24 U.S.P.Q.2d 1713, 1715 \(Com'r Pat. & Trademarks 1992\)](#). "Since the act of recording a document is not a determination of the document's validity," the existence of a recorded assignment "does not preclude [*5] a party from ... establishing

its ownership of the mark in a proper forum, *such as a federal court.*" *Id.* (emphasis added); see also Louis Altman and Malla Pollack, *3 Callmann on Unfair Competition, Trade & Monopolies* § 20:62 (4th ed. 2010).

[Sojuzplodoimport., 623 F.3d at 68](#). Therefore, simply because Plaintiff submitted a copy of the Agreement to the PTO and that office subsequently designated the mark as being assigned from Chambers to UBU/Elements does not require me to ignore Chambers' challenge to the validity of that record.² The high standard for a TRO demands that the Court inquire further to determine whether it is likely that Plaintiff will be able to prove the PTO's "ministerial act" of recording the assignment properly reflects ownership of the mark.

I am not convinced that Plaintiff can prove it owns the mark simply by pointing to the Agreement. The plain language of the Agreement³ indicates that Defendant Elements Personal Care, Inc. promised to "sell, grant, convey, transfer, assign, and deliver [*6] to" Plaintiff the tangible and intellectual property associated with ATG. Ex. A to Pl. Reply at 1. The contract further provides that Defendant Elements Personal Care, Inc. promised to deliver any necessary documents to assign or convey its right, title, and interest in ATG to Plaintiff at a closing of sale meeting. Ex. A to Pl. Reply at 2-3. It appears from the testimony and affidavits of the parties that this closing never occurred, and therefore Defendants never assigned the marks to Plaintiff in writing. For example, Chambers asserts he has never assigned any intellectual property pursuant to the Agreement. Chambers Aff. at ¶ 28. Chambers also points out that the Agreement illogically provides a closing date that precedes the date upon which the agreement was purportedly assigned. Agreement, Ex. A to Pl.'s Reply at 2. Finally, Plaintiff's principal Alan Blau testified at the June 7, 2016 hearing that he did not notice that the formalities involved in recording the assignment of the

² It appears that this document was filed with the PTO in direct response to a cease and desist letter that Chambers sent asserting his ownership of the marks, which further supports my inclination to view it with caution.

³ Chambers argues that the Agreement itself is invalid because the copy submitted [*7] by Plaintiff is an altered version of the one he signed. However, since the version he submits as the "original" Agreement does not differ in a way that is material to my analysis, I need not decide whether either of the documents presented to the Court is genuine at this time.

mark had not been performed until he received a cease and desist letter from Chambers challenging ownership of the marks.

/s/ Gerald Austin McHugh

United States District Court Judge

The Lanham Act requires that assignments of federally registered trademarks be in writing. [15 U.S.C. § 1060](#).⁴ Furthermore, "[a]n agreement to assign a mark in the future is not a present assignment and does not vest legal title at the time of the agreement." 3 McCarthy on Trademarks and Unfair Competition § 18:4 (4th ed.) (citing *Gaia Technologies, Inc. v. Reconversion Technologies, Inc.*, 93 F.3d 774, 779 (Fed. Cir.1996), amended on reh'g in part by, [104 F.3d 1296 \(Fed. Cir. 1996\)](#)); see also *Li'l Red Barn, Inc. v. Red Barn System, Inc.*, [322 F.Supp. 98 \(N.D. Ind. 1970\)](#), *aff'd per curiam*, 174 U.S.P.Q. 193 (7th Cir. 1972) ("[T]he rule is well established that a mere agreement for the future assignment of a trademark is not an assignment of either the mark itself or the goodwill attached to it."). I am therefore persuaded that while Defendants may have promised to assign the mark, there is insufficient evidence that such a promise was fulfilled and an assignment was executed. There are too many unresolved factual issues for me to conclude at this point that Plaintiff is likely to succeed on the Lanham Act claims asserted in the Complaint.

End of Document

Because ownership of the marks is also largely dispositive of Plaintiff's likelihood of success on its Tortious Interference claim, I also find it is inappropriate to grant a Temporary Restraining Order regarding that claim at this time.

Per Plaintiff's request at the June 7 hearing, a conference call is scheduled for **Friday, June 24, 2016 at 2:00 p.m.** to discuss expedited discovery and a preliminary injunction hearing. Counsel for Plaintiff is requested to initiate the call with opposing counsel and then call Judge McHugh's Chambers at 267-299-7301.

⁴ There are a limited number of exceptions. **[*8]** For example, an assignment in writing may not be necessary to transfer certain common law rights in a trademark. See [Warden v. Falk, No. 11-2796, 2011 U.S. Dist. LEXIS 82956, 2011 WL 3204815, at *6-7 \(E.D. Pa. July 27, 2011\)](#). In addition, a merger of one corporation into another effects a transfer of the marks owned by the acquired corporation, even without a formal assignment. *Am. Mfg. Co., Inc.*, 192 U.S.P.Q. (BNA) ¶ 498 (P.T.O. Aug. 31, 1976). None of these exceptions appears to be relevant to Plaintiff's claims, but this opinion should not be construed to limit Plaintiff's ability to raise such arguments if appropriate.

EXHIBIT 281

Joinder recommendations

1. That all those who participated in the underlying proceeding as a “party” receive notice from a claimant (in IRPs under Bylaw section 4.3(b)(iii)(A)(3)) of the full Notice of IRP and Request for IRP (including copies of all related, filed documents) contemporaneously with the claimant serving those documents on ICANN.
2. That all such parties have a right to intervene in the IRP. How that right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. No interim relief or settlement of the IRP can be made without allowing those given amicus status as a matter of right as described herein a chance to file an amicus brief on the requested relief or terms of settlement.

Joinder recommendations (con't)

3. In reviewing such applications, and without limitation to other obligations under the bylaws, the PROCEDURES OFFICER shall endeavor to adhere to the provisions of Bylaw section 4.3(s) to the extent possible while maintaining fundamental fairness.
- ~~4. Persons/entities participating in IRPs as amici shall each, for purposes of bylaw section 4.3(r) only, be considered "parties" to the IRP.~~

[On call May 11, 2017, we agreed to strike number 4, which is no longer part of this Joinder recommendation. We may look for other, non-financial, avenues to create disincentives for frivolous or abusive amici briefs but for now have not done so and this Joinder recommendation consists only of points 1 – 3 of these two Joinder slides.]

Panel Conflict of Interest recommendations

1. Term limit of five years (as in bylaw) – ~~no renewal (as in Work Stream One Final Report);~~ **[reconsidered on call – appears agreement for one additional five-year term (total ten-year term possible but not guaranteed) and so that is the proposal for first reading].**
2. Panelists in ongoing cases (still pending at end of **the panelist's final** term) can proceed to conclusion in that case but cannot be assigned to others.
3. ~~Further discussion needed:~~
 - **Staggered terms** – if we use 3-year term for three of the first members to standing panel shall they be eligible for **two full** a second, five-year terms **thereafter (total 13-year term possible but not guaranteed beyond three)**? (I recommend yes); **[support on call for yes and so that is the proposal for first reading]**
 - ~~Do case assignments end before term ends?~~

Panel Conflict of Interest recommendations

4. Add a provision to Section 3 of the USPs in appropriate place as follows:

In addition to the requirements in the Bylaws, every panelist shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so until the final decision has been rendered or the proceedings have otherwise finally terminated.

Retroactivity recommendations

1. With respect to substantive IRP standard:

- No retroactivity.

2. With respect to USP rules:

- With respect to the retroactive application of the new rules to IRPs now pending and filed on or after Oct. 1, 2016, I recommend that we insert a provision allowing a party to request the panel hearing the case to decide this as a matter of discretion. We should add a standard for the panel in reviewing such requests, specifically that unless all parties consent it shall not allow new rules to apply to pending cases if that action would work a substantial unfairness or increase in costs to any party or otherwise be unreasonable in the circumstances.

“Materially affected” – Standing recommendations

1. As for the recommendation that essentially anyone can bring an IRP claim:

- Recommend against that as beyond bylaws.

2. As for standing with respect to “imminent harm” recommend:

- Revise the definition of Claimant (Section 1 of USPs) to take into account the strict provisions of bylaw section 4.3(p) (even though the definition of Claimant in the USPs follows the provision of bylaw section 4.3(b)(i)).
- Make corresponding changes in Section 9 of the USPs as required.
- Recommend against changing provisions of Section 11.d of the USPs and recommend that they be left unchanged.

EXHIBIT 282

[IOT] Some IRP comments treatment for Frist Reading

McAuley, David Contact Information Redacted

Fri May 12 15:46:49 UTC 2017

- Previous message: [\[IOT\] memo referred to on last call \[re-titled\]](#)
- Next message: [\[IOT\] Some IRP comments treatment for Frist Reading](#)
- Messages sorted by: [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)

Dear members of the IRP IOT:

On the call yesterday, May 11, we discussed the slides entitled "IRP Slides for meeting May 11" that were sent to the list on May 10th.

As noted during the call, I have re-worked the slides based on our discussions and send them now (new title: Certain IRP Comments treatment for first reading) as a call for first-reading on these issues:

***** Joinder;

***** Panel conflict of interest;

***** Retroactivity; and

***** Standing (Materially Affected).

This "first reading" consists of the period until (and including) our next call (May 18 - I will ask Bernie or Brenda to confirm the time). That will serve as time within which to assess and agree or disagree.

Thank you.

Important drafting notes:

Additions are in red.

Even though we appeared to agree on the call May 3rd that panelists would have one five-year term with no opportunity for renewal, we discussed that notion further yesterday and the balance tilted toward allowing for a one-time renewal of an additional five-year term (total cap on service as panelist at ten years). The discussion yesterday on this issue is largely captured on pages 18 - 22 of the "Raw Caption Notes" of the call accessible here by scrolling down: <https://community.icann.org/pages/viewpage.action?pageId=64084338>

I added a second five-year term eligibility for panelists who receive three-year initial terms under the "staggered" selection process we have discussed. It seems the logical consequence but I note that this part was not explicitly discussed on yesterday's call so please give it some thought.

The slides on retroactivity are as discussed. Note to Sam, you indicated that you may have some comments on the retroactivity provision relating to rules so please note that.

Best regards,

David

David McAuley

Sr International Policy & Business Development Manager

Verisign Inc.

Contact Information Redacted

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URL:

<<http://mm.icann.org/pipermail/iot/attachments/20170512/bd2af51b/CertainIRPCommentstreatmentforfirstreading-0001.pptx>>

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- Previous message: [\[IOT\] memo referred to on last call \[re-titled\]](#)
 - Next message: [\[IOT\] Some IRP comments treatment for Frist Reading](#)
 - Messages sorted by: [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)

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EXHIBIT 283

[IOT] Status update

McAuley, David Contact Information Redacted
Fri May 19 17:37:28 UTC 2017

- Previous message: [\[IOT\] Fwd: FW: Trying to coordinate Joinder comments](#)
 - Next message: [\[IOT\] Caption Notes-Recordings-Transcript links for IRP-IOT Meeting #22 - 18 May 2017](#)
 - Messages sorted by: [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)
-

Dear members of the IRP IOT:

We have a call on Thursday, May 25, at 19:00 UTC - I will send an agenda by Wednesday - probably sooner.

(FYI - we have two further calls scheduled after next Thursday and prior to ICANN 59 - they are on Tuesday June 6, and Thursday June 15.)

We need to wrap issues on the supplementary procedures to get that part of our work finished. Here is where we stand:

First Reading Done:

***** Joinder issue - see 1-slide PPT attached (IRP IOT Joinder ...)

Ready for First Reading agreement:

***** Retroactivity; and

***** Standing (Materially Affected) - see 2-slide PPT attached (IRP IOT First Reading May 25 ...).

Ready for discussion (potential for First Reading):

***** Challenges to Consensus Policies -see my email<<http://mm.icann.org/pipermail/iot/2017-May/000213.html>> of May 9. That email gives background and then in that email I made these recommendations:

I recommend that we create a mandatory right of intervention for the SO whose policy is under challenge. And I recommend that we treat it along the lines I recommended for other Joinder issues, specifically as follows:

***** That such SO receive notice from a claimant of the full Notice of IRP and Request for IRP (including copies of all related, filed documents) contemporaneously with the claimant serving those documents on ICANN; and

***** That such SO have a right to intervene in the IRP. How that right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such SO to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. No interim relief or settlement of the IRP can be made without allowing those given amicus status a chance to file an amicus brief on the requested relief or terms of settlement.

***** I therefore suggest we stop short of providing such notice to SGs, WG Chairs and community members, and "those who helped create the consensus policy and those whose interests are represented in/affected by it."

***** I do not see the need to limit what a panel can do with respect to challenges to consensus policy inasmuch as bylaw section 4.3(o) seems well suited to address the matter.

Compromise approach floated, possible First Reading agreement:

***** Panel conflict of interest topic:

o See slides 3 and 4 of the attachment to my email<<http://mm.icann.org/pipermail/iot/2017-May/000224.html>> of May 12.

o Remaining differences over whether standing panel members are limited to one five-year term or can serve another. A potential compromise exists around the notion of "automatic" renewal for one additional term with some intervention by SOs/ACs (1) if the panelist is deemed ineffective (?) or (2) based on grounds used for

removal (?). We need to flesh this out - please give this some thought.

Please also look at the sign-up sheet and consider volunteering to lead on an issue discussion:
https://docs.google.com/spreadsheets/d/1Hi_HqvrfsT33p5mfYWT4-x-uhEoy9nCK8owX5uTKCOU/edit?ts=591dda09#gid=0

David

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<<http://mm.icann.org/pipermail/iot/attachments/20170519/b0b0ad76/IRPIOTFirstReadingMay25RetroactivityandStanding-0001.pptx>>

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URL:

<<http://mm.icann.org/pipermail/iot/attachments/20170519/b0b0ad76/IRPIOTJoinderissueFirstReadingcomplete-0001.pptx>>

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- Previous message: [\[IOT\] Fwd: FW: Trying to coordinate Joinder comments](#)
 - Next message: [\[IOT\] Caption Notes-Recordings-Transcript links for IRP-IOT Meeting #22 - 18 May 2017](#)
 - Messages sorted by: [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)

[More information about the IOT mailing list](#)

EXHIBIT 284

Joinder – First Reading complete

1. That all those who participated in the underlying proceeding as a “party” receive notice from a claimant (in IRPs under Bylaw section 4.3(b)(iii)(A)(3)) of the full Notice of IRP and Request for IRP (including copies of all related, filed documents) contemporaneously with the claimant serving those documents on ICANN.
2. That all such parties have a right to intervene in the IRP. How that right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. No interim relief or settlement of the IRP can be made without allowing those given amicus status as a matter of right as described herein a chance to file an amicus brief on the requested relief or terms of settlement.
3. In reviewing such applications, and without limitation to other obligations under the bylaws, the PROCEDURES OFFICER shall endeavor to adhere to the provisions of Bylaw section 4.3(s) to the extent possible while maintaining fundamental fairness.

EXHIBIT 285

[IOT] Joinder issues toward FIRST READING [renamed subject line]

McAuley, David Contact Information Redacted

Fri Aug 25 19:10:11 UTC 2017

- Previous message: [\[IOT\] Raw Caption Notes-Recordings-Transcript links for IRP-IOT Meeting #28 - 17 August 2017](#)
- Messages sorted by: [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)

Dear members of the IRP IOT:

This email is intended to accomplish the First Reading of the Joinder issue - note also that whatever we agree on Joinder will also affect our work on the rule concerning challenges to Consensus Policy.

You can see a summary of some of the joinder discussion in the email of July 21st forwarded below.

This proposal is my attempt to draw the various joinder views together in an acceptable final proposal. Keep in mind that the final language we adopt will be our instructions to Sidley as to how to amend the applicable rule - our language will not be the actual rule itself.

The aim is to confirm first reading at our next meeting, Thursday, September 7, at 19:00 UTC. Second reading should then be a largely pro forma exercise at our subsequent meeting on September 21st at 19:00 UTC.

If you object or propose different treatment please say so on list as soon as possible prior to September 7th and be specific and suggest specific alternative language.

HERE IS THE SUGGESTED JOINDER LANGUAGE:

1. That only those persons/entities who participated in the underlying proceeding as a "party" receive notice from a claimant (in IRPs under Bylaw section 4.3(b) (iii) (A) (3)) of the full Notice of IRP and Request for IRP

(including copies of all related, filed documents) contemporaneously with the claimant serving those documents on ICANN.

2. That all such parties have a right to intervene in the IRP. The timing and other aspects of intervention shall be managed pursuant to the applicable rules of arbitration of the ICDR except as otherwise indicated here. The manner in which this limited intervention right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. An intervening party shall be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as determined by the ICDR. An amicus may be subject to applicable costs, fees, expenses, and deposits provisions of the IRP as deemed reasonable by the PROCEDURES OFFICER.

3. No interim relief that would materially affect an interest of any such amicus to an IRP can be made without allowing such amicus an opportunity to be heard on the requested relief in a manner as determined by the PROCEDURES OFFICER.

4. In handling all matters of intervention, and without limitation to other obligations under the bylaws, the PROCEDURES OFFICER shall endeavor to adhere to the provisions of Bylaw section 4.3(s) to the extent possible while maintaining fundamental fairness.

Best regards,

David

David McAuley

Sr International Policy & Business Development Manager

Verisign Inc.

Contact Information Redacted

From: [iot-bounces at icann.org](mailto:iot-bounces@icann.org) [mailto:[iot-bounces at icann.org](mailto:iot-bounces@icann.org)] On Behalf Of McAuley, David via IOT
Sent: Friday, July 21, 2017 9:57 AM
To: [iot at icann.org](mailto:iot@icann.org)
Subject: [EXTERNAL] [IOT] Issues Treatment - Joinder

Dear members of the IRP IOT:

Let's move some issues along on list -see our sign-up sheet<https://docs.google.com/spreadsheets/d/1Hi_HgvrfstT33p5mfYWT4-x-uhEoy9nCK8owX5uTKC0U/edit?ts=591dda09#gid=0> for issues. This email deals with the joinder issue.

These following three numbered paragraphs constitute the previous proposal<<http://mm.icann.org/pipermail/iot/2017-June/000251.html>> on joinder:

1. That all those who participated in the underlying proceeding as a "party" receive notice from a claimant (in IRPs under Bylaw section 4.3(b)(iii)(A)(3)) of the full Notice of IRP and Request for IRP (including copies of all related, filed documents) contemporaneously with the claimant serving those documents on ICANN.

2. That all such parties have a right to intervene in the IRP. How that right shall be exercised shall be up to the PROCEDURES OFFICER, who may allow such intervention through granting IRP-party status or by allowing such party(ies) to file amicus brief(s), as the PROCEDURES OFFICER determines in his/her discretion. No interim relief or settlement of the IRP can be made without allowing those given amicus status as a matter of right as described herein a chance to file an amicus brief on the requested relief or terms of settlement.

3. In reviewing such applications, and without limitation to other obligations under the bylaws, the PROCEDURES OFFICER shall endeavor to adhere to the provisions of Bylaw section 4.3(s) to the extent possible while maintaining fundamental fairness.

On July 9th Liz Le of ICANN Legal listed concerns/questions with respect to this proposal in an email<<http://mm.icann.org/pipermail/iot/2017-July/000265.html>>.

My comments (as participant and issue lead):

I will note the gist of Liz's concern/question in italics and then my proposal/answer in red.

One overall note: This joinder proposal is strictly with respect to "parties" to expert panels as per #1 above - when we deal with challenges to consensus policies we can there deal with how SOs may intervene in those matters (remembering that we will ask Sidley to come up with actual "rules" language once we finish our work).

Liz's points (not necessarily her entire comments):

First, there needs to be rules and criteria established as to who can join/intervene by right as well who may be properly joined/allowed to intervene at the discretion of the IRP panels.

The intent is to allow all "parties" at the underlying proceeding to have a right of intervention, but that the IRP Panel (through the Procedures Officer) may limit such intervention to that of Amicus in certain cases. It is not envisioned to allow non-parties from below (or others) to join under these provisions - noting that these provisions just deal with parties below. We are not displacing rule #7 (Consolidation, Intervention, and Joinder) from the draft supplementary rules<<https://www.icann.org/en/system/files/files/draft-irp-supp-procedures-31oct16-en.pdf>> that went out for comment.

Second, clarification and development is needed on the standard of review that is to be applied by the Procedures Officer when determining the extent to which an intervenor may participate. What should the interested parties have to demonstrate (e.g., should the interested parties have to demonstrate harm based on an alleged violation by ICANN of the Bylaws or Articles? What are appropriate interests that will be supported?). What types of briefings and opportunity to be heard are needed in order to allow an interested party to petition the Procedures Officer to exercise his or her discretion and allow the party to join in the IRP?

I don't think the intervenor would have to allege or show harm - that is the job of the Claimant (presumably the "loser" below) - and that Claimant will have to allege/show that the decision by the panel below, if implemented by ICANN, would violate the Articles or Bylaws. The intervenor here would simply need to show party-status below. I would think that a request for joinder would have roughly the same information required of a Claim as per Bylaw 4.3(d) and would also require an equivalent filing fee.

Third, Also fundamental to this question is understanding if there are different levels of "joining" an IRP? Should a person/entity that can allege that they have been harmed by an alleged ICANN violation the Bylaws/Articles be treated differently than a person/entity that just has an

interest in someone else's claim that the Bylaws were violated? Keeping the purpose of the IRP in mind, does it make sense to treat each of these as having "IRP-party status"?

I think that in these circumstances (dealing with an expert panel below decision) the "winner" below would most probably be accorded party status and would have an obvious interest. The more difficult case might be an intervenor who was also a "loser" below in cases where there may have been more than two parties. Maybe we should require that they allege and show a material likelihood of winning on rehearing if the IRP panel were to advise ICANN to call for a rehearing.

Fourth, It would also be helpful to clarify if IRP-party status includes the ability to be a prevailing party, is entitled to its own discovery, and if such discovery would be coordinated or consolidated with that of the claimant?

My suggestion would be that anyone with party status (rather than amicus status) have discovery rights as coordinated by the IRP panel.

Fifth, An amicus curiae, as generally understood, typically does not participate as a party to a proceeding. The concept of allowing for briefing at the interim relief stage from an amicus, or a third party that believes it has an interest in the outcome (with IRP-party status or not), could be appropriate, but more information is needed as to the timing and expectation of what intervention or briefing is expected to achieve.

Perhaps this right should be limited to instances where requested interim relief, if granted, could materially harm the amicus's ability to pursue/achieve their legitimate interest.

Sixth, What standard is the panel adhering to when considering an amicus? Are there timing requirements of when the process should be invoked? The timing for an amicus curiae to comment on interim relief should take into account the fact that the interim relief process is an expedited process to provide emergency relief. For example, at what point in time can an amicus curiae comment on interim relief - during the briefing stage seeking interim relief or after the IRP Panel makes a determination an interim relief?

If the above responses don't address standard sufficiently then a specific proposal is invited. As for timing, I propose notice of intent to file within 10 days of receipt of the claim (not business days) with timing for briefs (whether as party or amicus) determined by PROCEDURES OFFICER.

Seventh, In regard to the settlement of issues presented in an IRP, the settlement of disputes is a private and often confidential process between two parties. It is unclear how and why an amicus curiae, who is not a party to the IRP, would be entitled to have input in the settlement amongst two (or more) parties to an IRP. What is the procedure for such a process? What types of briefings and opportunity to be heard are needed in order to allow an amicus curiae to comment on interim relief or settlement? Parties are not even required to notify or brief the panel during settlement discussion, and the panel does not have an opportunity to vet a settlement, so what else would need to be changed (and on what grounds) to make this intervention into a settlement feasible and justified as to cost and burden to the parties? Parties should not be required to prolong an IRP if they would prefer to end it. ... how is the right of an amicus curiae to approve settlement terms balanced with the interests of the parties to the settlement to keep the terms of the settlement confidential?

This seems a fair point and perhaps the right to intervene as to a settlement must be limited to parties.

Eighth, Additional development is needed to ensure that an amicus curiae's exercise of its rights to comment on interim relief or settlement does not delay the emergency relief and prejudice the rights of the parties to the IRP.

The reference (to Bylaw Section 4.3(s)) in paragraph 3 of the original proposal is intended to address this.

Ninth, further clarification and development is needed regarding timing of the joinder and intervention processes. The amount of time in which a party has to intervene or join in the IRP and the briefing schedule for such motion should take into consideration the intent under the Bylaws for IRP proceedings to be completed expeditiously with a written decision no later than six months after the filing of the Claim if feasible.

Suggest 10 days for notice etc., as noted under SIXTH above.

Tenth, another issue for consideration pertains to the extent to which confidential information can/should be shared with parties intervening/joining. For example, if a claimant wants to submit confidential information in support of its IRP, it should be able to protect that information from being accessible to intervenors, some of whom could be competitors or contracted parties. Do intervenors get access to information

exchanged between ICANN and the claimant? How will discovery methods apply to intervenors? Do intervenors have all rights as any other party to the proceeding, up to and including the ability to be determined as the prevailing party?

I would think that the panel, operating under ICDR rules, can handle these matters - e.g. I believe the rule on confidentiality here would be Article 21, subsection 5, which provides:

The tribunal may condition any exchange of information subject to claims of commercial or technical confidentiality on appropriate measures to protect such confidentiality.

(I am referring here to these rules:

[file:///C:/Users/dmcauley/Downloads/ICDR%20%20\(1\).pdf](file:///C:/Users/dmcauley/Downloads/ICDR%20%20(1).pdf)

Best regards,

David

David McAuley

Sr International Policy & Business Development Manager

Verisign Inc.

Contact Information Redacted

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- Previous message: [\[IOT\] Raw Caption Notes-Recordings-Transcript links for IRP-IOT Meeting #28 - 17 August 2017](#)
 - Messages sorted by: [\[date \]](#) [\[thread \]](#) [\[subject \]](#) [\[author \]](#)

[More information about the IOT mailing list](#)

EXHIBIT 286

 KeyCite by [Fagan](#) Negative Treatment
 Distinguished by [Tammage v. OneBeacon America Ins.](#), Wash.App.
 D v. 2, September 3, 2005

20 Wash.App. 20

Court of Appeals of Washington, Division 1.

Paul STEVENS, Administrator of the Estate
 of George B. Stevens, Deceased, Respondent,

v.

The NATIONAL LIFE ASSURANCE
 COMPANY OF CANADA, Appellant.

No. 5327-I.

|

May 8, 1978.

Synopsis

Administrator of decedent's estate brought action to recover proceeds of policy on his life. The Superior Court, King County, Herbert M. Stephens, J., granted administrator summary judgment, and insurer appealed. The Court of Appeals, Dore, J., held that language of printed life policy, which provided for "semi-annual payments in advance" was amended out of policy by typewritten amendment to application, and, thus, policy had not lapsed at time of insured's death due to his failure to pay semiannual premium in advance.

Judgment affirmed.

West Headnotes (2)

[1] Insurance Time for Payment

Language of printed life policy, which provided for "semi-annual payments in advance," was amended out of policy by typewritten amendment to application, which provided for payment of an additional risk premium and which deleted words "in advance" and merely provided for semiannual premium payments; thus, policy had not lapsed at time of insured's death due to his failure to pay semiannual premium in advance.

3 Cases that cite this headnote

[2] Insurance Time for Payment

Where payments of premiums are to be made in monthly or other period installments and no date is fixed by agreement on which each installment shall be paid, debtor has right to make installment payment at any time during that current month or period, and an assured is not in default until expiration of last day of such month or period.

3 Cases that cite this headnote

Attorneys and Law Firms

****1327 *20** Preston, Thorgrimson, Ellis, Holman & Fletcher, Charles Peery, Seattle, for appellant.

Matsen, Cory, Matsen & Sprague, Patrick J. Layman, Seattle, for respondent.

Opinion

DORE, Judge.

Paul Stevens, administrator of the Estate of George B. Stevens, Deceased, brought an action against The National Life Assurance Company of Canada for \$20,000 ***21** representing the proceeds of a life insurance policy on George Stevens' life. The insurance company defended contending that the semi-annual premium had not been paid in advance as required by the policy and had lapsed at the time of Stevens' death. The trial judge granted summary judgment for plaintiff in the amount of the life insurance proceeds minus a sum equal to the last premium payment. Defendant appeals.

Affirmed.

STATEMENT OF THE CASE

George B. Stevens, now deceased, made application for an insurance policy from The National Assurance Company of Canada (hereinafter referred to as "National") through an independent insurance agent. The application dated

September 5, 1974 was for a 10-year decreasing term policy in the amount of \$20,000 with semi-annual premiums, a waiver premium benefit, and an automatic loan privilege. Stevens paid \$111.50 with his application. On October 25, 1974 National executed policy No. **1328 554054 in the name of George B. Stevens in the amount of \$20,000 with a 10-year non-participating decreasing term policy with an annual premium of \$273.60. The premium language in the policy read:

\$273.60 payable on 25th day of October, 1974 and annually thereafter until eight full years' premiums shall have been paid, or until the prior death of the insured.

Stevens' estate was listed as the beneficiary of the policy. The policy made no direct reference to the waiver of premium benefit and the automatic premium loan privilege.

Stevens was a bartender and the issued life policy made no provision for an increased risk rating because of his Regular Premium.....

Extra Occupational Premium.....

\$213.60

60.00

TOTAL ANNUAL PREMIUM

\$273.60

Premium to be paid \$138.80 Semi-Annually. I understand and agree that the TOTAL DISABILITY BENEFIT WAIVER OF PREMIUM will not be included in this policy.

SIGNED AT

this 26th day of Nov. 1974

/s/ George B. Stevens

Under the amendment Stevens paid an additional \$27.30 for a total premium payment of \$138.80 (the amount of the semi-annual premium). The amendment was silent as to the automatic loan privilege. Other than the initial premium payment of \$138.80, no additional premium payment was made prior to George Stevens' death.

occupation. Apparently it was necessary for Stevens to agree in writing to the additional risk premium because on November 5, 1974, some 11 days after the execution of the policy, Stevens signed a written authorization to amend his application as follows:

*22 Policy No. 544,054

AMENDMENT OF APPLICATION

I, GEORGE B. STEVENS hereby amend the application for Life Insurance made to THE NATIONAL LIFE ASSURANCE COMPANY OF CANADA on the 5th day of Sept. 1974 in the manner provided below and understand and agree that this amendment shall become part of the said application, the information in which, in all other respects, is confirmed as being full, complete and true as at the date hereof.

Part I, Question 5, of said application shall be amended as follows:

Plan--10 Year Reducing Term--Non Participating Sum Insured--\$20,000.00

Furthermore, no billing notice nor late payment offer notice was ever sent by National at any time to Stevens.

On September 20, 1975 Stevens died, 35 days before the end of the first year policy period on October 25, 1975. The attorneys for the estate of Mr. Stevens wrote to National at its head office in Glens Falls, New York on October 31, 1975 advising National of George Stevens' death and requesting payment of benefits. National refused, claiming Stevens' policy had lapsed for non-payment of the April 24, 1975 semi-annual premium.

In June 1976 the administrator of the estate commenced an action against National to recover the proceeds of Stevens' policy No. 544054.

*23 ISSUE

Whether National's life insurance policy No. 544054 in the face amount of \$20,000 issued to George Stevens was in full force and effect when he died on September 20, 1975 or whether such policy had lapsed for failure of payment in advance of the semi-annual premium of \$138.80 on April 25, 1975?

DECISION

[1] This case turns on a very simple proposition. If the semi-annual premium was payable in advance by Stevens on April 25, 1975 and as admittedly he failed to make such payment, his policy lapsed and it was not in effect at the time of his death. On the other hand, if the Stevens Estate would be entitled to make the April 25, 1975 semi-annual premium payment at any time within the 6-month period up through October 25, 1975, then such policy was in full force and effect at the time of his death.

We hold that the Stevens Estate could have made the semi-annual premium payment on George Stevens' life insurance policy at any time on any day between April 25, 1974 up to and including October 25, 1975 and consequently such policy was in full force and effect at the time of his death.

****1329** Pertinent provisions of Stevens' life insurance policy provide:

THE CONTRACT The consideration for this policy is the application, a copy of which is attached hereto and made a part hereof, and the payment of premiums as herein provided. This policy and the application therefor constitute the entire contract between the parties and all statements made by the insured in the application shall, in the absence of fraud, be deemed representations and not warranties. No statement shall avoid the policy or be used in defence to a claim under it unless contained in the written application, and a copy of the same is attached hereto when issued. No modification of this contract shall be made except over the signature of the President or Secretary. Whenever any notice, election, consent, proof or request is to be made or given to ***24** or filed with the Company hereunder, the same must be in writing and must be so given to or filed with the Company at its United States Head Office in Glens Falls, New York.

PREMIUMS This contract is based on the assumption of the payment in advance of an annual premium but the

Company may agree to accept payment of such premium in instalments payable half-yearly or oftener in advance in amounts determined by the Company's published rates therefor at the date hereof. In the interpretation of this policy, the term "premium" shall, wherever the context requires, include such instalments whenever payable hereunder.

(Emphasis added.)

On the original application signed by Stevens he checked that the premium was to be paid semi-annually. The application did not say "in advance." It said "S-A", i. e., semi-annually, and made no reference to paying the premium in advance.

Approximately one month after the "effective date" of the policy and after Stevens fully paid his first semi-annual premium, the application was amended. The pertinent portions were typewritten and provided as follows: "Premium to be paid \$138.80 Semi-Annually." The words "in advance" were noticeably absent. The result of the amended application signed by Stevens was two-fold: (1) to change the mode of premium payment from annually in advance before the 25th day of October, to semi-annually with no specified due date, and (2) to delete the total disability benefit waiver of premium.

National received two valuable considerations in exchange for the "amendment of application" by Stevens. Stevens agreed to pay the additional premium of \$27.30 and he also gave up the total disability benefit waiver of premium. In return, on the face of it, Stevens supposedly was given the right to pay his semi-annual premium at any time during the 6-month period or specifically in this case, ***25** from any day between April 25, 1975 through October 24, 1975.

Under the written terms of National's policy No. 544054, the application of an assured becomes part of the insurance contract.

We hold that the language of Stevens' printed insurance policy providing for "semi-annual payments in advance," was amended out of the policy by the typewritten November 26, 1974 amendment to the application which deleted the words "in advance" and merely provided for semi-annual premium payments.

Couch on Insurance 2d, Time of Payment of Premiums 31:27, states:

The periods or times at which premiums are to be paid is a matter determined by the contract of the parties. Where the payment of premiums has been lawfully changed from an annual to a quarterly basis, the insurer cannot place them back on an annual basis so as to bind the insured without his consent. Conversely, the policy may give the insured the option of changing the period of payment. For example, where the policy specifically provided that the premiums may be paid in advance in semi-annual or quarterly instalments, no further consent of the company for quarterly payments was necessary.

****1330** Where a payment is to be made in monthly or other period instalments and no date is fixed by agreement on which each instalment shall be paid the debtor has the right to make the instalment payment at any time during that current month or period, and is not in default until the expiration of the last day of such month or period.

(Emphasis added.)

Couch cites as his authority for the above proposition the Washington case of [Brun v. Northern L. Ins. Co.](#), 16 Wash.2d 564, 134 P.2d 84, 87 (1943). In the Brun case the insurance application provided that "Annual premium \$75.64 payable in 12 installments of \$6.81 each." The *26 printed provisions of the life insurance policy in Brun provided that premiums were to be paid in advance. The language of the policy of the Brun case was set forth at page 566, 134 P.2d at page 85:

"THIS POLICY is issued in consideration of the Application and of the payment to the Company of an Annual Premium of Thirty-Eight and 74/100 Dollars on the date hereof, and like payment on the 1st day of August in each and every year during the life of the Insured.

"GRACE Thirty-one days will be allowed as a grace period for the payment of premiums falling due hereon after the initial premium has been paid in cash, during which period this policy shall be in full force.

"PREMIUMS The first and all other payments due the Company hereon are payable in advance in cash at the Home Office or to a duly authorized agent holding the Company's official receipt therefor, signed by the President or Secretary of the Company. Any annual

premium due hereunder may be paid in semi-annual or quarterly installments at the Company's published rates, and such payment in advance shall be a condition precedent to the validity of any claim under this policy. In event of lapse from non-payment of any premium or part of premium when due, all insurance hereunder shall immediately terminate, and all former payments hereon be forfeited to the Company, except as modified by the foregoing 'Grace' Provision and by the Non-Forfeiture Provisions elsewhere herein."

(Emphasis added.)

In Brun the life insurance policy was issued simultaneously with an accident policy on the insured's life. The pertinent portions of the accident policy were set forth at page 567, 134 P.2d at page 85:

"This policy is issued in consideration of the premium of Three and 05/100 Dollars covering the term of One month, beginning on the 1st day of August, 1940, against loss caused by bodily injuries, and for the term of 15 days, beginning on the 15th day after the aforesaid date against loss caused by sickness or disease. The aforesaid terms begin and end at twelve o'clock noon, Standard time, of the place where the Insured resides.

*27 "GRACE Thirty-one days will be allowed in the payment of premiums hereon after the initial premium has been paid in cash, during which period the policy shall be in full force.

"(3) (c) If default be made in the payment of the agreed premium for this policy, the subsequent acceptance of a premium by the Company or by any of its duly authorized agents shall reinstate the policy, but only to cover accidental injury thereafter sustained and such sickness as may begin more than ten days after the date of such acceptance."

The court on page 567, 134 P.2d on page 85 continued:

The above-quoted portions of the policy with reference to premiums and their payment are inconsistent with the provisions relating to the same subject as set forth in the application, but it is apparent from the record and the course of dealing between the parties

that it was their intention that the premium should be paid as set forth therein. The total premium installment of \$6.81 was divided by allocating \$3.76 to the life policy and \$3.05 to the accident policy.

(Emphasis added.)

In *Brun* the insurance company took the same position as National is contending in the subject case, that inasmuch as the policy ****1331** language provided the premium should be paid in advance, and the application merely provided for the amount of payment but did not have the language "in advance," the policy language would govern.

In the subject case no notice of premium due or notice of termination or reinstatement letter was sent to the insured, while in *Brun* the insurance company gave notification of default in premium payment not paid in advance and at all times contended payment should be made in advance, during the assured's lifetime.

Our Supreme Court, in granting judgment for the insured in *Brun*, held that as the application did not provide for payment of monthly payments in advance, the insured had until the last day of each month within which to make the payment for that current month. It was stated at page 569, [134 P.2d at page 86](#):

***28** Construing the application and the policies together and considering the course of conduct of appellant and insured with reference to the time the combined premium was due on the two policies, it is our opinion that it was the intention of the parties that the premium should be payable in twelve monthly installments of \$6.81 each, and that, as no time was provided as to the date of each monthly payment, the insured had until the last day of each month within which to make the payment for that current month. In so far as the printed portions of the policies relating to the payment of premiums are inconsistent with the time of installment payment, as set forth in the application, the latter must prevail, as it states the true agreement between the insured and the agent of the appellant, made within the scope of his authority and subsequently ratified by the appellant.

The provision in the application as to the times of payments of premium is not ambiguous. It is, however,

incomplete, in that it does not set forth a date in each month when the monthly installments of premium shall be paid, and it is necessary that the court construe this provision. The rule of law applicable to such a situation as this is that, where a payment is to be made in monthly or other periodic installments, and no date is fixed by the agreement of the parties on which each installment shall be paid, the debtor has the right to make the installment payment at any time during that current month or period, and is not in default until the expiration of the last day of such month or period.

We have not had cited to us, nor have we found, any adjudicated case that has considered the precise question as to the payment of installments of an insurance premium. But the principle has been recognized in [Bernard v. Triangle Music Co., 1 Wash.2d 41, at page 50, 95 P.2d 43, at page 47, 126 A.L.R. 558](#), in which this court said:

It cannot be held that the covenant, as it stands, is incomplete or ambiguous and, therefore, subject to constructive interpretation. We are legally bound to treat it as complete and certain, for the common law, in so far as it is not inconsistent with our constitution and laws nor incompatible with our institutions, is prescribed as the rule of decision in all the courts of this state; and it is an old and well-established rule of the common law that, ***29** when rent is reserved in a lease and no time is specified for its payment, it becomes due on the last day of the period with respect to which it is reserved, whether that period be a week, a month, a quarter, a year, or a term of years.

In discussing the time of payment of an annuity under an agreement which provided for payments annually, the court said in [Mower v. Sanford, 76 Conn. 504, 57 A. 119, 63 L.R.A. 625, 100 Am.St. 1008](#):

An agreement to pay a fixed sum annually, or each year, in the absence of language modifying the ordinary meaning of these terms, cannot fairly be construed as a promise to pay such sum annually in advance, or at the commencement of each year. A contract for the payment of money in fixed instalments, containing no other provision for the time of payment of such instalments than that they are to ****1332** be paid annually, is lawfully performed by the payment of a single instalment at the end of each year.

The contract now before the court does not provide that the installments shall be paid in advance, and the fact that the first installment was paid by the insured when the application for insurance was made, does not alter the case, nor does it fix a time for, or affect, the time of payment of the future installments. If the appellant had decided that the monthly payments were to be made on the first or any other date of the month, it should have so provided in the contract.

The same principle has also been recognized in statutes providing for the publication of notices "once a week" for a given period of time. If no day of the week on which the publication is to be made is specified, it may be made on any day of that week. [King County v. Seattle](#), 7 Wash.2d 236, 109 P.2d 530. As the time of publication is a jurisdictional step in a proceeding, and if such publication can be made on the last or any other day of the current week, then the reason why a contractual installment payment may be made on the last or any other day of the month or period is all the more cogent.

(Emphasis added.)

Clearly in the subject case, National as far as their billing procedures and administrative practices went, considered the amended application which had deleted all reference to *30 payment of semi-annual premiums in advance, to have amended the printed policy. When April 25, 1975 arrived National sent no billing or notification to Stevens, and when the 31-day grace period expired and according to its contention the policy had terminated, it never notified Stevens either directly or through their agent, that Stevens' policy had been terminated.

National's answers to interrogatories on notification for delinquent premium payments is extremely damaging to their position that the Stevens policy had lapsed on October 24, 1975.

INTERROGATORY NO. 1: Please state whether a billing notice was ever sent to George B. Stevens prior to the due date of the April, 1975 semi-annual premium for Policy No. 544054.

ANSWER: No.

INTERROGATORY NO. 5: Please describe your normal business procedure for preparing and sending billing notices. As part of the answer to this interrogatory, please

identify by job title or description the person responsible for each step of your normal business procedure for preparing and sending these notices.

ANSWER: Commencing with the second premium due under a policy, billings are produced automatically by our Computer System. For U.S. residents, these billings are produced 3 weeks prior to the premium due date. The billings are produced (1 copy only) in the name of the owner and addressed according to the billing address on the application for insurance. The billings are forwarded to our Policyholders' Service Department where they are checked manually through our computer displays to verify information is correct. They are then mailed to the policyowner directly including a self-addressed return envelope.

INTERROGATORY NO. 13: Please state whether a late payment offer was ever sent to George B. Stevens following the due date of the April 1975 semi-annual premium for policy No. 544054.

ANSWER: No.

INTERROGATORY NO. 17: Please describe your normal business procedure for preparing and sending late payment *31 offers. As part of the answer to this interrogatory, please identify by job title or description the person responsible for each step of your normal business procedure for preparing and sending these late payment offers.

ANSWER: If premium payment has not been received in full by 30 days after the premium due date, the computer will automatically produce a "Late Payment Offer" notice in four parts. All copies are forwarded to our Policy Service Department where the original is mailed directly, 2 copies are forwarded to the **1333 Branch of record and the remaining is retained.

(Emphasis added.) National's own answers to interrogatories admit that the company or at least their computer, at all times took the position that Stevens' life insurance policy had not lapsed prior to his death, and that the April 24, 1975 premium payment could be paid at any time up to and through October 24, 1975. Had the company considered Stevens' semi-annual payment due on April 24, 1975, presumably it would have mailed him a billing automatically three weeks prior to the due date at

Stevens' home. Thirty days after the due date the premium still not being paid, the company, according to routine procedures, should have automatically mailed Stevens a "late payment offer" notice. In the subject case National mailed neither notice to Stevens, obviously admitting that Stevens could pay the semi-annual premium on any day up to and through 1975. National's position prior to Stevens' death was the same as plaintiff's in the present litigation.

If George Stevens had not died and had paid his life insurance policy premium any day prior to October 24, 1975, we are confident National would have accepted the premium and mentioned not a word about a lapsed policy.

We hold that the rationale of Brun controls the subject case and conclude that the amended application signed by Stevens under date of September 5, 1974 in a typewritten format and which deleted the words "in advance", effectively amended the premium provision of policy No. 544054 which provided for payment of premiums in advance. We *32 further hold that such provision for the payment of premiums, as amended by the amended application of September 5, 1974, is not ambiguous and needs no interpretation.

[2] We also hold that where payment of premiums are to be made in monthly or other period installments and no date is fixed by the agreement on which each installment shall be paid, the debtor has the right to make the installment payment at any time during that current month or period, and an assured is not in default until the expiration of the last day of such month or period.

George Stevens had the right to pay the semi-annual premium on his insurance policy with defendant on any day between April 25, 1975 through October 24, 1975. Stevens' policy had not lapsed at the time of his death on September 20, 1975 and was in full force and effect.

Judgment is affirmed.

JAMES and CALLOW, JJ., concur.

All Citations

20 Wash.App. 20, 578 P.2d 1327

EXHIBIT 287

468 B.R. 36

United States Bankruptcy Court, D. Rhode Island.

In re **CITY OF CENTRAL FALLS,****RHODE ISLAND,** Debtor.

City of Central Falls, Rhode Island, Plaintiff

v.

Central Falls Teachers' Union, Rhode
Island Council 94, AFSCME, AFL-
CIO Local 1627, et al., Defendants.

Bankruptcy No. 11-13105-FJB.

|
Adversary No. 11-1094.|
March 23, 2012.**Synopsis**

Background: State-appointed receiver for Chapter 9 debtor-city brought adversary proceeding for declaratory judgment against, inter alia, two unions that were parties to collective bargaining agreements (CBAs) with school district that operated city's public schools, seeking determinations that school district was part of city, such that its debts and contract obligations were subject to adjustment in city's case, and that receiver, acting on city's behalf, had power under Rhode Island's fiscal stability laws to bargain collectively with unions. Receiver moved for summary judgment, and one union moved to dismiss for lack of subject matter jurisdiction or to abstain.

Holdings: The Bankruptcy Court, [Frank J. Bailey, J.](#), held that:

[1] claims for declaratory relief presented requisite actual controversy;

[2] claims for declaratory relief were non-core proceedings;

[3] mandatory abstention did not apply;

[4] permissive abstention was not warranted; and

[5] amendments to city charter disestablished school committee and left no board or agency through which city could control schools.

Ordered accordingly.

West Headnotes (36)

[1] Declaratory Judgment

🔑 Power to render

Bankruptcy courts are among the federal courts that may grant declaratory relief under Declaratory Judgment Act. 28 U.S.C.A. § 2201(a).

3 Cases that cite this headnote

[2] Declaratory Judgment

🔑 Necessity

Declaratory Judgment

🔑 Nature and elements in general

Declaratory Judgment

🔑 Moot, abstract or hypothetical questions

Despite the availability of declaratory relief before a party is injured or aggrieved, court may enter declaratory relief only in a case of “actual controversy” in the constitutional sense, which requires a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. U.S.C.A. Const. Art. 3, § 2, cl. 1; 28 U.S.C.A. § 2201(a).

Cases that cite this headnote

[3] Declaratory Judgment

🔑 Discretion of Court

Even where an actual controversy is presented, court retains discretion to deny declaratory relief for prudential reasons. 28 U.S.C.A. § 2201(a).

1 Cases that cite this headnote

[4] Bankruptcy

🔑 Assumption, Rejection, or Assignment

Bankruptcy🔑 **Adjustment of Debts of a Municipality**

Powers of a municipality in a Chapter 9 case include the power to reject executory contracts. 11 U.S.C.A. §§ 365(a), 901, 902(5).

[Cases that cite this headnote](#)

[5] Bankruptcy🔑 **Executory nature in general**

As a general rule, a contract is “executory,” within meaning of trustee's power to assume or reject debtor's executory contracts, when performance remains due to some extent on both sides. 11 U.S.C.A. § 365(a).

[Cases that cite this headnote](#)

[6] Bankruptcy🔑 **Rejection of executory contract or lease****Bankruptcy**🔑 **Effect of Acceptance or Rejection**

Rejection of executory contract has the effect of freeing debtor from the obligation to perform contract and leaves nondebtor party with a claim for breach that is deemed to have arisen immediately before the date of filing of the bankruptcy petition. 11 U.S.C.A. § 365(g) (1).

[Cases that cite this headnote](#)

[7] Bankruptcy🔑 **Collective bargaining agreements**

Provided certain conditions are satisfied, trustee's power to reject debtor's executory contracts extends to collective bargaining agreements (CBAs). 11 U.S.C.A. § 365(a).

[Cases that cite this headnote](#)

[8] Declaratory Judgment🔑 **Education**

Declaratory judgment claim asserted by state-appointed receiver for Chapter 9 debtor-city, seeking determination that school district that operated city's public schools was part

of city, such that receiver had power to reject union's collective bargaining agreement (CBA) with school district, presented requisite actual controversy; decision on claim would establish whether receiver could reject CBA as contract with city, or could establish cause for receiver to object to union's claim against city, and adjudication of claim, by establishing whether rejection was possibility, would hasten receivers' contract negotiations and settlement of school district's budget, thereby shortening debt adjustment process and duration of city's time in receivership. U.S.C.A. Const. Art. 3, § 2, cl. 1; 11 U.S.C.A. §§ 365(a), 901, 902(5); 28 U.S.C.A. § 2201(a).

[Cases that cite this headnote](#)

[9] Declaratory Judgment🔑 **Education**

Claim for declaratory judgment asserted by state-appointed receiver for Chapter 9 debtor-city, which sought determination that school district was part of city, such that receiver had power to reject collective bargaining agreement (CBA) between teachers' union and school district that operated city's public schools, presented requisite actual controversy, even though CBA, which had expired but continued to be governing, might not be executory and union had not filed proof of claim against city; reasonable possibility existed that CBA, if deemed to be a contract with city, would be ruled executory and subject to rejection, union still could file proof of claim if school district was determined to be part of city and CBA was rejected, and receiver needed to resolve issues surrounding CBA in light of its impact on city's budget. U.S.C.A. Const. Art. 3, § 2, cl. 1; 11 U.S.C.A. §§ 365(a), 901, 902(5); 28 U.S.C.A. § 2201(a).

[Cases that cite this headnote](#)

[10] Declaratory Judgment🔑 **Education**

Contingent claim for declaratory relief asserted by state-appointed receiver for

Chapter 9 debtor-city presented requisite actual controversy in seeking, upon court's determination that school district was part of city, rather than separate entity, additional declaration that receiver had power under Rhode Island's fiscal stability laws, pursuant to which he was appointed, to bargain collectively, on city's behalf, with unions that had collective bargaining agreements (CBAs) with school district; if school district was part of city, then both CBAs would have to be renegotiated, and declaration that receiver could act for city would advance such negotiations and reorganization process in city's bankruptcy case. [U.S.C.A. Const. Art. 3, § 2, cl. 1](#); [11 U.S.C.A. §§ 365\(a\), 901, 902\(5\)](#); [28 U.S.C.A. § 2201\(a\)](#).

[Cases that cite this headnote](#)

[11] Declaratory Judgment

🔑 [Jurisdiction not enlarged](#)

Declaratory Judgment Act does not itself confer subject matter jurisdiction, but instead makes available a declaratory remedy for disputes that come within the court's jurisdiction on some other basis. [28 U.S.C.A. § 2201\(a\)](#).

[Cases that cite this headnote](#)

[12] Bankruptcy

🔑 [Core, Non-Core, or Related Proceedings in General; Nexus](#)

Bankruptcy

🔑 [Core or non-core proceedings](#)

Bankruptcy

🔑 [Consent to or Waiver of Objections to Jurisdiction or Venue](#)

As to all core proceedings arising under Bankruptcy Code or arising in a case under Code, bankruptcy judge has authority, regardless of the consent of the parties, to hear and determine and enter appropriate orders and judgments, but as to all other referred matters, bankruptcy judge may not, without the consent of the parties, determine such

matters and enter final orders or judgments. [28 U.S.C.A. § 157\(b\)\(1\), \(c\)](#).

[3 Cases that cite this headnote](#)

[13] Bankruptcy

🔑 [Core or non-core proceedings](#)

Bankruptcy

🔑 [Related proceedings](#)

Bankruptcy

🔑 [Submission to district court for judgment](#)

So long as non-core matter is related to bankruptcy case, it remains within bankruptcy court's subject matter jurisdiction, and court retains authority to hear and enter proposed findings and conclusions in the matter, with judgment to enter finally in the district court. [28 U.S.C.A. §§ 157\(a\), 1334](#).

[Cases that cite this headnote](#)

[14] Bankruptcy

🔑 [Particular proceedings or issues](#)

In addressing whether state-appointed receiver's requests for declaratory relief in city's Chapter 9 case were core proceedings, bankruptcy court had to make determination as to each request for declaratory relief. [28 U.S.C.A. § 157\(b\)\(2\)](#).

[1 Cases that cite this headnote](#)

[15] Bankruptcy

🔑 [Core or non-core proceedings](#)

Term "core proceeding," as used in statute, refers to those matters that a bankruptcy judge may hear, determine, and dispose of by appropriate orders and judgments, subject only to appellate review. [28 U.S.C.A. § 157\(b\)](#).

[Cases that cite this headnote](#)

[16] Bankruptcy

🔑 [Administration of estate](#)

Bankruptcy

🔑 [Adjustment of Debts of a Municipality](#)

Provision of statute which treats as core proceeding “matters concerning the administration of the estate,” cannot apply in Chapter 9 case, which involves no estate. 11 U.S.C.A. §§ 103(f), 541(a), 901(a); 28 U.S.C.A. § 157(b)(2)(A).

[Cases that cite this headnote](#)

[17] Bankruptcy

🔑 Core or non-core proceedings

It is the nature of the proceeding, meaning its relation to the basic function of the bankruptcy court, and not the state or federal basis for the claim, that determines whether proceeding is a “core proceeding.” 28 U.S.C.A. § 157(b)(3).

[Cases that cite this headnote](#)

[18] Bankruptcy

🔑 Core or related proceedings

Proceedings to assume or reject executory contracts, arising as they do under the Bankruptcy Code and being unavailable outside of bankruptcy, affect the adjustment of the debtor-creditor relationship within the meaning of statute identifying categories of core proceedings, and therefore are “core proceedings.” 11 U.S.C.A. § 365(a); 28 U.S.C.A. § 157(b)(2)(O).

[Cases that cite this headnote](#)

[19] Bankruptcy

🔑 Particular proceedings or issues

Receiver's claim for declaratory judgment that school district which operated city's public schools was part of city arose entirely under state law, rather than Bankruptcy Code, would not decide any core matter, and, although it arose in city's Chapter 9 case, could have arisen and been brought other than in bankruptcy court, and therefore claim was “non-core proceeding” and was merely “related to” bankruptcy case, even though requested declaration could be useful in structuring negotiations with unions

with which school district had collective bargaining agreements (CBAs) and could have consequence for core matters in case, including rejection of CBAs, litigation and adjustment of claims, and extent of automatic stay. 11 U.S.C.A. §§ 362, 365(a); 28 U.S.C.A. § 157(c)(1).

[Cases that cite this headnote](#)

[20] Bankruptcy

🔑 Particular proceedings or issues

Claim for declaratory judgment brought by receiver for Chapter 9 debtor-city, which sought determination as to receiver's authority under Rhode Island's fiscal stability laws pursuant to which he was appointed, arose entirely under state law, and could have arisen and been brought other than in bankruptcy court had city not sought bankruptcy relief, and therefore claim was “related to” bankruptcy case, but was “non-core proceeding.” 28 U.S.C.A. § 157(c)(1).

[Cases that cite this headnote](#)

[21] Bankruptcy

🔑 Particular proceedings or issues

Bankruptcy

🔑 Submission to district court for judgment

Bankruptcy judge could hear state-appointed receiver's declaratory judgment complaint in city's Chapter 9 case and propose findings of facts and conclusions of law for entry of final judgment by district court on receiver's two non-core claims for declaratory relief. 28 U.S.C.A. §§ 157(c)(1), 2201(a).

[Cases that cite this headnote](#)

[22] Federal Courts

🔑 Bankruptcy

Bankruptcy jurisdiction statute's mandatory abstention provision mandates that court abstain if five conditions are satisfied: (1) the proceeding is based on a state law claim or cause of action, (2) the claim or cause of action is related to a case under Bankruptcy Code but

does not arise under Code and does not arise in a case under Code, (3) federal courts would not have jurisdiction over the claim but for its relation to a bankruptcy case, (4) an action “is commenced” in a state forum of appropriate jurisdiction, and (5) the action can be timely adjudicated in that state forum. 28 U.S.C.A. § 1334(c)(2).

[3 Cases that cite this headnote](#)

[23] Federal Courts

 [Bankruptcy](#)

Claims for declaratory relief asserted by state-appointed receiver in Chapter 9 case of debtor-city could not be timely adjudicated in another forum, and therefore mandatory abstention did not apply, even though adversary proceeding sought declaration of rights and relations under state law and federal jurisdiction would not have existed over receiver's claims but for bankruptcy case, given urgency of matters to be decided within the context of reorganization process, which needed to occur within weeks, rather than months or years. 28 U.S.C.A. § 1334(c)(2).

[Cases that cite this headnote](#)

[24] Federal Courts

 [Bankruptcy](#)

Relevant considerations in deciding whether permissive abstention is warranted include (1) effect or lack thereof on efficient administration of estate if court recommends abstention, (2) extent to which state law issues predominate over bankruptcy issues, (3) difficulty or unsettled nature of applicable law, (4) presence of related proceeding commenced in state court or other nonbankruptcy court, (5) jurisdictional basis, if any, other than bankruptcy jurisdiction statute, (6) degree of relatedness or remoteness of proceeding to main bankruptcy case, (7) substance rather than form of asserted core proceeding, (8) feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court

with enforcement left to bankruptcy court, (9) burden of bankruptcy court's docket, (10) likelihood that commencement of proceeding in bankruptcy court involves forum shopping by one of the parties, (11) existence of a right to a jury trial, and (12) presence in proceeding of nondebtor parties. 28 U.S.C.A. § 1334(c)(1).

[Cases that cite this headnote](#)

[25] Federal Courts

 [Bankruptcy](#)

Permissive abstention was not warranted in adversary proceeding in which state-appointed receiver for Chapter 9 debtor-city sought declaration that school district was part of city, such that unions' collective bargaining agreements (CBAs) with school district were subject to adjustment in city's case; although state-law issues predominated, and issues were unusual and of special concern to state, its municipalities, and its various authorities, issues did not come to bankruptcy court without determinative signposts in state law, answers to declaratory requests could be narrowly framed, issues were of fundamental importance to bankruptcy case, and need for expedition warranted resolving issues in bankruptcy court. 28 U.S.C.A. § 1334(c)(1).

[Cases that cite this headnote](#)


[26] Statutes

 [Questions of law or fact](#)

Questions of statutory interpretation are questions of law.

[Cases that cite this headnote](#)

[27] Bankruptcy

 [Municipalities](#)

Only a “municipality,” as that term is defined in the Bankruptcy Code, may be a debtor under Chapter 9 of the Bankruptcy Code. 11 U.S.C.A. §§ 101(40), 109(c)(1).

[3 Cases that cite this headnote](#)

[28] Bankruptcy**↳ Municipalities**

Exercise of bankruptcy jurisdiction over city, including its school district, if school district was part of city rather than separate entity, did not offend Tenth Amendment where city voluntarily petitioned for Chapter 9 relief and did so with proper state authorization. [U.S.C.A. Const.Amend. 10](#); [11 U.S.C.A. § 109\(c\)\(1\)](#).

[Cases that cite this headnote](#)

[29] Bankruptcy**↳ Nature and form;adversary proceedings**

Union's argument that school district that operated public schools of Chapter 9 debtor-city qualified as municipality under Bankruptcy Code and so had to be treated as separate and distinct entity for Chapter 9 purposes, even if school district was part of city under state law, raised issue collateral to claims for declaratory judgment that were subject of adversary complaint to determine whether school district was part of city, making its debts and contract obligations subject to adjustment in city's case, and in substance sought dismissal as to portion of city's case, and therefore issue had to be brought as motion filed in main case, with notice to all creditors, and was not properly raised in adversary proceeding. [11 U.S.C.A. § 101\(40\)](#).

[Cases that cite this headnote](#)

[30] Bankruptcy**↳ Municipalities****Bankruptcy****↳ Adjustment of Debts of a Municipality**

School district that was part of Chapter 9 debtor-municipality, under state law of which it was a creature, could not be excluded from bankruptcy relief afforded to municipality even if school district itself qualified as "municipality" as defined by Bankruptcy

Code and was thus eligible to be Chapter 9 debtor. [11 U.S.C.A. §§ 101\(40\), 109\(c\)\(1\)](#).

[Cases that cite this headnote](#)

[31] Bankruptcy**↳ Adjustment of Debts of a Municipality**

State law governed issue of whether school district that operated public schools of Chapter 9 debtor-city was part of debtor-city, such that school district's debts and obligations were subject to adjustment in debtor-city's case.

[Cases that cite this headnote](#)

[32] Bankruptcy**↳ Application of state or federal law in general****Federal Courts****↳ Anticipating or predicting state decision**

When ruling on an issue of state law, a federal court exercising bankruptcy jurisdiction, like a federal court sitting in diversity, must rule as it believes the highest court of the state would rule.

[Cases that cite this headnote](#)

[33] Federal Courts**↳ Highest court****Federal Courts****↳ State constitutions, statutes, regulations, and ordinances**

In deciding issue of state law, federal court should employ the method and approach announced by the state's highest court.

[Cases that cite this headnote](#)

[34] Federal Courts**↳ State constitutions, statutes, regulations, and ordinances**

Where issue of state law being decided by federal court is one of statutory construction, court should follow state's rules of statutory construction.

[Cases that cite this headnote](#)

[35] Municipal Corporations

🔑 [Relation to state](#)

Municipalities are creatures of state law and subject to the power of the state, as limited by its constitution, to create, divide, and even abolish them.

[Cases that cite this headnote](#)

[36] Bankruptcy

🔑 [Submission to district court for judgment](#)

Education

🔑 [Operation and effect](#)

Bankruptcy court would recommend that district court find that, under Rhode Island law, amendment to city charter that deleted words “school committee” from provision of charter which had created school committee and indicated that city's executive and administrative work would be performed in part through that committee disestablished school committee and left no board or agency through which city could control schools, effectively severing city's constitutional connection to school district under state law and removing school district from city. 28 U.S.C.A. § 157(c)(1); R.I.Const. Art. 13, § 8; R.I.Gen.Laws 1956, § 16 2 9(a).

[Cases that cite this headnote](#)

West Codenotes

Recognized as Unconstitutional

28 U.S.C.A. § 157(b)

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**MEMORANDUM OF DECISION ON
CITY'S MOTION FOR SUMMARY
JUDGMENT AND ON TEACHERS' UNION'S
MOTION TO DISMISS OR ABSTAIN**

FRANK J. BAILEY, Bankruptcy Judge.

This adversary proceeding arises in the bankruptcy case of the City of Central Falls, Rhode Island (the “City”), a proceeding for adjustment of debts of a municipality under chapter 9 of the Bankruptcy Code. The plaintiff is Robert G. Flanders, Jr. (the “Receiver”) in his capacity as the state-appointed receiver of the City. The principal defendants are two labor unions, the Central Falls Teachers Union, Local 1657 of the American Federation of Teachers (the “Teachers' Union”) and Local 1627, Rhode Island Council 94, AFSCME, AFL CIO (“Council 94”) (jointly, the “Unions”). Each is party to a collective bargaining agreement with the Central Falls School District (the “School District”), which suffice it to say for now runs the public schools in Central Falls. As part of his efforts to fashion a feasible and comprehensive plan of debt adjustment in this bankruptcy case, the Receiver has been renegotiating the CBAs with the Unions, but his efforts have been impeded by uncertainty over two issues: (i) whether the School District is part of the City, such that the debts and contract obligations of the School District are obligations of the City and therefore subject to adjustment in this bankruptcy case; and (ii) whether the Receiver, acting on behalf of the City, has the power under Rhode Island's Fiscal Stability Act, the statute defining his powers as receiver, to collectively bargain with the Unions. By his complaint in this adversary proceeding, the Receiver seeks a declaratory judgment resolving both issues in the affirmative, and he has now moved for summary judgment to that effect. In response, the Teachers' Union has moved to dismiss for lack of subject matter jurisdiction or to abstain; and, on the merits, both Unions have opposed summary judgment and urged resolution of the Receiver's issues in the negative. In view of the need to

avoid significant delays in the reorganization process, the Court heard both motions on an expedited basis and now addresses them in this memorandum of decision.

PROCEDURAL HISTORY

On August 1, 2011, the City, by and through the Receiver, filed a voluntary petition under Chapter 9 of the Bankruptcy Code, commencing the Chapter 9 case in which this adversary proceeding arises. On December 1, 2011, the Court entered an Order for Relief in the Chapter 9 case. In the first five months of the case, the Receiver negotiated agreements with three unions with whom the City had collective bargaining agreements and a further agreement with the City's retirees. The court approved these agreements, each a major step toward a confirmable plan of debt adjustment.

¹ The Receiver has previously reported to the Court that he has successfully negotiated new collective bargaining agreements with the City's police, firefighter, and municipal worker unions; in each instance the new agreement was part of a consensual resolution of a motion by the Receiver to reject earlier collective bargaining agreements with these unions.

*43 In the meantime, the Receiver had also begun negotiations with the defendant Unions, the Teachers' Union and Council 94. Each is a party to a collective bargaining agreement with the Central Falls School District. The Teachers' Union's contract expired on August 31, 2011, but under state law, its terms continue to govern for a time, the extent of which is uncertain.² Council 94's contract expires on June 30, 2013. Though negotiations have continued, each defendant Union expressly has reserved the right to argue (i) that the School District is not part of the City and therefore the collective bargaining process is not within the Bankruptcy Court's subject-matter jurisdiction and (ii) that the Receiver does not have the power to act on behalf of the City relative to collective bargaining with the defendant Unions.

² At the hearing, counsel for the Teachers' Union indicated that Rhode Island law was unclear, that the contract's terms will govern until a new agreement is reached or perhaps until impasse resolution procedures are at an end. I express no opinion on the issue. The parties agree that the contract's terms continued to govern as of the date of the hearing.

On December 30, 2011, the Receiver filed the complaint commencing this adversary proceeding, a complaint seeking only declaratory relief and naming only the Teachers' Union as a defendant. It requested two declarations: in Count One, "that the School District is part of the City and therefore, *ipso facto*, the collective bargaining process is within the Bankruptcy Court's subject-matter jurisdiction"; and in Count Two, "that the Receiver has the power under the Fiscal Stability Act to act on behalf of the City relative to collective bargaining with the Union." By a first amendment to the complaint, the Receiver added Council 94 as a defendant. By a second amendment, the Receiver added numerous related governmental parties (the "Governmental Defendants") as nominal defendants, the court having determined that these were necessary parties.³ These amendments notwithstanding, the complaint's demand for declaratory relief is unchanged. At the Receiver's request, the court established an expedited schedule for adjudication of the adversary proceeding.

³ The Governmental Defendants are the State of Rhode Island; the Rhode Island Department of Elementary and Secondary Education and Debora Gist as the Department's Commissioner; the Rhode Island Board of Regents for Elementary and Secondary Education and George Carullo, Patrick A. Guida, Colleen Callahan, Lorne A. Adrian, Carolina B. Bernal, Dr. Robert Carothers, Karin Forbes, Matthew Santos, and Betsy Shimberg as members of the Board; the Central Falls School District; Frances Gallo, as Superintendent of the Central Falls Schools; and the Central Falls Board of Trustees and Anna Cano Morales, Sonia Rodrigues, Stephanie Gonzalez, Cheryl LaFond, Brian Keith Nordin, and Ana Cecilia Rosado as members of the Board of Trustees.

Before the time to answer the Second Amended Complaint, the Receiver filed the present motion for summary judgment. The Teachers' Union filed an opposition to the motion for summary judgment and a "cross-motion" to dismiss for lack of subject matter jurisdiction or to abstain.⁴ Having moved under [Fed.R.Civ.P. 12\(b\)\(1\)](#) to dismiss or abstain, the Teachers' Union has not yet filed an answer, and its answer has not come due. In a separate opposition to the motion for summary judgment, Council 94 indicated that it was relying on the opposition filed by the Teachers' Union and has submitted no separate argument of its

own. Council 94 has filed an answer opposing the Receiver's demands for declaratory *44 relief.⁵ Each of the Governmental Defendants has answered the Second Amended Complaint and, without articulating a position on the two main issues, has simply requested the judgment of the court; none has opposed the motion for summary judgment.

⁴ Though the Teachers' Union has argued that it would be appropriate, on the Receiver's motion for summary judgment, to enter judgment *against* the Receiver, it has not filed a cross motion for summary judgment.

⁵ Council 94's answer is to the Amended Complaint; it has not answered the Second Amended Complaint, but the operative allegations and demands are the same.

By order of August 5, 2011 in the Chapter 9 case, the court established October 4, 2011 as the deadline for filing proofs of claim, but the order also provided that "a claim arising from the rejection of an executory contract ... of the debtor may be filed within such time as the court later directs." The Teachers' Union has not filed a proof of claim. On October 3, 2011, Council 94 filed a proof of claim in an amount stated as "unknown," in part on the basis of its collective bargaining agreement with the School District.⁶

⁶ Proofs of claim nos. 20 1, 20 2, 21 1, and 21 2.

As of the date of the hearing on the present motions, negotiations between the Receiver and the Unions were continuing but remained in preliminary stages. In a recent status report in the Chapter 9 case, the Receiver indicated that he expects to make a financial offer to the Unions on or before March 21, 2012, and that he expects to know within three weeks thereafter whether he will have reached new and modified collective bargaining agreements with the Unions. In his complaint in this adversary proceeding, the Receiver stated that if he is unable to negotiate collective bargaining agreements with the Unions that would enable the City to operate with balanced budgets for a period of five years, he will move to reject their collective bargaining agreements. He has not yet moved to reject either agreement. The Receiver maintains that before he can file a confirmable plan in this case, the court must resolve the issues as to which he now seeks declaratory relief.

DECLARATORY RELIEF

The Court must first determine its subject matter jurisdiction and therefore will address the Motion to Dismiss or Abstain before the Motion for Summary Judgment. However, in order to address the issues of jurisdiction, authority, and abstention that are presented by the former motion, it would help first to clarify the relief being demanded and establish whether declaratory relief is appropriate and warranted.

[1] The Declaratory Judgment Act states that "[i]n a case of actual controversy within its jurisdiction ... any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought."⁷ Bankruptcy courts are among the federal courts that may grant declaratory relief under this statute.⁸ And, notwithstanding the inapplicability of Fed.R.Civ.P. 57 to adversary proceedings, the Bankruptcy Rules make provision for entertainment of complaints for declaratory relief in bankruptcy cases.⁹

⁷ 28 U.S.C. § 2201(a).

⁸ *Nipon v. Leslie Fay Co. Inc. (In re Leslie Fay Co. Inc.)*, 216 B.R. 117, 134 (Bankr.S.D.N.Y.1997); *Downington Industrial and Agricultural School v. Commonwealth of Pennsylvania Dept. of Ed. (In re Downington Industrial and Agricultural School)*, 172 B.R. 813, 819 (Bankr.E.D.Pa.1994).

⁹ Fed. R. Bankr.P. 7001(9) (adversary proceedings include certain proceedings to obtain a declaratory judgment). The fact that the rules so provide is not a basis for concluding that a bankruptcy court has authority to enter a declaratory judgment, and I do not suggest otherwise. No bankruptcy rule makes Fed.R.Civ.P. 57 applicable in bankruptcy cases or adversary proceedings.

*45 [2] [3] The Declaratory Judgment Act is designed to enable litigants to clarify legal rights and obligations before acting upon them, "whether or not further relief is or could be sought."⁰ Despite the availability of this relief before a party is injured or aggrieved, a court may enter declaratory relief only "in a case of actual controversy." An actual controversy is "a case and controversy in the constitutional sense.... It must be a

real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.”² But even where an actual controversy is presented, the court retains discretion to deny declaratory relief for prudential reasons.³

10 28 U.S.C. § 2201(a); *Ernst & Young v. Depositors Economic Protection Corp.*, 45 F.3d 530, 534 (1st Cir.1995).

11 28 U.S.C. § 2201(a).

12 *Public Service Com. v. Wycoff Co.*, 344 U.S. 237, 242 243, 73 S.Ct. 236, 97 L.Ed. 291 (1952) (internal quotation marks omitted).

13 *Diaz Fonseca v. Puerto Rico*, 451 F.3d 13, 27 (1st Cir.2006) and cases cited.

The Receiver contends without elaboration that there exists an actual controversy as to both issues on which he seeks declaratory relief, and the Unions neither contend otherwise nor expressly address the issue. Though the Unions oppose summary judgment, neither has done so on the basis that there does *not* exist an actual controversy or that declaratory relief is not otherwise appropriate. And, although the Teachers' Union has moved to dismiss for lack of subject matter jurisdiction, and lack of an actual controversy would be a defect in subject matter jurisdiction, the Teachers Union does not contend in its motion to dismiss that this adversary proceeding suffers from that particular jurisdictional defect.

Still, the court must satisfy itself that there exists an actual controversy with respect to each question presented and not merely a difference of opinion over hypothetical facts. This in turn requires an understanding of precisely what each question asks and how it affects the rights and legal relations between the Receiver and each Union.

a. Declaratory Relief as to Count I

[4] [5] [6] [7] In his first count, the Receiver seeks a declaration “that the School District is part of the City and therefore, *ipso facto*, the collective bargaining process is within the Bankruptcy Court's subject-matter jurisdiction.” By this language, I understand the Receiver to seek a determination in two parts: (i) that the School District is not a separate entity from the City but

merely a part or department of the City, and (ii) that because the School District is a part of the City, the debts and contractual obligations of the School District to the Unions are debts and contractual obligations of the City and therefore subject to possible adjustment, especially by rejection, in the City's bankruptcy case. The powers of a municipality in a Chapter 9 case include the power to reject executory contracts.⁴ Provided certain conditions *46 are satisfied, this power of rejection extends to collective bargaining agreements.⁵ By seeking a declaration that “the collective bargaining process is within the Bankruptcy Court's subject-matter jurisdiction,” the Receiver is not so much interested in the extent of the court's jurisdiction or authority as in the reach of the City's power to reject. Does it extend to the Unions' contracts with the School District?

14 11 U.S.C. § 365(a) (subject to certain exceptions, “the trustee, subject to the court's approval, may assume or reject any executory contract ... of the debtor), 901 (section 365 of the Bankruptcy Code applies in a case under Chapter 9), and 902(5) (“ ‘trustee, when used in a section that is made applicable in a case under this chapter by section ... 901 of this title, means debtor). As a general rule, a contract is “executory when performance remains due to some extent on both sides. 3 Collier on Bankruptcy ¶ 365.02 (16th ed. 2011); *Ready Prod., Inc. v. Jarvis (In re Jarvis)*, 2005 Bankr.LEXIS 536, 2005 WL 758805, *2 (Bankr.D.N.H.2005) (surveying state of law in First Circuit). Rejection has the effect of freeing the debtor from the obligation to perform the contract and leaves the nondebtor party with a claim for breach that is deemed to have arisen immediately before the date of filing of the bankruptcy petition. 11 U.S.C. § 365(g)(1).

15 *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984) (holding, in a chapter 11 case, that collective bargaining agreements are subject to rejection under § 365(a), but the standard of rejection is stricter than the ordinary business judgment standard and requires a showing of reasonable efforts to negotiate a voluntary modification). See also *IBEW, Local 2376 v. City of Vallejo (In re City of Vallejo)*, 432 B.R. 262, 272 (E.D.Cal.2010) (a municipality operating under Chapter 9 may utilize 11 U.S.C. § 365(a) to reject a collective bargaining agreement if the municipality can show that the requirements of *Bildisco* are met).

I make no ruling at this time as to the specific requirements for rejection in a Chapter 9 case.

The Receiver's first count is no broader than this. The Receiver does not in this proceeding move to reject the collective bargaining agreement of either Union; he indicates that he may in the near future move to reject one or both, but in view of the early stage of negotiations with the Unions, he believes that a motion to reject would at present be premature, and the Teachers' Union concurs. (Council 94 has voiced no position on the issue.) Nor does the Receiver seek a declaration that either agreement is executory within the meaning of § 365(a). His interest in this proceeding is simply in establishing that rejection is a possibility, because the Unions' agreements are with the debtor City.

As to both Unions, this controversy and that presented by Count Two are purely legal. The material "facts" are almost all of a legislative nature, and the few remaining material facts that are not of this nature are neither controverted nor developing.

[8] With respect to Council 94, the first count presents an actual controversy for three reasons. First, it will determine the possibility of rejection. Council 94's collective bargaining agreement is unexpired and appears to be an executory contract.⁶ If it is a contract with the City, not with an independent entity, it would be subject to possible rejection in this case; but if it is not a contract with the City, then rejection under the Bankruptcy Code would not be an option. Second, if Council 94's contract is not with the City, the Receiver will have cause to object to the contract claim asserted by Council 94: that the School District's obligations under the contract are not obligations of the City. Third, in order to formulate a plan of debt adjustment in this case and to understand the feasibility of any plan he does formulate, the Receiver must determine the School District's budget for the projected five-year term of the plan. Under recent amendments to Rhode Island law, the City will, during the term of the plan, be responsible for a small fraction of the School District's budget.⁷ The Unions' contracts *47 together constitute the vast majority of that budget. By determining whether rejection is a possibility, adjudication of the Receiver's first count would hasten the negotiation of the Unions' contracts and the settlement of the School District's budget, and it would thereby shorten the debt adjustment process in bankruptcy and the duration of the City's time in

receivership. For each of these reasons, I am satisfied that the first count presents an actual controversy with Council 94 that warrants declaratory relief.

16 I need not and do not make a final ruling on that issue in this adversary proceeding.

17 Over the last 20 years, the State has funded the entire operational budget. Though the fraction for which the City will be responsible is small, the School District's budget is much larger than the City's budget, and even a small fraction of the schools' budget could have an appreciable effect on the City's already stretched finances and may have a material impact on confirmation.

[9] As against the Teachers' Union, the existence of an actual controversy is for two reasons less certain: its contract may not be executory, and it has not filed a proof of claim. There is a dispute as to whether the Teachers' contract remains executory on the one hand the contract has expired, on the other it continues to govern, and the issue has not been raised or briefed. And the Teachers' Union has not filed a proof of claim. Still, there exists at least a reasonable possibility that the contract, if it is deemed a contract with the City, would be deemed executory and subject to rejection. And the Teachers' Union may yet file a proof of claim if the School District is part of the City and its collective bargaining agreement is executory and ultimately rejected. With respect to budgetary concerns, the existence of an actual controversy is more certain: the Receiver's need to move ahead on the Teachers' Union's contract is even more urgent than on Council 94's contract. As the Teachers' Union explained at the hearing, its budget is by far the larger of the two and the most significant item in the School District budget. In addition, where the court has already determined that an actual controversy exists as to Council 94, there is good cause to consider the same issue as to the Teachers' Union at the same time the Teachers' Union has shown every indication of wanting to be heard on the issue. The Court therefore concludes that the first count presents an actual controversy with the Unions that warrants declaratory relief.

b. Declaratory Relief as to Count II

[10] By his second count, the Receiver seeks a declaration "that the Receiver has the power under the Fiscal Stability Act to act on behalf of the City relative to collective bargaining with the Unions." As the Receiver himself

states, the need for this declaration is contingent on the court's first declaring that the School District is part of the City.⁸ By this count, the Receiver seeks a declaration of the scope of his power under Rhode Island's Fiscal Stability Act, pursuant to which he was appointed receiver and by which his powers are established and defined. The Unions have taken the position that the Fiscal Stability Act does not empower the Receiver to collectively bargain with the Unions on the City's behalf. The Receiver contends that the Act does so empower him and that a declaration on this issue is needed so that the parties can proceed with a full understanding of their respective rights.

¹⁸ Upon a determination that the School District is not part of the City, this second count would become moot.

The court concludes that this count presents an actual controversy as to both Unions. If the School District is part of the City, then both contracts will require renegotiation. Indeed the expiration of the Teachers' Union contract last August would require negotiation of a new agreement *48 even if the City were not in bankruptcy. A declaration that the Receiver may act for the City in those negotiations plainly will advance the negotiations and the reorganization process in bankruptcy. This controversy, too, warrants declaratory relief.

MOTION TO DISMISS OR ABSTAIN

[11] The Declaratory Judgment Act does not itself confer subject-matter jurisdiction. Rather, it makes available a declaratory remedy for disputes that come within the court's jurisdiction on some other basis.⁹ The determination that declaratory relief is appropriate does not obviate the need to address the Teachers' Motion to Dismiss or Abstain.

¹⁹ *Ernst & Young v. Depositors Economic Protection Corp.*, 45 F.3d at 534.

In that motion, the Teachers' Union makes the following four arguments. First, the court's subject-matter jurisdiction is limited to core proceedings, but the Receiver's requests for declaratory relief are not core proceedings within the meaning of 28 U.S.C. § 157(b) (enumerating core proceedings and authorizing bankruptcy judges to hear and determine and enter

appropriate orders and judgments in them). Second, even if they are core proceedings, they arise under state law and therefore are not matters on which a bankruptcy judge, lacking life tenure and protection against reduction of salary, may constitutionally enter judgment, a proposition for which the Teachers' Union relies on *Stern v. Marshall*, U.S. , 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011). Third, even if the court does have subject-matter jurisdiction, the court must, under 28 U.S.C. § 1334(c)(2), abstain from adjudicating the adversary proceeding because it arises under state law and can be timely adjudicated in a state forum. And fourth, even if § 1334(c)(2) does not mandate abstention, the court may and should abstain under § 1334(c)(1) out of respect for state law and for the numerous state parties and state interests in this matter. The Receiver opposes the Union's position at each turn. The court will address the arguments in order.

a. Core Status and Subject-Matter Jurisdiction

The Teachers' first argument has two parts: (i) the court's subject-matter jurisdiction is limited to core proceedings, (ii) but the Receiver's requests for declaratory relief are not core proceedings. For the reasons set forth below, the court agrees that the Receiver's requests are not core and that this renders the bankruptcy court unable to enter a final judgment in the matter but not that subject-matter jurisdiction is lacking.

I begin with the argument that the bankruptcy court's subject-matter jurisdiction is limited to core proceedings. The Teachers' argue without elaboration: “[t]he Court's subject-matter jurisdiction in an adversary proceeding is limited to ‘core proceedings arising under title 11, or arising in a case under title 11....’ 28 U.S.C. § 157(b)(1).” The Receiver does not answer this part of the Union's argument.

[12] [13] Bankruptcy jurisdiction is vested in the first instance in the district courts.²⁰ The district courts are empowered by 28 U.S.C. § 157(a) to provide “that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.”² The district *49 court for the District of Rhode Island has done just that.²² A bankruptcy judge's authority over the matters so referred is not uniform. As to “all core proceedings arising under title

11 or arising in a case under [title 11](#),” a bankruptcy judge has authority, regardless of the consent of the parties, to hear and determine and enter appropriate orders and judgments.²³ As to all other referred matters, however, a bankruptcy judge may not, without the consent of the parties the Unions have indicated that they do not consent determine such matters and enter final orders or judgments.²⁴ Still, a bankruptcy judge is expressly permitted to hear these non-core matters.²⁵ However, when a bankruptcy judge does hear such a matter, he or she “shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.”²⁶ Therefore, it is inaccurate to state that outside of core proceedings, a bankruptcy judge lacks subject-matter jurisdiction. Neither Congress by statute nor the Supreme Court in *Stern v. Marshall* or otherwise has so limited the jurisdiction of a bankruptcy judge. Provided the matter in question is related to a bankruptcy case the present matters unquestionably are it remains within the subject-matter jurisdiction created in [§ 1334](#) and referred to the bankruptcy court under [§ 157\(a\)](#). The bankruptcy judge retains authority to hear and enter proposed findings and conclusions in the matter, with judgment to enter finally in the district court.

20 [28 U.S.C. § 1334\(a\), \(b\), and \(e\)](#).

21 [28 U.S.C. § 157\(a\)](#).

22 DRI LR Gen 109(a) (“All cases arising under [Title 11](#) shall be referred automatically to the bankruptcy judge(s) of this District.). Though I am a bankruptcy judge of the District of Massachusetts, by designation under [11 U.S.C. § 921\(b\)](#), I am a bankruptcy judge of the District of Rhode Island for this bankruptcy case. See Designation Order, Case No. 11 13105 (Bankr.D. R.I.), Doc. # 2.

23 [28 U.S.C. § 157\(b\)\(1\)](#) (“Bankruptcy judges may hear and determine all cases under [title 11](#) and all core proceedings arising under [title 11](#), or arising in a case under [title 11](#), referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.).

24 [28 U.S.C. § 157\(b\)\(1\)](#) and (c).

25 [28 U.S.C. § 157\(c\)\(1\)](#) (“A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under [title 11](#).).

26 [28 U.S.C. § 157\(c\)\(1\)](#). See also [Fed. R. Bankr.P. 9033](#) and DRI LR Gen 109(d).

[14] The next issue is whether the Receiver's requests for declaratory relief are core. The Court must make this determination for each request for declaratory relief. The Teachers' Union argues that the requests for declaratory relief are not core because they are not among the core proceedings that are enumerated in [28 U.S.C. § 157\(b\)\(2\)](#), do not invoke a substantive right created by federal bankruptcy law, arise entirely under state law, could exist independently outside of bankruptcy, and could proceed in another court in the absence of a bankruptcy case. The Receiver contends that both declaratory requests are core for the following reasons: they fall within two of the enumerated categories of core proceedings “matters concerning the administration of the estate” [§ 157\(b\)\(2\)\(A\)](#), and “other proceedings affecting ... the adjustment of the debtor-creditor ... relationship,” [§ 157\(b\)\(2\)\(O\)](#) because they are related to the rejection of executory contracts; they will “determine who the debtor is” *50 and thereby determine the extent of the bankruptcy court's subject matter jurisdiction in this bankruptcy case, an issue a bankruptcy court always has jurisdiction to determine; they will affect various core matters, including especially by determining whether creditors of the School District are creditors of the City; and they will clarify whether the City may move to reject the collective bargaining agreement with the School District.²⁷

27 The Receiver's position on this issue is set forth not only in his brief in opposition to the Motion to Dismiss or Abstain but also in his brief in support of his Motion for Summary Judgment.

[15] [16] [17] [18] The term “core proceeding” is used in [28 U.S.C. § 157\(b\)](#) to refer to those matters a bankruptcy judge may hear, determine, and dispose of by appropriate orders and judgments, subject only to appellate review. Subsection 157(b) provides a nonexhaustive list of core proceedings, including two catch-all categories on which the Receiver relies: “matters concerning the administration of the estate,” [§ 157\(b\)\(2\)\(A\)](#), and “other proceedings affecting ... the adjustment of the debtor-creditor ... relationship,” [§ 157\(b\)\(2\)\(O\)](#). The

first of these, “matters concerning the administration of the estate,” cannot apply in a Chapter 9 case because Chapter 9 cases involve no estate.²⁸ Section 157 does not otherwise define “core proceeding” except by dictating that “[a] determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.” 28 U.S.C. § 157(b)(3). “It is the nature of the proceeding its relation to the basic function of the bankruptcy court not the state or federal basis for the claim, that makes the difference here.”²⁹ The legislative history of 28 U.S.C. § 157 indicates that “Congress intended that ‘core proceedings’ would be interpreted broadly, close to or congruent with constitutional limits.”³⁰ Proceedings under 11 U.S.C. § 365(a) to assume or reject executory contracts, arising as they do under the Bankruptcy Code and being unavailable outside of bankruptcy, “affect the adjustment of the debtor-creditor relationship” within the meaning of § 157(b)(2)(O) and therefore are undisputedly core proceedings.³

²⁸ The section of the Bankruptcy Code that creates a bankruptcy estate is § 541(a), but that section does not apply in cases under Chapter 9. 11 U.S.C. § 901(a) (listing Code sections that apply in a chapter 9 case); 11 U.S.C. § 103(f) (“Except as provided in section 901 of this title, only chapters 1 and 9 of this title apply in a case under such chapter 9.).

²⁹ *Arnold Print Works v. Apkin (In re Arnold Print Works)*, 815 F.2d 165, 169 (1st Cir.1987).

³⁰ *Id.* at 168–69.

³¹ *In re Texaco, Inc.*, 77 B.R. 433, 437 (Bankr.S.D.N.Y.1987); *In re UAL Corp.*, 293 B.R. 183, 184 (Bankr.N.D.Ill.2003).

[19] As the Teachers' Union rightly points out, however, the Receiver's demands for relief include no motion under § 365(a) of the Bankruptcy Code to reject an executory contract. Nor do they seek a determination that the Unions' collective bargaining agreements are executory or even that they are contracts with the City. The Receiver's first count for a declaration that the School District is part of the City stops short of putting the Unions' collective bargaining agreements in controversy at all. It follows that, however useful the requested declaration may be, both in structuring negotiations and possibly in narrowing issues in future litigation, this adversary proceeding cannot itself definitively determine

any consequence of the requested declaration for the relationship *51 between the City and the Unions. In addition, the first count arises entirely under state law, not under the Bankruptcy Code; and though it arises in a bankruptcy case, it could as easily have arisen, and been brought elsewhere, had the City not commenced this bankruptcy case. The Receiver is correct in stating that Count One may have consequences for numerous core matters in this case, including the rejection of contracts, the litigation and adjustment of claims, and the extent of the automatic stay. Still, it is not enough that the declarations he requests may affect these. What is dispositive here is that the declarations would not themselves determine any core matter.³²

³² To be sure, it likely would bear upon, even have issue preclusive effect in, certain core proceedings, such as a motion to reject the Unions' collective bargaining agreement or an objection to the claim of Council 94. But its preclusion would go only to discrete issues, not to the core matter itself: collateral estoppel but not res judicata. Moreover, until a core proceeding is commenced, the Court cannot know the full range of issues that can and will be raised or the importance of this one issue to resolution of the core proceeding.

The Receiver has characterized his first count as one to determine who is the debtor and, consequently, to determine the extent of the bankruptcy court's subject matter jurisdiction. This characterization is not quite apt. The debtor in this case is the City of Central Falls, and “the court's jurisdiction” by which the Receiver means the City's power in bankruptcy, subject to court approval, to adjust debts and contractual obligations extends to all contractual obligations and other debts of the City. That much is clear and undisputed. The real issue in dispute, which Count One bears upon *but would not actually determine*, is whether the Unions' collective bargaining agreements are executory contracts with the City, in which case those contracts would be subject to adjustment under § 365. Were this a proceeding to determine that the contractual obligations of the School District to the Unions are obligations of the City under executory contracts, it would have a much stronger claim to core status. This would then be a proceeding to determine that certain obligations are subject to adjustment in the bankruptcy case. But the Receiver's first count stops short of this and therefore is non-core. It is merely “related to” this bankruptcy case within the meaning of 28 U.S.C. §

157(c)(1), and the bankruptcy judge's authority over it is therefore limited to that in § 157(c)(1).

[20] The second count's claim to core status is no stronger than the first's. The second count seeks a determination of the authority of the Receiver under the Fiscal Recovery Act, the state statute that delimits his authority. Like the first it arises entirely under state law and, though it arises in this bankruptcy case, could have arisen and been brought elsewhere had the City not sought bankruptcy relief. It too is related to this case, and its determination is important to the progress of this case, but it is not core.

b. *Stern v. Marshall*

The Teachers' Union next argues that even if the declaratory judgment counts are core, the Supreme Court's recent decision in *Stern v. Marshall*, U.S. , 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011), precludes the bankruptcy court from entering final judgment on them. In *Stern*, the Supreme Court held that Congress violated Article III of the United States Constitution in 28 U.S.C. § 157(b) by assigning to bankruptcy judges judges lacking life tenure and protection against diminution of salary for final adjudication as a core proceeding a counterclaim by the bankruptcy estate against a creditor who asserted a claim against the estate where *52 resolution of the counterclaim was not necessarily resolved in the process of adjudicating the creditor's proof of claim. In the discussion above, this court has already decided that the declaratory judgment counts are not core and therefore that, lacking the Unions' consent, the bankruptcy court may not enter final judgment but is limited to hearing the matter and submitting proposed findings and rulings to the district court, with judgment to be entered by the district court. When asked at hearing whether such a conclusion specifically, a determination that the claims at issue are merely "related to" and not core would render the present argument moot, the Teachers' Union said it would not; but counsel could not explain why, except to state that, in *Stern*, the Supreme Court signaled that "the bankruptcy courts need to carefully consider whether they should be deciding certain types of purely state law questions."³³

³³ Nowhere does the Teachers' Union specify precisely what type of state law question its argument is concerned with.

[21] I understand the Teachers' Union to be arguing that *Stern* somehow invalidates the procedure prescribed in 28 U.S.C. § 157(c)(1) for a matter that is not a core proceeding but that is otherwise related to a bankruptcy case and that arises entirely under state law. *Stern* provides no support for this reading. *Stern* concerned only the authority of a bankruptcy court, as a court whose judges lack the full protections of Article III, to enter certain final judgments, and it rested exclusively on a separation-of-powers rationale. It did not address the validity of a judgment entered by the district court, whose Article III credentials the Teachers' Union does not dispute, pursuant to the process set forth in 28 U.S.C. § 157(c)(1). Nor did it address concerns of federalism; although the counterclaim at issue in *Stern* arose under state law, the determinative feature of that counterclaim was that it did not arise under the Bankruptcy Code. The operative dichotomy was not federal versus state, but bankruptcy versus nonbankruptcy. The Teachers' Union has offered no reason why *Stern* should affect the validity of § 157(c)(1) procedures and judgments. In *Stern* itself, the Supreme Court indicated that the fault it found was limited to "one isolated respect" of the bankruptcy jurisdictional scheme in § 157³⁴ and that its decision did not meaningfully change the division of labor in the statute.³⁵ I am satisfied that *Stern* had no effect on § 157(c)(1) and that a bankruptcy judge may hear the Receiver's declaratory judgment complaint and propose findings of facts and conclusions of law on its two counts.

³⁴ *Stern v. Marshall*, 131 S.Ct. at 2620.

³⁵ *Id.* The court stated:

As described above, the current bankruptcy system also requires the district court to review de novo and enter final judgment on any matters that are "related to the bankruptcy proceedings, § 157(c)(1), and permits the district court to withdraw from the bankruptcy court any referred case, proceeding, or part thereof, § 157(d). Pierce has not argued that the bankruptcy courts "are barred from 'hearing all counterclaims or proposing findings of fact and conclusions of law on those matters, but rather that it must be the district court that "finally decide s] them. We do not think the removal of counterclaims such as Vickie's from core bankruptcy jurisdiction meaningfully changes the division of labor in the current statute; we

agree with the United States that the question presented here is a “narrow one.

Stern v. Marshall, 131 S.Ct. at 2620 (internal citations omitted).

c. Mandatory Abstention, 28 U.S.C. § 1334(c)(2)

[22] In the alternative, the Teachers' Union argues that 28 U.S.C. § 1334(c)(2) *53 requires that the court abstain from adjudicating the Receiver's complaint. Section 1334(c)(2) states:

Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.³⁶

³⁶ 28 U.S.C. § 1334(c)(2).

This subsection applies by its terms to a district court exercising bankruptcy jurisdiction under § 1334 and, by operation of 28 U.S.C. §§ 151 and 157(a), to a bankruptcy court acting upon a bankruptcy matter by reference under § 157(a).³⁷ Section 1334(c)(2) mandates that a court abstain if five conditions are satisfied: (1) the proceeding is based on a state law claim or cause of action; (2) the claim or cause of action is related to a case under title 11 but does not arise under title 11 and does not arise in a case under title 11; (3) federal courts would not have jurisdiction over the claim but for its relation to a bankruptcy case; (4) an action “is commenced” in a state forum of appropriate jurisdiction; and (5) the action can be timely adjudicated in that state forum.³⁸ The Teachers' Union contends all five are satisfied. The Receiver opposes abstention, contending principally that timely adjudication cannot be had in another forum.

³⁷ The bankruptcy judges in a federal judicial district “constitute a unit of the district court for that district. 28 U.S.C. § 151.

³⁸ *Stoe v. Flaherty*, 436 F.3d 209, 213 (3d Cir.2006).

[23] Two of the five conditions appear to be satisfied here: the proceeding is based on a state law claim or cause of action it seeks a declaration of rights and relations under Rhode Island law; and the federal courts would not have jurisdiction over the claim but for its relation to a bankruptcy case. However, at least one other, timely adjudication, is not satisfied, and therefore abstention is not mandatory.³⁹

³⁹ The court also questions whether this matter “does not arise in a case under title 11 and that a matter “is commenced when it has not already been commenced. Where the timeliness requirement is not satisfied, these concerns are academic and need not be addressed.

The matters cannot be “timely” adjudicated in a state forum of appropriate jurisdiction. What constitutes “timely” adjudication is a function of the needs of the reorganization process. Here, the Receiver expects to be in a position to complete negotiations with the Unions before mid-April. The completion of these negotiations, and the resolution of the status of the City's obligations to the Unions (if any), are the last matters he must address before submitting an amended plan of reorganization on which the Receiver hopes to proceed to confirmation. The Receiver's goals, shared by the court, are to resolve the bankruptcy process and then complete his receivership in a much shorter time than the usual span of litigation outside of bankruptcy and, indeed, in other Chapter 9 adjustment cases. This goal is driven in part by the cost of the reorganization process, which increases with its length and at some point jeopardizes the reorganization itself. It is also driven by the need to complete the receivership process and return the City to municipal normalcy. The Rhode Island Supreme Court *54 has itself recognized this imperative with respect to the receivership of Central Falls.⁴⁰ The Receiver filed his complaint in this adversary proceeding on December 30, 2011, and asked for disposition of the matter by March 2, 2012. After hearing from the Unions, and at their request, I enlarged that time by approximately a month but generally agreed with the Receiver's appraisal of the matter's urgency and with the timeline on which it should be decided.

40 See *Moreau v. Flanders*, 15 A.3d 565, 576 79 (R.I.2011) (indicating concern about the absence of an explicit sunset provision in the framework of Rhode Island's municipal receivership statute and stating that "it would seem that a period of oversight that exceeds two years from the appointment of a receiver might be unreasonable).

The matter would not likely be adjudicated in the state courts within the time that this bankruptcy case requires. The bankruptcy courts are designed and intended to handle all matters in a bankruptcy case precisely to make reorganization more feasible and to advance matters whose adjudication is critical to the progress of the case. A state court would be receiving this matter without the bankruptcy court's sense of the whole case in which it is situated, on a docket already crowded with other matters. And it takes nothing away from the state courts to observe that the usual course of civil litigation is vastly longer in duration than this matter requires: weeks, not months or years.⁴

41 At the hearing on this motion, the court explored with the parties the possibility of certifying key questions in this adversary proceeding to the Rhode Island Supreme Court, an unusual procedure. The court did this in part because the Unions cited the speed with which that court heard and decided other litigation concerning the City's receivership. By the end of the hearing, however, it was clear that even that pace, which is veritable alacrity at the appellate level, would not meet the needs of this case. And this court cannot know in advance whether the Supreme Court would even agree to address the question and, if so, how soon. Where the Supreme Court's calendar is closed for this term, it is unclear that the matter could even be heard before October.

I am mindful that the bankruptcy court itself cannot finally decide this matter. Under § 157(c)(1), further process will be required in the district court before final judgment can enter. Even so, I find and conclude that adjudication of this matter in the bankruptcy court pursuant § 157(c)(1) is the option most likely to result in a timely adjudication. For these reasons, abstention is not mandatory.

d. Discretionary Abstention, 28 U.S.C. § 1334(c)(1)

In the alternative, the Teachers' Union argues that the bankruptcy court may and should, in the interest of

respect for state law, abstain under § 1334(c)(1) from adjudicating this matter. The Union argues that the court should abstain because the issues presented arise entirely under state law and are of particular importance to the state but will have little or no consequence in this bankruptcy case. The Receiver opposes discretionary abstention, arguing that abstention is disfavored and would impede the efficient administration of the case, that the issue presented is important to the bankruptcy case, and that although the questions arise under state law, established Rhode Island law already answers the questions.

[24] Where abstention is not mandatory under § 1334(c)(2), subsection (c)(1) nonetheless permits a court to abstain from hearing a matter related to a bankruptcy case in the "interest of justice" or "in the interest of comity with State courts or respect for State law." *55 28 U.S.C. § 1334(c)(1). Courts have developed a comprehensive list of the relevant considerations:

- (1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention,
- (2) the extent to which state law issues predominate over bankruptcy issues,
- (3) the difficulty or unsettled nature of the applicable law,
- (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court,
- (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334,
- (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case,
- (7) the substance rather than form of an asserted "core" proceeding,
- (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court,
- (9) the burden of [the bankruptcy court's] docket,
- (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties,
- (11)

the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties.⁴²

⁴² *In re Chicago, M. & St. P. & Pac. R.R.*, 6 F.3d 1184, 1189 (7th Cir.1993); see also *In re Middlesex Power Equip. & Marine, Inc.*, 292 F.3d 61, 69 (1st Cir.Mass.2002) (citing court's "broad discretion to abstain and citing to lists of factors employed in other circuits).

"Courts should apply these factors flexibly, for their relevance and importance will vary with the particular circumstances of each case, and no one factor is necessarily determinative."⁴³

⁴³ *In re Middlesex Power Equip. & Marine, Inc.*, 292 F.3d 61, 69.

[25] Several of these factors undisputedly weigh heavily in favor of abstention. First, the state issues predominate; both parties do also advance arguments under federal law, but at bottom both declaratory requests are about state law. Second, unlike many state law issues that are routinely litigated in bankruptcy court regarding contracts, security interests, exemptions, property rights, and the like the issues presented here are unusual and not well-trodden. Third, the issues concern the structure of state and municipal government and its financing and are thus of special concern to the State of Rhode Island, its municipalities, and its various authorities. And fourth, those authorities are necessary parties in this proceeding. Respect for state law is therefore of greater than usual importance here, a significant concern.⁴⁴

⁴⁴ *Id.* ("because section 1334(c)(1) is concerned with comity and respect for state law, whether a case involves unsettled issues of state law is always significant).

The force of this concern is blunted by other factors. Though the state issues are not well-settled, they do not come to this court without determinative signposts in state law; this court would not be making state law out of whole cloth. In addition, answers to declaratory requests can and would be framed narrowly. And, though the Governmental Defendants are present in this proceeding as necessary third parties, they have taken no position on the substantive issues and have not requested dismissal

or abstention but rather, in each of their answers, have *requested* the judgment of this court.

Moreover, there are two countervailing concerns. The first is the importance of these issues to the bankruptcy case. If the School District is part of the City, then its contracts may be subject to adjustment in this case. The Teachers' Union argues that "the City is not a party to the Unions' contracts and cannot reject them," and *56 therefore that the declaratory judgment issues cannot have a meaningful impact on the bankruptcy case. This argument puts the cart before the horse. The purpose of this adversary proceeding is, in effect, to determine whether the City is a party to the contracts. The Receiver's ability to reject those contracts, and by extension to negotiate with authority concerning them, is hardly settled. The Teachers' Union also contends that the issues presented cannot meaningfully affect the City's bankruptcy case for the further reason that the net effect of rejection of the Unions' contracts on the City would be negligible because the State will still fund over 95% of the School District's operating costs over the next five years.⁴⁵ But the Teachers' Union concedes that the School District budget dwarf's the balance of the City's budget the figures cited to the court were \$44 million for the School District and \$17.5 million for the balance of the City. It follows that even a small fraction of the School budget can have a significant effect on the City's overall ability to make ends meet and to propose a feasible plan. But even this point misses the big picture: the City's receipt of budgetary assistance from the State is not a reason the City should not use the resources at its disposal in this case to get its budget under control. Control of the budget is self-justifying, even for those portions of the budget that the State has and may in the future subsidize in part or even in full. The availability of life-support is not justification for *not* curing the disease that necessitates it. The City has every reason to diminish the extent of its necessity, and that in itself is a legitimate goal in this case. Therefore, the issues presented are of fundamental importance in this bankruptcy case.

⁴⁵ Five years is the term of the plan of debt adjustment the City contemplates filing in this case.

The second countervailing concern is the need for expedition. For reasons explained above, sending this matter to state court would likely delay this case for much longer than the reorganization effort can tolerate or, more

likely, force the Receiver to proceed without a resolution of this issue, which would effectively compromise some or all of his legitimate objectives in this case, or both.⁴⁶ In short, determination of these issues by the state courts is not a realistic option. The real options are determination in the present proceeding or not at all. For all these reasons, the better course is not to abstain. The Court therefore turns to the Motion for Summary Judgment.

⁴⁶ Compromise is part of bankruptcy, and there has been a fair measure of it in this case already, but it should not be necessitated by inability to timely adjudicate a matter, especially when there exists a forum that can accomplish that.

MOTION FOR SUMMARY JUDGMENT

Standard of Review

[26] Summary judgment is appropriate when there is no genuine issue of material fact and, on the uncontroverted facts, the moving party is entitled to judgment as a matter of law.⁴⁷ Where, as here, the burden of proof at trial would fall on the party seeking summary judgment, that party must support its motion with evidence in the form of affidavits, admissions, depositions, answers to interrogatories, and the like as to each essential element of its cause of action. The evidence must be such as would permit the movant at trial to withstand a motion for directed verdict *57 under Fed.R.Civ.P. 50(a).⁴⁸ Provided it does so, the burden then shifts to the opposing party to adduce evidence that establishes a genuine issue of material fact as to at least one essential element of the moving party's case. The Court must view all evidence in the light most favorable to the nonmoving party and indulge all inferences favorable to that party.⁴⁹ The ultimate burden of proving the absence of a genuine issue of material fact remains at all times on the moving party. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."⁵⁰ Absent a genuine dispute of material fact, questions of law are appropriate for resolution on summary judgment.⁵ Questions of statutory interpretation are questions of law.⁵²

⁴⁷ Fed.R.Civ.P. 56, made applicable by Fed. R. Bankr.P. 7056; *Desmond v. Varrasso (In re Varrasso)*, 37 F.3d 760, 763 (1st Cir.1994).

⁴⁸ *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

⁴⁹ *Daury v. Smith*, 842 F.2d 9, 11 (1st Cir.1988).

⁵⁰ *Martinez Rodriguez v. Guevara*, 597 F.3d 414, 419 (1st Cir.2010), quoting from *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

⁵¹ *Zehner v. Central Berkshire Regional School Dist.*, 921 F.Supp. 850, 857 (D.Mass.1995) (citing to *Jimenez v. Peninsular & Oriental Steam Nav. Co.*, 974 F.2d 221, 223 (1st Cir.1992)).

⁵² See *Hernandez Miranda v. Empresas Diaz Masso, Inc.*, 651 F.3d 167, 170 (1st Cir.2011); *Simmons v. Galvin*, 575 F.3d 24, 30 (1st Cir.2009) ("questions of statutory interpretation are questions of law ripe for resolution at the pleadings stage").

The court adjudicates this motion for summary judgment in a proceeding in which it must make "proposed findings of fact." To be clear, a motion for summary judgment involves no findings of fact, merely (insofar as facts are concerned) rulings of law as to whether there exist genuine issues as to the material facts. The following facts are not findings of the court.

Facts

The facts as the court must construe them are as follows. Except where otherwise indicated, they are either admitted or otherwise uncontroverted.⁵³

⁵³ The parties followed the procedure set forth on DRI LR Cv 56(a), made applicable to this proceeding by R.I. LBR 1001 1(b). Accordingly, the City filed a Statement of Undisputed Facts with its motion for summary judgment. The Teachers' Union responded with a Statement of Disputed Facts and also filed a further Amended Statement of Undisputed Facts, to which the City responded with a Statement of Disputed Facts. Except as otherwise noted, the numeration through ¶ 43 corresponds to that in the City's Statement of Undisputed Facts. Council 94, which on the whole relies on the Teachers' Union's response to the Motion for Summary Judgment, nonetheless filed a short separate response from that of the Teachers' Union to the City's Statement of Undisputed Facts. It states only that "Council 94] has reviewed the Statement and disagrees that Paragraphs 22, 42 and 43.(sic) In addition, Council

94] defers to the pleadings filed by the Teachers' Union]. Council 94 cited no evidentiary basis for controverting paragraphs 22, 42, and 43.

1. The plaintiff City is a municipality of the State of Rhode Island (the "State") and a political subdivision thereof.

2. On August 1, 2011, the City filed a voluntary petition under Chapter 9 of the Bankruptcy Code with the United States Bankruptcy Court for the District of Rhode Island, commencing the Chapter 9 case in which this adversary proceeding arises.

3. On December 1, 2011, the Court entered an order for relief in the Chapter 9 case.

4. Defendant Central Falls Teachers' Union (the "Teachers' Union") is a labor *58 union that, at present and since 1967, is and has been the exclusive bargaining agent for all classroom teachers and eligible certified personnel of the Central Falls School District (the "School District"). The Teachers Union has approximately 287 members, who include prekindergarten through grade 12 teachers, certified school nurse teachers, deans, guidance counselors, school librarians, department chairs, temporary certified employees, speech pathologists, coaches, social workers, school psychologists, and certain part-time certified district staff. The principal office of the Teachers' Union is located in Lincoln, Rhode Island. ⁵⁴

⁵⁴ The facts in this paragraph include the uncontroverted facts from the Teachers' Unions Statement of Undisputed Facts, ¶ 1.

5. Defendant Rhode Island Council 94, AFSCME, AFL CIO Local 1627 ("Council 94"), a labor union, is the bargaining unit for certain Central Falls non-teacher, non-certified school employees. Its principal place of business is in North Providence, Rhode Island. ⁵⁵

⁵⁵ The facts in this paragraph include the uncontroverted facts from the Teachers' Unions Statement of Undisputed Facts, ¶ 2.

6. The Council 94 employees participate in the Rhode Island Municipal Employees' Retirement System.

7. All state employees and teachers are required under Rhode Island law, [R.I. Gen. Laws § 36-9-2](#), to participate in the Employees Retirement System of the State of Rhode Island ("ERSRI").

8. Non-state employees and non-teachers are not permitted to be members of the ERSRI.

9. In 1952, the City adopted a home-rule charter that designated the City's school committee as one of the independent boards and commissions responsible for performing the executive and administrative work of the city.

10. On March 26, 1991, the governor of Rhode Island and the State commissioner of elementary and secondary education entered into a Memorandum of Understanding with the mayor of Central Falls and the chairmen of the Central Falls City Council, the Central Falls School Committee, and the Central Falls Review Commission. The Memorandum of Understanding contemplated a full state administrative and financial takeover of the Central Falls school system, beginning on July 1, 1992.

11. The Memorandum of Understanding set forth that the Proposed Agreement was expressly subject to certain terms and conditions, one of which was General Assembly approval.

12. In 1991, the Rhode Island General Assembly (the "General Assembly") passed legislation, 1991 R.I. Pub. Laws ch. 312 (the "1991 Act"). The 1991 Act provided for (i) shared funding of the School District by the State and the City for fiscal year ending June 30, 1992, and (ii) a shifting of the administration of the City's schools to a state administrator who was granted the same powers and duties afforded to the school committee. Specifically, the 1991 Act provided as follows:

Section 2. State Administrative Takeover of Central Falls School District July 1, 1991. The state administrative takeover of the Central Falls school system, to begin on July 1, 1991, shall be accomplished in the following manner:

(a) the governor, in consultation with the commissioner of elementary and secondary education, shall appoint a special state administrator for the Central Falls school system.

(b) The special state administrator shall have all the rights, responsibilities, *59 duties and obligations afforded to school committees under the applicable law and regulation of the state.

- (c) The special state administrator will report to the commissioner, seek community input from a nine (9) member Central Falls advisory group, and shall provide regular briefings to the mayor of Central Falls.
- (d) The special state administrator shall plan a complete state financial and administrative takeover of the Central Falls school system, commencing July 1, 1992.

Section 3. *Central Falls School District Advisory Group.* The commissioner of elementary and secondary education is hereby directed to solicit nominations for persons to serve on the Central Falls advisory group for the period July 1, 1991 to June 30, 2002. All persons except the special state administrator shall serve without compensation. The board of regents shall appoint the members of the advisory group from nominations made by the commissioner. The advisory group shall meet monthly, shall select a chairman, and shall advise and assist the special state administrator on matters relating to the complete takeover of the Central Falls school district. The special state administrator and the superintendent of schools shall serve as ex-officio, non-voting members of this advisory group.

Section 4. *Administrative plan of the Central Falls School District period of July 1, 1991 to June 30, 1992.*

- (a) During the fiscal year 1992, the operation of the Central Falls school district shall continue in the same manner as in prior fiscal years except as herein provided.
- (b) The special state administrator shall replace the school committee as provided in this act.
- (c) Collective bargaining agreements currently in force shall remain in effect through June 30, 1992.
- (d) The city of Central Falls shall continue to be responsible for payment of all bond principal and interest.
- (e) The city of Central Falls shall continue to be the fiscal agent for the Central Falls school district, except that a separate interest-bearing checking account shall be established for the school district. Only expenses incurred after July 1, 1991 shall be paid from this account; provided, further, the incurring

and payment of expenses shall be subject to the prior approval of the special state administrator or his/her designee. The account shall contain the revenues to be provided in accordance with section 1 of this act. In accordance with federal regulations, federal funds shall be deposited in a non-interest bearing checking account, and shall be subject to the conditions set forth in this act.

Section 5. Nothing contained in this act shall be interpreted to restrict the commissioner or the special state administrator from fulfilling their duties regarding the Central Falls school system.

12.1 The School District has been overseen by the Rhode Island Department of Education since July 1, 1991.⁵⁶

⁵⁶ Teachers' Union's Statement of Undisputed Facts, ¶ 3. The Teachers' Union's evidence, consisting of a portion of the Report of Receiver Mark A. Pfeiffer (predecessor to Robert Flanders in the Central Falls Receivership), does not indicate the manner or capacity the School District was overseen by RIDE in this period. RIDE has oversight responsibilities for all school districts and presumably did so even before this period began. The evidence does not indicate whether and how this oversight differed from its oversight of this and other school districts before and after the 1991 Act. It appears from the Report that Receiver Pfeiffer was referring special oversight authority put in place by the 1991 Act, and continued thereafter in succeeding legislation, and I construe this evidence to refer to those changes, the details of which are specified in the 1991 Act.

*60 13. Under the 1991 Act, the City retained the legal obligation to pay debt service on bonds for school buildings.

14. Section 4 of the 1991 Act set forth an administrative plan for the School District for the period of July 1, 1991, to June 30, 1992. It stated that "the city of Central Falls shall continue to be the fiscal agent for the Central Falls school district, except that a separate interest-bearing checking account shall be established for the school district." 1991 R.I. Pub. Laws ch. 312, § 4(e).

15. In 2002, the General Assembly passed an act, 2002 R.I. Pub. Laws ch. 204 (the "2002 Act"), codified at [R.I. Gen. Laws § 16-2-34](#). The 2002 Act replaced the state administrator created by the 1991 Act with a board of

trustees appointed by the commissioner of the department of elementary and secondary education, subject to the approval of the Rhode Island board of regents for elementary and secondary education. In part, § 16 2 34 states:

- (a) There is hereby established a seven (7) member board of trustees, which shall govern the Central Falls School District. With the exception of those powers and duties reserved by the commissioner of elementary and secondary education, and the board of regents for elementary and secondary education, the board of trustees shall have the powers and duties of school committees.
- (b) The board of regents for elementary and secondary education shall appoint the members of the board of trustees from nominations made by the commissioner of elementary and secondary education. The chairperson shall also be selected in this manner. The board of regents shall determine the number, qualifications, and terms of office of members of the board of trustees, provided however, that at least four (4) of the members shall be residents of the city and parents of current or former Central Falls public school students. The remaining three (3) shall be appointed at large.
- (f) []The board of trustees shall have ... the following powers and duties: ... (3) to appoint a superintendent to serve as its chief executive officer[.] ...
- (j) The appointment of the special state administrator for the Central Falls School District and the Central Falls School District Advisory Group, created by chapter 312 of the Rhode Island Public Laws of 1991, will no longer be in effect upon the selection and appointment of the board of trustees created in this section. All powers and duties of the special state administrator and the Central Falls School District Advisory Group are hereby transferred and assigned to the board of trustees created in this section, upon the selection and appointment of that board.

R.I. Gen. Laws § 16 2 34(a), (b), (f), and (j).⁵⁷

⁵⁷ The Receiver contends that it is established and uncontroverted that the members of the board of trustee are not subject to removal by the commissioner. The Teachers' Union admits this but

contends that neither are the members of the board of trustees subject to removal by the City. Both positions are conclusions of law, not statements of fact.

*⁶¹ 15.1 Effective July 1, 2003, the Board of Regents approved the School District's first Board of Trustees. Since then, all members of the Board of Trustees have been appointed pursuant to § 16 2 34(b). This system of State control makes the School District unique in all of Rhode Island.⁵⁸

⁵⁸ Teachers' Union's Statement of Uncontested Facts, ¶ 9.

15.2 Whereas, under the revised City Charter currently in effect, the Mayor and the City Council members must be legal residents of the City “for at least two years” § 16 2 34(b) as amended by the 2002 Act requires that only four of the seven members of the Board of Trustees must be City residents. Of the six current members of the Board of Trustees, only three are City residents.⁵⁹

⁵⁹ Teachers' Union's Statement of Uncontested Facts, ¶¶ 11 and 12.

15.3 The Teachers' Union states that it is established and uncontroverted that § 16 2 34, as amended by the 2002 Act, was not repealed by the 2007 amendment to the City Charter and has not been subsequently repealed.⁶⁰ The City responds that this is not an appropriate statement of fact but a disputed conclusion of law for the court to determine. The court agrees with the City.

⁶⁰ Teachers' Union's Statement of Uncontested Facts, ¶ 13.

15.4 The Board of Trustees continues to operate the School District pursuant to § 16 2 34.⁶

⁶¹ Teachers' Union's Statement of Uncontested Facts, ¶ 14.

15.5 The Teachers' Union states that there is evidence that the School Committee has ceased to exist since 1991, but the evidence is a statement in the affidavit of Jane Sessums, who makes the statement on the basis of the 1991 Act, and therefore this is merely a legal conclusion, and a disputed one.⁶²

62 Teachers' Union's Statement of Uncontested Facts, ¶ 14.

16. The 2002 Act did not alter the provisions of P.L. 1991, ch. 312 regarding the City's obligation to pay debt service on bonds or the City's status as fiscal agent.

17. The City remains obligated to pay debt service on bonds for school buildings. There is evidence in the record that the State reimburses the City for 97 percent of the principal and interest the City must pay on school bonds and school construction bonds. There is also evidence in the record that the amount the Receiver expects the City to pay in connection with principal and interest on bonds from fiscal year 2012 to fiscal year 2016 will be offset by between 70% and 80% per year by State reimbursement.

18. Payments for the debt service on bonds for school buildings were accounted for in the City's initial Plan of Debt Adjustment filed with the bankruptcy court on September 22, 2011.

19. In November 2006, the electors of the City approved amendments to its home-rule charter that had been proposed by the City Council.⁶³ The amendments deleted certain sections of the pre-amendment *62 charter (which had itself been adopted in 1952): § 3 608(1), which had addressed the composition of the school committee⁶⁴; § 3 608(2), which had addressed the filling of vacancies on the school committee⁶⁵; and § 3 608(3), which had addressed the qualifications of school committee members.⁶⁶ In the amended charter, § 3 608 was simply marked "reserved," without specific content. The amendments also redacted § 3 100(c), the section that created certain independent boards and commissions, by deleting the school committee from that list.⁶⁷ They also deleted in its entirety Chapter 14 of Article IV; Article IV is entitled Executive and Administrative Branch Powers and Duties, and Chapter 14 had been the chapter (comprising seven sections) that governed the school board. In the amended charter, Chapter 14 is now marked "reserved." However, the amendments left in place §§ 6 107 and 6 108, both of which appear in Article VI of the Charter, entitled "Municipal Elections."⁶⁸ Section 6 *63 107,⁶⁹ though not identical to deleted § 3 608(1), is very similar to it: like the deleted section, it specifies that the school committee shall consist of five members, one from each of the City's five wards,

and it further specifies when their terms shall begin and when elections shall be held. Section 6 108⁷⁰ is virtually identical to deleted § 3 608(2). Deleted § 3 608(3) has no remaining parallel or equivalent in the charter as amended. The original charter also included mention of school committee members in §§ 6 109 and 6 110, both of which were carried over unmodified into the amended charter. Section 6 109 specifies when general elections for city officers, expressly "including members of the school committee," shall be held. Section 6 110 deals with signature requirements on petitions for city officers, "including members of the school committee," to be elected. Also, the amended charter, at ¶ 4 1500, carries over from the original a reference to a school department: "The board of recreation shall ... cooperate with the school department in coordinating its activities with the recreation program conducted by the school department." This appears to be the only mention of a school "department" in the charters, old and new.

63 In conjunction with the motion for summary judgment, the Receiver and Teachers' Union each originally submitted isolated excerpts from published editions of the original and amended charters. The Court then ordered the parties to submit full copies of both the original charter and the amended, and the Receiver and both Unions did so in a single document entitled Collective Submission of City Charters. Facts ¶ 19 is a description of the relevant portions of the texts so produced.

64 Section 3 608(1), entitled "The school committee, stated:

The school committee shall consist of five members, one of whom shall be elected from each of the five wards as the same are now constituted. The terms of members of the school committee shall begin on the first Monday of January following the year in which they were elected, except that a member elected to fill a vacancy shall serve for the balance of the unexpired term. At the municipal election in 1953, a member from the first ward shall be elected for a term of two years, a member from the second ward and a member from the third ward for a term of four years, a member from the fourth ward and a member from the fifth ward for a term of six years. At each municipal election thereafter, there shall be elected for a term of six years a member of the school committee to replace the one whose term shall be expiring.

65 Section 3 608(2), entitled “Vacancies, stated:
In case of death, resignation, or inability to serve, or removal from the ward from which he was elected, of any member of the school committee, or if for any other cause there shall be a vacancy in the membership of the committee, a majority of the members of the school committee may appoint, as a member of said committee, a person who at the time of his appointment shall be a qualified elector in the ward where such vacancy occurs. Such persons shall hold office as a member of the school committee until the first Monday in January, succeeding the municipal election, next following his appointment, at which election the unexpired term shall be filled by the electors of the ward so affected.

66 Section 3 608(3), entitled “Qualifications of members of the school committee, stated in its entirety: “Members of the school committee, at the time of their elections, shall be qualified electors of and residents of the respective ward from which they are elected.

67 Section 3 100(c) stated: “The executive and administrative work of the city shall be performed by: ... (c) The following independent boards and commissions which are hereby created: ... School committee. No other entity listed in § 3 100(c) was deleted from the list, but three were added (the Zoning Board, Detention Facility Board, and Planning Board), and the Board of Pensions and Retirement was changed to the Board of Retirement.

68 An editor's note appearing in the texts of both the original and the amended charters, at the start of Article VI, which includes section 6 107 and 6 108, indicates that the text of this article does not derive from the 1952 original but from a 1953 corrective amendment to it: “Article VI of the original Home Rule Charter was declared unconstitutional in *State ex rel Messier v. Turrow et al.*, 81 R.I. 149, 99 A.2d 484. Subsequently, the Legislature, in a Special November Session, 1953, enacted chapter 3239 entitled as follows: ‘An Act pertaining to municipal primaries and elections in the City of Central Falls, and validating certain provision in the City of Central Falls Home Rule Charter. *This Act is set out herein, in place of the original Article VI.* (Emphasis added.) If this note is to be credited (I make no determination on that issue), then (i) the 1952 charter did not include this Article VI, (ii) the 2007 amended charter may not have included it either, and (iii) Article VI may be a legislative fix

that the editors reproduced as if it were part of the charter because it was designed to fill a gap left by the invalidation of the original Article VI. This leaves much uncertainty about Article VI.

69 Section 6 107, entitled “Election of members of school committee, states:

The school committee shall consist of five members, one of whom shall be elected from each of the five wards as the same are now constituted. The terms of members of the school committee shall begin on the first Monday of January following the year in which they were elected, except that at the election held on January 19, 1954, a member from the first ward shall be elected to serve from the 1st day of February, 1954 until the first Monday of January, 1956, a member from the second ward and a member from the third ward to serve from the 1st day of February, 1954, until the first Monday of January, 1958, and a member from the fourth ward and a member from the fifth ward to serve from the 1st day of February, 1954, until the first Monday of January, 1960 and until their successors are elected and qualified. A member elected to fill a vacancy shall serve for the balance of the unexpired term. At each municipal election to be held on the first Tuesday after the first Monday in November, 1955 and in every odd year thereafter, there shall be elected for a term of six years commencing with the first Monday in January then next succeeding a member of the school committee to replace the one whose term shall be expiring.

In the language of the amended charter, this section is modified only by the replacement of “the 1st day of February each time it occurs with “February 1.

70 Section 6 108, entitled “Vacancies in membership of school committee, stated:

In case of death, resignation, or inability to serve, or removal from the ward from which he was elected, of any member of the school committee, or if for any other cause there shall be a vacancy in the membership of the committee, a majority of the members of the school committee may appoint, as a member of said committee, a person who at the time of his appointment shall be a qualified elector in the ward where such vacancy occurs. Such person shall hold office as a member of the school committee until the first Monday in January, succeeding the municipal election next following his appointment, at which election the

unexpired term shall be filled by the electors of the ward so affected.

In the amended charter, the language of this section is identical.

20. In 2007, the General Assembly ratified the city charter as amended.

21. The General Assembly has never authorized the Central Falls Board of Trustees or the state administrator to exercise any sovereign power in the areas of taxation, eminent domain, or the police power other than the enforcement of compulsory *64 attendance laws by the Superintendent of Schools.

22. From 1991 to the present, the City has provided services to the School District without invoicing or otherwise charging the School District for said services, including, but not limited to, police programs in the schools, fire department safety programs in the schools, maintenance of school athletic facilities, purchasing of sports equipment, maintenance of school parking lots, trash removal for the schools, fire alarm and sprinkler systems in the schools, and maintenance, repairs, and upgrades to various school buildings. There is evidence that “historically, the City has not budgeted funds specifically for the purpose of maintaining the school buildings.”

22.1 Since 1991, the operational costs for the Central Falls public schools have been paid for by the State of Rhode Island. Between fiscal year 1992 and fiscal year 2011, the State provided \$604 million for the operation of the School District.⁷¹ Between 2007 and 2011, and aside from any federal funding the City may have received for its schools, the School District has been entirely funded by the State. No other municipal school district in Rhode Island is funded entirely by the state.⁷²

⁷¹ Teachers' Union's Statement of Uncontested Facts, ¶¶ 16-17.

⁷² Teachers' Union's Statement of Uncontested Facts, ¶ 18.

23. The Rhode Island Department of Elementary and Secondary Education (“RIDE”) completed a full program and finance review of the School District on October 31, 2011 and issued a Final Program Review Determination Letter on November 14, 2011. RIDE anticipates a

\$256,432 deficit in the School District Unrestricted Fund at the conclusion of fiscal year ending June 30, 2012.

24. In 2010, the General Assembly passed legislation which provided for a new funding formula for public education in Rhode Island (the “Funding Formula”).

25. In support of the legislation, Deborah Gist, the Commissioner of the Department of Elementary and Secondary Education, submitted a report to the General Assembly on the Funding Formula, dated November 15, 2010.

26. Under the Funding Formula, commencing Fiscal Year ending June 30, 2013, the City will be required to make contributions to the cost of operating the City's schools by paying funds into the Central Falls Stabilization Fund. There is evidence that the City would be required to fund barely five percent of the School District's total operating costs, while the remaining funding required will continue to come from the State, and that the State has acknowledged that “it is unlikely that the city will be able to fund education in the immediate future” and has begun to explore possible ways it could “allow for 100% funding if the city cannot afford to pay its local contribution.”

27. The City's contribution to the Central Falls Stabilization Fund was included in the City's initial Plan of Debt Adjustment filed with the bankruptcy court on September 22, 2011.

28. Under a proposed legislative change to R.I. Gen. Laws § 16-7.2-6, the City's contribution to the Central Falls Stabilization Fund would be increased. There is evidence that the City would be required to fund barely five percent of the School District's total operating costs, while the remaining funding required will continue to come from the State, and that the State has acknowledged that “it is unlikely that the city will be able to fund education in the immediate future” and has begun to explore possible ways it could *65 “allow for 100% funding if the city cannot afford to pay its local contribution.”

29. The Funding Formula funds state-run schools, such as charter public schools, the William M. Davies, Jr. Career and Technical High School, and the Metropolitan Regional Career and Technical Center, differently from its funding of local school districts.

30. Given changes in the school Funding Formula based, in part, on declining enrollments, RIDE forecasts a decline in the School District's state revenue, unrestricted state aid, of \$1,688,271 each year for eight years starting in fiscal year ending 2014. The cumulative impact of this decrease over the five-year period from fiscal year ending 2012 to fiscal year ending 2016 is \$4,783,465. There is evidence that the State has acknowledged that "it is unlikely that the city will be able to fund education in the immediate future" and has begun to explore possible ways it could "allow for 100% funding if the city cannot afford to pay its local contribution."

31. In addition, the School District received over \$10 million in federal grant fund revenues from the 2009 American Recovery and Reinvestment Act ("ARRA"). These monies, used to support school programming and other initiatives, will not be replaced once spent: \$4.3 million in ending fiscal year 2012, \$2.9 million in fiscal year ending 2013, \$.9 million in fiscal year ending 2014, \$.1 million in fiscal year ending 2015, and no funds in fiscal year ending 2016. The cumulative impact of this decrease over the five-year period from fiscal year ending 2012 to fiscal year ending 2016 is \$4,324,259.

32. Additionally, RIDE estimates that the School District will face slight declines in non-ARRA federal grant fund revenues over the five-year period. The cumulative impact of this decrease over the five-year period from fiscal year ending 2012 to fiscal year ending 2016 is \$555,122.

33. At the time the City filed its initial Plan of Debt Adjustment, the School District's operating costs were fully funded by the State, and the financial information available at the time indicated that the School District had a funding surplus for Fiscal Year ending June 30, 2012.

34. Based upon the RIDE forecasts, the School District is facing a significant drop in revenue sources of approximately \$8.5 million over the five-year period. Given the starting deficit at the end of fiscal year ending 2012 and increasing cost trends, without significant cuts to expenses, the School District will have a cumulative deficit well in excess of \$10 million by the end of fiscal year ending 2016.⁷³

⁷³ The School District admits the first sentence of this paragraph but, without citing controverting evidence, denies the second "because it is impossible to know

with certainty what the School District's costs and revenues will be during that time frame. I deem the second sentence uncontroverted subject to the unremarkable caveat that it is impossible to know the future and that budgetary projections are projections, not statements of fact about the future.

35. As a result of the RIDE Program Review and RIDE revenue forecasts, the City needs to develop an amended Plan of Debt Adjustment to fund the Fiscal Year ending 2012 deficit as well as the projected deficits for the remaining years of the five-year term of the Plan of Debt Adjustment.⁷⁴

⁷⁴ The Teachers' Union denies this fact only on the basis that "it is the State, not the City, which funds the School District and negotiates collective bargaining agreements with the Unions. Accordingly, an adjustment of the School District's finances would have no impact on the City's finances. I therefore accept ¶ 35 subject to the caveat that any deficit in the School District's budget does not affect the City's budget if the School District is not part of the City.

*⁶⁶ 36. The most recent collective bargaining agreement between the School District and the Teachers' Union expired on August 31, 2011.

37. Negotiations on a new collective bargaining agreement were conducted between negotiating teams from the School District and the Teachers' Union prior to the filing of the bankruptcy petition. These negotiations did not yield a new collective bargaining agreement.

38. Soon after the commencement of the bankruptcy case, the Receiver replaced the negotiating team that had been acting on behalf of the School District and continued negotiating a collective bargaining agreement between the City and the Teachers' Union. The Teachers' Union reserved its right to argue that the School District is not subject to the City's bankruptcy proceeding and that the Receiver is without authority to execute a collective bargaining agreement.

39. On July 29, 2011, the Receiver issued an order to the School District directing that the Board of Trustees not to enter into or to amend any collective bargaining agreements or to approve expenditures or contracts in excess of \$25,000 without the Receiver's prior written approval.

40. The City and Council 94 have a collective bargaining agreement which expires on June 30, 2013.

41. The City and Council 94 began discussions to open up and amend their collective bargaining agreement in December 2011.

42. R.I. Gen. Laws § 16 1 11 states:⁷⁵

⁷⁵ Citing to the two statutory provisions reproduced in this paragraph, the City states that it is established and uncontroverted that “the City will be liable for any difference between any appropriation by the state government or the federal government and the costs arising from any collective bargaining agreement commencing in Fiscal Year ending 2012. The Teachers' Union denies this, states that § 16 1 11 and § 16 7.2 6(d) speak for themselves, and, on the basis of a RIDE 2010 Report (Teachers Exhibit 29, at pp. 8 9), states (i) that the State continues to fully fund the School District and (ii) that the State has acknowledged that “it is unlikely that the City will be able to fund education in the immediate future and has begun to explore possible ways it could “allow for 100% funding if the city cannot afford to pay its local contribution. Because the City's “fact is not a fact but a conclusion of law based on the cited statutes, it suffices to reproduce the statutory language in question. The Court further notes that the Union's evidence that the State may find a way to avert a shortfall does not controvert the proposition that the City will be liable for any shortfall that the State does not avert.

For the purposes of this section and §§ 16 1 10 and 16 5 22, the department of elementary and secondary education shall be subrogated to all the powers and functions of the city or town school committee, including the right to draw orders upon the city or town treasurer for the payment for the support of the public schools of the city or town of any money in the city or town treasury required by law to be accredited to the public school account. The department of elementary and secondary education may also apportion to or expend for the support of the public schools of the city or town any part of the annual appropriation for public schools provided by § 16 4 5 as shall not be apportioned for other purposes, or the whole, or any part of the annual appropriation as the general

assembly shall make for the purposes of this section and §§ 16 1 10 and 16 5 22.

*67 And R.I. Gen. Laws § 16 7.2 6(d) states:

Central Falls Stabilization Fund is established to assure that appropriate funding is available to support the community, including students from the community that attend the charter schools, Davies, and the Met Center pursuant to § 16 7.2 5, due to concerns regarding the city's capacity to meet the local share of education costs. This fund requires that the difference between education aid calculated pursuant to § 16 7.2 3 and education aid, as of the effective date of the formula, shall be shared between the state and the city of Central Falls. The state's share of the fund will be paid directly to the Central Falls school district upon verification that the city has transferred its share of the local contribution for education. At the end of the transition period defined in § 16 7.2 7, the municipality will continue its contribution pursuant to § 16 7 24.

43. Based upon preliminary financial model projections prepared by the City, and in particular the sharp decrease in projected revenues from state and federal sources over the term of the City's five-year plan of debt adjustment, without substantial changes to the structure and delivery of educational services within the School District, the City will not be able to propose a plan with balanced budgets in the absence of a substantial infusion of state or federal funds.⁷⁶

⁷⁶ The facts in this paragraph are established by averments in the affidavit of Gayle Corrigan. The Teachers' Union denies this paragraph and cites as controverting evidence only the RIDE 2010 Report (Teachers Exhibit 29, at pp. 8 9), which, the Union says, stands for the proposition “that the State continues to fully fund the School District and has

begun to explore possible ways it could ‘allow for 100% funding if the city cannot afford to pay its local contribution. This evidence does not controvert the City’s fact in evidence because that evidence already states that the City “will not be able to propose a plan with balanced budgets *in the absence of a substantial infusion of state or federal funds.*”

44. The Rhode Island State Fiscal Year 2012 Supplemental Appropriations Act, Article 1, has a separate line item for the School District. No other school district in Rhode Island has a similar line item entry in this document. The only other schools to have such separate State budget allocations are State schools such as Rhode Island School for the Deaf and Davies Vocational.⁷⁷

⁷⁷ Teachers' Union's Statement of Uncontested Facts, ¶ 19.

45. Rhode Island Education Aid, an October 2010 report of the Rhode Island House Fiscal Advisory Staff, shows State aid to Central Falls as a separate budgetary line item.⁷⁸

⁷⁸ Teachers' Union's Statement of Uncontested Facts, ¶ 20.

46. The Fiscal Year 2010, 2009, and 2008 Personnel Supplements for the State Department for Elementary and Secondary Education show State aid to the School District as a separate budget line item. No other school district has a similar line item entry in these documents.⁷⁹

⁷⁹ Teachers' Union's Statement of Uncontested Facts, ¶ 21.

47. Except insofar as (i) the School District is part of the City (which is a question of law to be decided in this case) and (ii) members of the Board of Trustees are residents of Central Falls, the School District establishes its annual budget with no City involvement.

48. Under § 16 2 34, the Superintendent must “prepare a budget and otherwise participate in budget development as *68 required,” R.I. Gen. Laws § 16 2 34(h)(6), and the Board of Regents provides “parameters for overall budget requests, approve[s] the budget, and otherwise participate[s] in budget development,” and the Commissioner recommends “parameters for overall budget requests, recommend[s] a budget, and otherwise

participate[s] in budget development,” R.I. Gen. Laws § 16 2 34(c), (d).⁸⁰

⁸⁰ Teachers' Union's Statement of Uncontested Facts, ¶ 23.

49. The historic practice has been for the superintendent to prepare the budget. Except insofar as the School District is a part of the City, in which case the superintendent would be a City official, no City official has had responsibility for preparing or approving the School District’s budget since 2005.⁸

⁸¹ Teachers' Union's Statement of Uncontested Facts, ¶ 24. The term “historic practice” here is undefined. And the significance (if any) of 2005 is not evident from the deposition testimony submitted in support of this paragraph.

50. The City and the School District issue separate annual financial statements. In each year starting with the year ending June 30, 2003, the financial statements prepared for the City were prepared by different auditors than the financial statements prepared for the School District.⁸²

⁸² Teachers' Union's Statement of Uncontested Facts, ¶ 25.

51. In each year starting with the year ended June 30, 2002, Note 1 to the City’s financial statements state:

Reporting Entity: In evaluating how to define the City, for financial reporting purposes, management [i.e., the City] has considered all potential component units. The decision to include a potential component unit in the reporting entity was made by applying the criteria set forth in GASB Statement No. 14. Under GASB Statement No. 14, the financial reporting entity includes both the primary government and all of its component units. Component units are legally separate entities that meet any of the following three tests:

Test 1 The primary government appoints the voting majority of the board of the potential component unit and

- Is able to impose its will on the potential component unit and/or
- Is in a relationship of financial benefit or burden with the potential component unit;

Test 2 The potential component unit is fiscally dependent upon the primary government; or

Test 3 The financial statements would be misleading if data from the potential component unit were not included.

The following entities were considered for classification as a component unit for fiscal year 2003:

- Central Falls Redevelopment Agency

Although this entity meets certain criteria of the tests previously listed, it is deemed not to have separate legal status apart for the City. As a result, the financial data of the above entity has been included as a non-major special revenue fund within the City's financial statements.

- Central Falls Housing Authority
- Central Falls Community Center
- Central Falls School District
- Central Falls Detention Facility Corporation

Since these entities do not meet any of the above three tests, they have *69 not been included in the financial reporting entity.⁸³

⁸³ Teachers' Union's Statement of Uncontested Facts, ¶ 26.

52. The covers of the eight annual financial statements for the School District for the years ended June 30, 2003 through June 30, 2010, describe the School District as “a component unit of the State of Rhode Island.”⁸⁴

⁸⁴ Teachers' Union's Statement of Uncontested Facts, ¶ 27.

53. The School District has its own bank accounts that are maintained for the benefit of the School District. It is the responsibility of the Superintendent to maintain those accounts; the Superintendent has authority over those accounts and uses them for “school related purposes.” Except insofar as the School District may be deemed a unit of the City (a contested issue of law which it is the purpose of this adversary proceeding to decide), and therefore

the Superintendent a City official, no City official has authority over those accounts.⁸⁵

⁸⁵ Teachers' Union's Statement of Uncontested Facts, ¶ 28.

54. School District employees currently receive paychecks issued by the School District payroll department.⁸⁶ Before the 1991 State takeover, payroll checks for School District employees were issued by the “City of Central Falls.” After the takeover, those checks were issued by the “Central Falls School District.”⁸⁷

⁸⁶ Teachers' Union's Statement of Uncontested Facts, ¶ 29.

⁸⁷ Teachers' Union's Statement of Uncontested Facts, ¶ 30.

55. To obtain insurance, the School District participates in “a non-profit, public entity risk pool (Rhode Island Inter Local Risk Management Trust, Inc.), which provides coverage for property/liability claims and workers compensation claims.” The City, too, participates in the risk pool, but it signed a participation agreement with the risk pool separate and apart from the participation agreement the School District executed with the risk pool. The School District pays its own premiums to the risk pool for coverage, separate from any premiums paid by the City for coverage for the City.⁸⁸

⁸⁸ Teachers' Union's Statement of Uncontested Facts, ¶¶ 31-33.

56. The Superintendent answers to the Board of Trustees, and the Board of Trustees answers to the Board of Regents and the Commissioner. The School District has its own Finance Department, HR Department, Building and Maintenance Department, and IT system separate from the City.⁸⁹

⁸⁹ Teachers' Union's Statement of Uncontested Facts, ¶ 34.

57. The School District maintains its own business records, which the Superintendent is responsible for maintaining.⁹⁰

⁹⁰ Teachers' Union's Statement of Uncontested Facts, ¶ 35. The Teachers' Union also contends that it

is established and uncontroverted that “the School District can sue and be sued in its own name, but the Receiver disputes this, saying that although the School District has sued and been sued in its own name, the General Assembly has not granted this power under *R.I. Gen. Laws* §§ 16 2 9 and 16 2 34. The court concludes that this “fact” is a conclusion of law.

58. The School District enters into ordinary course commercial contracts in its own name, including on at least one occasion with the City itself (through the Receiver).⁹

91 Teachers' Union's Statement of Uncontested Facts, ¶ 36.

*70 59. With the exception of contracts for buildings and maintenance, since 2005, there have been no City officials (other than the Superintendent, if the School District is part of the City) whose job it is to approve ordinary course goods and services contracts entered into by the School District.⁹²

92 Teachers' Union's Statement of Uncontested Facts, ¶ 37.

60. Section 16 2 34 provides that the superintendent, along with the chair of the Board of Trustees, must “negotiate ... all district employment contracts, which contract shall be subject to the approval of the commissioner of elementary and secondary education with the concurrence of the board of regents.” *R.I. Gen. Laws* § 16 2 34(h)(10).⁹³

93 Teachers' Union's Statement of Uncontested Facts, ¶ 38.

61. The Chair of the Board of Trustees and the Superintendent, along with additional designees, have negotiated collective bargaining agreements on behalf of the School District. Since the advent of the Board of Trustees in 2002, all School District contracts with the Teachers' Union have been approved by the Board of Trustees with the concurrence of the Commissioner and Board of Regents. The Superintendent and the Chair of the Board of Trustees submitted the most recent collective bargaining agreement between the Teachers' Union and the School District to the Commissioner and the Board of Regents for their approval. The Commissioner approved

the agreement and the Board of Regents concurred with the Commissioner's approval.⁹⁴

94 Teachers' Union's Statement of Uncontested Facts, ¶¶ 39 40.

62. Since 1992, no City official (except for the Superintendent and the Board of Trustees to the extent they are deemed City officials) has participated in negotiations between the School District and its unions.⁹⁵

95 Teachers' Union's Statement of Uncontested Facts, ¶ 41.

63. The School District enters into collective bargaining agreements its own name and has done so since 1992.⁹⁶

96 Teachers' Union's Statement of Uncontested Facts, ¶ 42.

64. The School District has its own formal personnel policies, set by the Superintendent in consultation with and subject to the approval of the Board of Trustees. Except to the extent that the School District is part of the City and the Superintendent is therefore a City official, no City official has any role in setting these policies.⁹⁷

97 Teachers' Union's Statement of Uncontested Facts, ¶ 43.

65. The Superintendent is ultimately responsible for hiring and firing employees (except that there is a question of law as to whether terminated employees have a right of appeal to the Board of Trustees).⁹⁸

98 Teachers' Union's Statement of Uncontested Facts, ¶ 44.

66. Elected City officials have had no input on employment decisions that were made by Superintendent Gallo or any other superintendent from 2005 to the present.⁹⁹

99 Teachers' Union's Statement of Uncontested Facts, ¶ 45.

67. The pay of most School District employees is set by their collective bargaining agreements, which are negotiated by the Superintendent and subject to the approval of the Commissioner of Education and the Board of Regents. *R.I. Gen. Laws* § 16 2 34(h)(10).

Except to *71 the extent that the School District is part of the City and the Superintendent is therefore a City official, no City official is responsible for deciding how much any employee of the School District gets paid. ⁰⁰

¹⁰⁰ Teachers' Union's Statement of Uncontested Facts, ¶ 46.

Count I: Whether the School District Is Part of the City

a. Arguments of the Parties

The parties' arguments are numerous and extensive. I summarize here only their overall structure.

The Receiver's position is as follows. Rhode Island law governs the question of whether the School District is part of the City. Case law in Rhode Island recognizes that education is in the first instance a state-level concern, but one that the General Assembly has delegated to or vested in the school committees of the various municipalities. The Central Falls home rule charter of 1952 created a school committee and gave to it the basic governance of the City's schools, collectively known as the School District. The School District is not a separate entity from the City: it lacks incidents of municipal sovereignty, such as police powers and powers of taxation and eminent domain; it cannot hold property in its own name; though it may contract in its own name, the City is liable for its contracts; it cannot be sued in its own name; and prior to 1991, it was controlled by the City's school committee.

The 1991 and 2002 Acts did not change the School District's status as a department of the City. The plain language of those acts confirms that the City remained the fiscal agent for the School District, that governing case law was not abrogated, that the City remained liable for debt service on school bonds, and that the City continued to own and maintain the school buildings and adjacent property. More importantly, the Acts cannot have divested the City of the School District because that would have altered the City's form of government, which, by the State constitution, would have required passage by the City's electorate. Though the City has no active school committee, the City Charter, amended in 2007, continues to provide for the election of a school committee.

Nor does the extent of the School District's reliance on State funding change its status. Many municipalities receive State funding to aid the operation of their schools.

Central Falls differs only in degree and has continued to fund the schools, albeit minimally. And the State, by recent legislation, is requiring the City to fund a larger portion of the School District's budget in coming years. ⁰

¹⁰¹ Anticipating that the Teachers' Union would make an "arm of the state" argument, the Receiver also made extensive arguments on that subject. The Teachers' Union did not in fact make the anticipated argument, and therefore I need not set forth the Receiver's position on it. I agree with the Receiver and the Teachers' Union that the arm of the state theory is irrelevant.

The Teachers' Union responds in the first instance with arguments under federal law. The School District is not a debtor in this Chapter 9 case. It is a separate and distinct governmental entity. Under federal law, the School District must be treated as a separate entity for Chapter 9 purposes and is not authorized to be a debtor in its own right. The exercise of bankruptcy jurisdiction over it would violate the Tenth Amendment.

In the alternative, the Teachers' Union argues that, under Rhode Island law, the School District is not part of the City. Before 1991, it fit the paradigm of a municipally-run *72 school district. That changed with the 1991 and 2002 Acts, which together removed the schools from City control. These changes were sealed by amendments to the City's charter in 2007, which terminated the City's school committee. The State's control and funding of the School District is not just extensive, but complete and unique in the State. It must be seen as a difference in kind. Any argument that these changes are "only temporary" ignores their 21 year duration and modifications to the City charter. And the cases on which the Receiver relies are inapposite: they are limited to circumstances where the school district is funded by the municipality and controlled by its school committee, neither of which is true in Central Falls. The State has the power to create a school district that is independent of a municipality and, by virtue of the 1991 and 2002 Acts and the amendment to the City charter, has done so here.

In its reply brief and at oral argument, the Receiver added a further argument, this one under federal law: that under the definition of municipality in the Bankruptcy Code, the School District would not qualify as a municipality in its

own right, and therefore it should not now be viewed as a separate entity.

b. Overview of Analysis

The debtor in this chapter 9 case is the City of Central Falls, and the question presented by Count One is simply whether, under Rhode Island law, the School District is part of the City.¹⁰² Under Rhode Island law, the crucial factors are not the extent of state funding or the duration of state intervention. Rhode Island law begins with the act by which the School District was created, the adoption of the City Charter of 1952. The Charter created a municipally-elected school committee to govern the City's schools, collectively known as the School District. Until 1991, the School District fit the paradigm of a municipally-run school district, one which, under Rhode Island case law, would have been viewed and treated as part of the City. The 1991 and 2002 Acts transferred political control over the School District from the City, through its school committee, to a state administrator and then to the state-appointed Board of Trustees. It may well be, as the Receiver argues, that these Acts cannot by themselves have removed the School District from the City. The Receiver contends that under the Rhode Island constitution, removal would have required an amendment to the City's Charter, itself requiring a vote of the City's electors. In 2007, however, the City did, by the vote of its electors approving amendments to the City's charter and the State legislature's ratification, disestablish its school committee and with it any remaining political control over and constitutional connection to the School District. The City's remaining obligations to and interests in the School District—that the District serves the City's children, uses the City's school properties, requires City funding, is governed in part by trustees who are City residents—do not make it part of the City. However provisional this arrangement may be, the status quo is separation.

¹⁰² If not, the court need not determine what else the School District might be: a stand alone entity, an agency of the State, or something else. That issue is not presented here or within this court's jurisdiction to decide.

c. Governing Law

For jurisdictional purposes, the Teachers' Union insisted that the issues presented in this proceeding were exclusively of state law, yet it now leads with three

arguments under federal law: (i) the *73 School District is not eligible to be a debtor under Chapter 9, both because it has not been authorized by the State to file a bankruptcy petition and because the Receiver himself has not been authorized by the State to file a Chapter 9 petition on its behalf; (ii) exercise of bankruptcy jurisdiction over the School District would violate the Tenth Amendment to the U.S. Constitution; and (iii) the School District would qualify as a municipality under the Bankruptcy Code and therefore, even if under state law it is part of the City, it must be treated as a separate and distinct entity for purposes of Chapter 9. The Receiver responds that the first and second arguments are moot and irrelevant but answers the third at some length, arguing that the School District is not a municipality within the meaning of § 101(40) of the Bankruptcy Code and therefore should not be deemed a separate entity from the City. These arguments require that the court determine their relevance and whether the question presented by Count One is, at bottom, one of federal law or state.

[27] Only a “municipality,” as that term is defined in the Bankruptcy Code, may be a debtor under Chapter 9 of the Bankruptcy Code.¹⁰³ The debtor in this case is the City of Central Falls—and only the City of Central Falls. The City is undisputedly a municipality, and its eligibility to be a debtor has already been determined, as reflected by entry of an order for relief.¹⁰⁴ As the Receiver points out, he has not sought, and does not in this proceeding seek, Chapter 9 relief for the School District. Accordingly, I conclude that the Teachers' Union's arguments about eligibility—that, for lack of State authorization, the School District is not eligible to be a debtor under Chapter 9, and that the Receiver is not authorized to file a Chapter 9 petition on its behalf—are moot and irrelevant.

¹⁰³ 11 U.S.C. § 109(c)(1) (“an entity may be a debtor under chapter 9 of this title if and only if such entity (1) is a municipality”); 11 U.S.C. § 101(40) (in title 11, “ ‘municipality’ means political subdivision or public agency or instrumentality of a state”).

¹⁰⁴ The court established a deadline for filing objections to the eligibility of the City to be a debtor and for filing motions to dismiss. All filed objections to eligibility were withdrawn, whereupon the court entered an order for relief. See 11 U.S.C. § 921(c) and (d).

[28] In Count One, the Receiver seeks only a determination that the School District is part of the City. A judgment in his favor on this count would not add a debtor to this case but merely define the scope of the existing debtor. That debtor, the City, has voluntarily petitioned the court for bankruptcy relief and has done so with proper state authorization; the Teachers' Union does not contend otherwise. Consequently, the resulting exercise of bankruptcy jurisdiction over the City, whether it includes the School District or not, would not offend the Tenth Amendment. The Teachers' Union appears to concede this, too, because it argues that the offense against the Tenth Amendment would occur if (i) the court exercised jurisdiction over the School District (ii) notwithstanding that it is a *separate* entity from the City. But this cannot occur. If the School District is deemed a separate entity, there will be no exercise of jurisdiction over it, either as part of the debtor or as a separate debtor. The Tenth Amendment argument is therefore moot, of no consequence.

[29] This leaves only the Teachers' Union's third argument: that the School District would qualify as a municipality under the Bankruptcy Code and therefore, even if under state law it is part of the City, it must be treated as a separate and distinct entity for purposes of Chapter 9. In restated form, the Union is arguing that *74 even if, under Rhode Island law, the School District is a part of the debtor City, the Bankruptcy Code requires that it be treated otherwise. The court need not address this issue unless it first determines that, under state law, the School District is part of the City; otherwise, it is moot. Even if the court were to determine that the School District is part of the City, the issue would be collateral to the declaratory counts that are the subject of the Receiver's complaint. In substance this argument is a motion to dismiss the bankruptcy case as to a portion of the debtor. Such a motion must be filed in the bankruptcy case itself, with notice to all creditors. It is not properly brought in this adversary proceeding, much less (in the first instance) by argument in response to a motion for summary judgment, and is in fact untimely.

[30] In the interest of completeness, however, I address the merits here. The Union rests this argument on five cases in which a school district, utility district, water district, or housing authority has been deemed a municipality that is eligible to be chapter 9 debtor in its own right, separate from the municipality in which it is

located. I need not parse the cases in any depth; at best, they stand for the proposition that a school district may, in some instances, be a municipality and an eligible Chapter 9 debtor.

This is very different from saying that Chapter 9 authorizes a bankruptcy court to exclude from bankruptcy relief a school district or other portion of an eligible debtor municipality, notwithstanding that the school district is, under the law of the state of which it is a creature, part of the debtor municipality. I am aware of no authority for that practice and find none in Chapter 9. “[A]n entity may be a debtor under chapter 9 ... if ... such entity is a municipality.”⁰⁵ A municipality, if it is eligible at all, is eligible as it exists in state law. The Bankruptcy Code neither creates nor redefines it and makes no provision for limiting eligibility to portions of otherwise eligible municipalities. This proposal has no parallel in other chapters of the Code. What the Teacher's Union is proposing finds no basis in the Bankruptcy Code.

¹⁰⁵ 11 U.S.C. § 109(c)(1).

In addition, it would be antithetical to the principles of the Bankruptcy Code, which is informed by an intent to bring all of a debtor's debts and contracts into the case, in order to provide the most comprehensive relief possible.⁰⁶ Were the court to exclude from a municipality's bankruptcy case significant financial obligations of the debtor, the utility of its bankruptcy relief would be severely compromised. For all these reasons, the court rejects this argument.

¹⁰⁶ See, e.g., 11 U.S.C. § 101(5) (definition of claim).

[31] This leaves only Count One as framed by the Receiver. It asks not whether the School District is a municipality but whether it is part of the City of Central Falls. As the City is a creature of Rhode Island law, so must the answer to this question be.⁰⁷ This matter is therefore governed by Rhode Island law.

¹⁰⁷ See *Butner v. United States*, 440 U.S. 48, 54–55, 99 S.Ct. 914, 918, 59 L.Ed.2d 136 (1979) (“Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law. “Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested

party is involved in a bankruptcy proceeding.). *Butner* involved property rights, not the relation of a municipality to its school district, but the principle is the same: unless Congress has altered the governing considerations, a question of state law should be determined in the usual manner, unaffected by the bankruptcy context in which the question arises.

*75 [32] [33] [34] When ruling on an issue of state law, a federal court exercising bankruptcy jurisdiction, like a federal court sitting in diversity, must rule as it believes the highest court of the state would rule.⁰⁸ To that end, the federal court should employ the method and approach announced by the state's highest court.⁰⁹ Where the issue is one of statutory construction, the court should follow the state's rules of statutory construction.⁰

108 *In re Miller*, 113 B.R. 98, 101 (Bankr.D.Mass.1990).

109 *Cahoon v. Shelton*, 647 F.3d 18, 22 (1st Cir.2011).

110 *Woods v. Friction Materials, Inc.*, 30 F.3d 255, 263 (1st Cir.1994); *Huguenin v. Ponte*, 29 F.Supp.2d 57, 63 (D.R.I., 1998).

d. The City Charter of 1952

[35] Municipalities are creatures of state law and subject to the power of the State, as limited by its constitution, to create, divide, and even abolish them. The issue of whether the School District is part of the City turns on how the City and its relation to the School District are defined and constituted by state law.

111 *Kennedy v. Mayor of Pawtucket*, 24 R.I. 461, 53 A. 317, 320 (1902), citing *Laramie Co. v. Albany Co.*, 92 U.S. 307, 310, 23 L.Ed. 552 (1875) (“Corporations of the kind are properly denominated public corporations, for the reason that they are but parts of the machinery employed in carrying on the affairs of the State; and it is well settled law, that the charters under which such corporations are created may be changed, modified, or repealed, as the exigencies of the public service or the public welfare may demand.).

In this instance, the originating act that is, the act by which the School District was formed is the adoption by the City and ratification by the State of the City's home-rule charter of 1952. The parties have cited to the court no other act of the State by which the School District was established,² and I am aware of no other. The City of

Central Falls is a duly authorized municipal corporation that has a home-rule charter adopted in accordance with Article 13 of the Rhode Island Constitution.³ The City's charter, first adopted in 1952 and amended in 2007, in large measure defines the form and constitution of the City as a body politic.

112 I set aside for the time being any later changes or reconstitutions, including those effected by the 1991 and 2002 Acts and the 2007 changes to the city charter.

113 *Moreau v. Flanders*, 15 A.3d at 569.

In relevant part, § 3 100 of the 1952 charter specified the authorities through which the executive and administrative work of the City would be performed and also *created* certain of those authorities, including a school committee. It stated: “The executive and administrative work of the city shall be performed by: ... (c) The following independent boards and commissions *which are hereby created*: ... School committee.”⁴ By this act the Central Falls School District was constituted as a part of the City of Central Falls. The nomenclature “school district” appears to be simply the term by which the State refers to the collection of elementary and secondary schools that are operated by the school committee of a particular city or town. The charter essentially creates the school district as a department of the City, under the control of the City's elected school committee, one of the City's independent boards.⁵

114 1952 Charter of the City of Central Falls, § 3 100(c) (emphasis added).

115 In other sections of Article III of the Charter, entitled “Executive and Administrative Branch Organization, the 1952 charter specified how many members the committee would have and when their terms would commence, § 3 608(1), the manner of filling of vacancies on the school committee, § 3 608(2), and the qualifications of school committee members. § 3 608(3). And in Article VI, entitled “Municipal Elections, the 1952 charter contained two further sections, §§ 6 107 and 6 108, that dealt exclusively with school committee members and that were essentially duplicative §§ 3 608(1) and 3 608(2). See Facts ¶ 19 above.

*76 The Receiver has succinctly and accurately summarized Rhode Island law on the relation of a school

committee to its municipality on the one hand and the State on the other. The Rhode Island Constitution grants the General Assembly plenary power over education.⁶ The General Assembly has exercised this power generally by statutorily vesting power over education in local school committees:

116 *City of Pawtucket v. Sundlun*, 662 A.2d 40, 56 57 (R.I.1995) (citing R.I. Const. art. XII, § 1); see also *Natl Educ. Assn of R.I. v. Garrahy*, 598 F.Supp. 1374, 1387 (D.R.I.1984) (“it is beyond gainsaying that under Rhode Island] state law, the state exercises supreme responsibility in the arena of education).

The entire care, control, and management of all public school interests of the several cities and towns shall be vested in the school committees of the several cities and towns.⁷

117 R.I. Gen. Laws § 16 2 9(a); see also *East Providence School Committee v. Smith*, 896 A.2d 49, 53 n. 4 (“the General Assembly has delegated its constitutional responsibilities for public education to school committees]). General Laws 1938, ch. 178, § 22 was a precursor to G.L1956 § 16 2 9, which, like the current version of the statute, vested school committees with “the entire care, control, and management of schools. *East Providence School Committee v. Smith*, 896 A.2d at 53 n. 3.

On the basis of this delegation, the Rhode Island Supreme Court has held, in *Cummings v. Godin* and repeatedly thereafter, that school committees are “agencies of the state” in that they carry out by delegation the educational mission that resides in the first instance in the General Assembly; but in the same cases the court has further held that school committees “are not ‘state agencies’ because their duties are limited to matters of local rather than statewide concern.”⁸ It follows, *Cummings* concluded, that “a school committee is a municipal body and all of its employees, city employees.”⁹ Accordingly, in *Cummings*, the court held that an employee of the Woonsocket public schools was an employee of the City of Woonsocket and subject to a provision in the Woonsocket city charter applicable to city employees.²⁰ And in *Peters v. Jim Walter Door Sales of Tampa, Inc.*, the court ruled that the City of East Providence, and not the East Providence School Committee, was the proper party defendant in a suit for the death of a student from injuries he incurred in school.²

118 *Cummings v. Godin*, 119 R.I. 325, 377 A.2d 1071, 1073 (1977); *Coventry School Committee v. Richtarik*, 122 R.I. 707, 411 A.2d 912, 915 (1980); *Peters v. Jim Walter Door Sales of Tampa, Inc.*, 525 A.2d 46, 47 (R.I.1987); *East Providence School Committee v. Smith*, 896 A.2d 49, 53 (R.I.2006); accord *Casey v. Newport School Committee*, 13 F.Supp.2d 242 (D.R.I.1998) (applying Rhode Island law and holding city, rather than school committee, was proper defendant).

119 *Cummings v. Godin*, 377 A.2d at 1074; *Peters v. Jim Walter Door Sales of Tampa, Inc.*, 525 A.2d at 47.

120 *Id.*

121 *Peters v. Jim Walter Door Sales of Tampa, Inc.*, 525 A.2d at 47.

In view of (i) the creation of the Central Falls school committee by the 1952 city charter, (ii) the General Assembly's delegation of authority over education to the various school committees, and (iii) the *77 Rhode Island Supreme Court's holding that a school committee, notwithstanding its role as an agency of the state, is a department of its municipality, I am satisfied that, at least until 1991 and the changes that ensued, the School District was part of the City.²²

122 The Teachers' Union appears to agree. “Over twenty years ago, the Central Falls School District fit into the paradigm of a municipally controlled school system that, through its School Committee, administered the State function of education within the borders of its home municipality. Teachers' Unions Amended Memorandum, p. 37.

e. The 1991 and 2002 Acts and the Charter Amendment
Have subsequent events changed this essentially constitutional relationship of the City to its school district? The Receiver argues that notwithstanding the 1991 and 2002 Acts, which removed control of the School District from the Central Falls School Committee and placed it first in a state administrator and then in the state-appointed Board of Trustees that continues to govern the School District, the essential relation of the City to the School District remains unaffected. It must remain unaffected, the Receiver argues, because the 1991 and 2002 Acts were both unilateral acts of the General Assembly, but a permanent modification of the City's form of government would have required an amendment

to its charter, and, by constitutional requirement, R.I. Const. Art. 13, § 8 (procedure for amendments to charters), that in turn would have required a vote of the City's electorate.²³ Neither Act was voted on by the City's electorate. The Receiver further contends that the amendments to the City's charter in 2007 essentially changed nothing and preserved provisions for election of a school committee. Accordingly, despite the City's long-standing lack of political control over the School District, the School District's inclusion in the City is unchanged. The arrangements effected by the 1991 and 2002 Acts must be viewed as temporary and provisional. The Acts effected no permanent change in the form, structure, or reach of City government. So argues the Receiver.

123 *Viveiros v. Town of Middletown*, 973 A.2d 607, 614 (R.I.2009) (“once a town or city has adopted a charter pursuant to the home rule provisions of article 13 of the Rhode Island Constitution, the charter can be modified only by amendment pursuant to section 8”).

The Teachers' Union disagrees. I need not set forth its arguments in full. It suffices to note the Union's position on the 2007 amendment to the city charter, which is that the amendment terminated the City's school committee altogether.

[36] The court agrees. The critical amendment was the deletion of the words “school committee” from § 3 100(c) of the City's charter.²⁴ By virtue of those words, § 3 100 had created a school committee and had indicated that the City's executive and administrative work would be performed in part through that committee. The deletion disestablished the school committee and left no board or agency through which the City might control the schools. Insofar as the State's grant of “the care, control, and management” of the schools in R.I. Gen. Laws § 16 2 9(a) is a grant specifically to “the school committees of the several cities and towns,” that amendment effectively severed the City's constitutional connection to the School District. That action was undertaken in full compliance with the legal procedures that *78 Rhode Island has established for self-governance. The electorate voted for the change and the state legislature ratified it. It can no longer be said that the structure of the City's government includes the care, control, and management of the schools, which is precisely the business of the School District.

124 It is undisputed that the amendment was passed by the electorate and ratified by the General Assembly, and satisfies the procedural requirement in R.I. Const. Art. 13, § 8 for amendment of the charter.

It is true, as the Receiver points out, that the charter appears to have retained provisions for election of a school committee, §§ 6 107 and 6 108. It is also true that the deletion of §§ 3 608(1) and 3 608(2) is, in itself, inconsequential, those sections having been essentially duplicative of retained sections 6 107 and 6 108. Likewise, the deletion of § 3 608(3) is in itself of no real relevance, as it only removed certain limitations on school committee membership. Still, it is undisputed (i) that the school committee itself was deleted from the list in § 3 100 of the independent boards and commissions by which the City's executive and administrative work would be performed and (ii) that Chapter 14 of Article IV, which had set forth the powers and duties of the school committee, was also deleted. The deletions of §§ 3 608(1), 3 608(2), and 3 608(3) are consistent with and confirmatory of the deletion of school committee in § 3 100. The deletion of the school committee from § 3 100 must be given effect no less than the inclusion of “school committee” in § 3 100(c) was given effect before the deletion.²⁵ The purpose of the surviving provisions for electing school committee members is unclear, and, aside from the “editor's note” appearing in the volumes setting forth the texts of the original and amended charters, the parties have offered no legislative history on the subject.²⁶ Whatever their purpose, however, there is nothing ambiguous about the deletion in § 3 100. There remains no charter-authorized school committee to which members might be elected.²⁷

125 *Retirement Bd. of Employees Retirement System of State v. DiPrete*, 845 A.2d 270, 297 (R.I.2004) (“We shall not interpret a statute to include a matter omitted unless the clear purpose of the legislation would fail without the implication.”).

126 From the editor's note, it appears that Article VI of the charter, including §§ 6 107 and 6 108, may not in fact be part of the amended charter at all but an editorial interjection of a 1953 legislative “fix” into the published text of the amended charter. See Facts ¶ 19, fn. 66 above. I need not make a final determination of that issue because there is no ambiguity in the critical deletions.

127 It is not clear whether the Receiver attaches significance to the fact that, at § 3 608 of the charter, where three deleted school committee provisions previously resided, the charter now says “reserved. The word reserved in that place merely reserves the section number for possible future use. It does not in any sense reserve the deleted provisions that had previously been codified at that section number. In any event, the word reserved appears only in § 3 608 and not also in § 3 100, the place of the deletion of real consequence.

In view of this change to the charter and the resulting disestablishment of the Central Falls school committee, it is unnecessary to determine whether the 1991 Act or the 2002 Act effectively removed the School District from the City. The deed has in any event been done by other, more fundamental, means.

As it stands, the Central Falls School District has been assigned by the 2002 Act and R.I. Gen. Laws § 16 2 34 to the control of the state-appointed Board of Trustees. The Board has been given “the powers and duties of a school committee.” The Board is independent of the City and not mentioned in the City's charter. Its members are not elected by City voters, appointed by City officials, or answerable *79 to City authorities. Rather, they are appointed by the board of regents for elementary and secondary education from nominations made by the commissioner of elementary and secondary education. 28 Four of its seven members “shall be residents of the city and parents of current or former Central Falls public school students.” 29 But, as they do not hold their positions by virtue of the charter and do not answer to City electors or a City appointing officer, their City residency does not make them City officials and does not make the Board the City's school committee. The political and constitutional separation of the School District from the City is complete. 30

128 R.I. Gen. Laws § 16 2 34(b).

129 *Id.*

130 This appears to be confirmed in the recent amendment of R.I. Gen. Laws § 16 2 9(a)(18) by 2011 R.I. Pub. Laws ch. 11 265, § 1. Prior to the amendment, § 16 2 9(a)(18) had simply indicated that “School committees shall have ... the following powers and duties: ... (18) To enter into contracts. The amendment added a proviso and an exception

to the proviso. The proviso is “that the power and duty to enter into collective bargaining agreements shall be vested in the chief executive officer of the municipality and not in the school committee. The exception expressly excludes “the Central Falls school district board of trustees established by § 16 2 34 from the application of the proviso, thus negating any implied power or duty of the “chief executive officer of Central Falls to enter into collective bargaining agreements on behalf of the Central Falls School District.

I do not suggest that this state of affairs is not temporary or provisional. Still, the court cannot know the future and, in any event, must judge this controversy according to present circumstances, not circumstances as they may yet develop.

f. Facts Deemed Irrelevant

In making this determination, the court has deemed certain facts to be of little or no relevance, and these should be dealt with expressly. First is the fact that the City has been wholly dependent on outside sources, mostly the State, for the funding of its operating budget for over twenty years. This fact is irrelevant because there is no state law that makes it a factor of significance to the continued relation of this school district to this city. Municipalities routinely receive state funding, some more than others. The Unions have cited to me no feature of state law that might alter the relation of a municipality to its school district on the basis of the extent or duration of its state funding. Much less have they specified a legal tipping point.

Second is the duration of the period in which the City has not had control of its schools. Again, nothing in the governing law states that after a certain number of years in the care of a state administrator or board of trustees, a city's school district ceases to be *its* school district. It is possible for the state to have stepped in as caretaker for the City, even on an extended basis.

Third is the fact that state law may require the City to contribute to the funding of its schools. Again, the court is aware of no provision in the City's charter or in any state law that makes the School District's status as part of the City or not dependent on the presence or absence of an obligation to fund.

Fourth, the Receiver has emphasized that the School District lacks many of the attributes of municipal sovereignty, such as powers of taxation and eminent domain, and therefore should not be deemed a separate entity from the City. Under this theory, the School District must be a dependency of some sort. Again, nothing in the City's charter or in any other state law *80 of which I am aware prohibits a city from severing its relationship to its school district, however dependent, by a properly approved and ratified amendment of its charter that disestablishes its school committee, especially where the State has already provided other governance and support for the school district. States have conjured all manner of entities and arrangements through which to fulfill their objectives.

Fifth, the Receiver emphasizes that the 1991 Act, which replaced the City's school committee with a state administrator, nonetheless expressly reserved for the City the status of "fiscal agent." It said: "The city of Central Falls shall continue to be the fiscal agent for the Central Falls school district, except that a separate interest-bearing checking account shall be established for the school district."³ I have attached little significance to this fact for the following reasons. First, nowhere in the record has the Receiver supplied evidence of what it means to be the fiscal agent. At least for lack of evidence establishing its import, the title "fiscal agent" is wholly undefined and without significance. Second, the title does not appear in the City's charter and therefore cannot constitute the basis for a continuing charter-based relationship between the City and the School District. Third, the court is by no means confident that the City's status as fiscal agent has survived the significant changes to the relationship of the City to the School District that occurred after the 1991 Act, especially the 2002 Act and the amendment to the City's charter.

¹³¹ 1991 R.I. Pub. Laws ch. 312, § 4(e).

Sixth, the labels and classifications in the City's and School District's financial statements to the effect that the School District is not a component unit of the City and is a component unit of the State³² are essentially offered as opinions of law and are therefore irrelevant. To the extent that they are simply offered as accountants' opinions, it suffices to note that accounting standards do not necessarily coincide with the law to be applied in this proceeding and have no relevance.

¹³² See Facts ¶¶ 51-52.

Seventh, the evidence of the operational independence of the School District from the City that it maintains separate bank accounts and financial records, pays its own payroll, purchases its own insurance, enters into contracts, makes its own personnel policies and decisions, all independent of the City is of little significance for two reasons. First, it has no significance under Rhode Island law for the charter-based relationship of the City to the School District. Second, the Unions have adduced no evidence that this practice differs from the practices of school districts that are parts of their respective municipalities.

g. Conclusion as to Motion for Summary Judgment

The material facts are not in controversy, but on the factual record established by this motion, the Receiver is not entitled to judgment as a matter of law. Rather, on the governing law, it appears that judgment should enter against the Receiver with a declaration that the School District is not part of the City. Rule 56(f)(1) now expressly permits a court to grant summary judgment for a nonmovant, but only "after giving notice and a reasonable time to respond."³³ The Court will hold a status conference to determine whether judgment should enter against the Receiver or, in the alternative, whether this adversary proceeding should proceed to trial, *81 as provisionally scheduled. The Receiver's second count is dependent on the outcome of the first. Upon a final determination that the School District is not part of the City, the second would be moot. Entry of this decision should not be delayed for a merely academic consideration of that issue. Therefore, as to Count Two, the court will hold the Motion for Summary Judgment in abeyance pending a determination as to whether summary judgment will enter against the Receiver on Count One. If that event, the court would enter an order deeming Count Two moot.

¹³³ Fed.R.Civ.P. 56(f)(1).

ORDER

For the reasons set forth above, the court hereby **ORDERS** as follows:

1. The Cross Motion of the Teachers' Union to Dismiss or Abstain is DENIED.

2. The two counts in this proceeding are non-core matters that are otherwise related to the City's bankruptcy case. Under 28 U.S.C. § 157(c)(1), this court will hear the adversary proceeding and, at the conclusion, enter proposed findings of fact and conclusions of law, subject to review and entry of final judgment by the district court as specified in § 157(c)(1) and related rules.

3. As to Count One, the Receiver's Motion for Summary Judgment is DENIED, and the court will schedule a hearing to determine whether, under Fed.R.Civ.P. 56(f)(1), the court should grant summary judgment for the Unions.

4. As to Count Two, decision on the Motion for Summary Judgment is deferred.

5. Pursuant to Fed. R. Civ. P. 56(h), the court hereby determines that the facts in the Facts section of this memorandum, except those enumerated below, are not genuinely in dispute and are established in this adversary proceeding. (This is not a conclusion that every fact so established is material.) The exceptions are the facts appearing in (i) the footnote to ¶ 15, (ii) ¶ 15.3, (iii) ¶ 15.5, (iv) the second and third sentences of ¶ 17, (v) the last sentence of ¶ 22, (vi) the last sentence of ¶ 26, (vii) the last sentence of ¶ 28, (viii) the last sentence of ¶ 30, and (ix) the footnote to ¶ 57.

All Citations

468 B.R. 36, 278 Ed. Law Rep. 1002

EXHIBIT 288

International Centre for Settlement of Investment Disputes
Washington, D.C.

In the proceedings between

Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and
Vivendi Universal, S.A.

(Claimants)

and

The Argentine Republic

(Respondent)

ICSID Case No. ARB/03/19

**ORDER IN RESPONSE TO A PETITION FOR TRANSPARENCY AND
PARTICIPATION AS *AMICUS CURIAE***

Members of the Tribunal:

Professor Jeswald W. Salacuse, President
Professor Gabrielle Kaufmann-Kohler, Arbitrator
Professor Pedro Nikken, Arbitrator

Secretary of the Tribunal:

Mr. Gonzalo Flores

Date: May 19, 2005

I. Introduction

1. On January 28, 2005, five non-governmental organizations, Asociación Civil por la Igualdad y la Justicia (ACIJ), Centro de Estudios Legales y Sociales (CELS), Center for International Environmental Law (CIEL), Consumidores Libres Cooperativa Ltda. de Provisión de Servicios de Acción Comunitaria , and Unión de Usuarios y Consumidores [hereinafter Petitioners] filed a “Petition for Transparency and Participation as Amicus Curiae” [hereinafter the Petition] in the above-entitled case with ICSID. Asserting that the case involved matters of basic public interest and the fundamental rights of people living in the area affected by the dispute in the case, the Petitioners requested the Tribunal to grant three requests:

- a. to allow Petitioners access to the hearings in the case;
- b. to allow Petitioners opportunity to present legal arguments as *amicus curiae*;
- and
- c. to allow Petitioners timely, sufficient, and unrestricted access to all of the documents in the case.

2. On February 16, 2005, the Secretary of the Tribunal, at the direction of the Tribunal President, sent copies of the Petition to the Claimants and Respondent and requested them to submit their observations thereon to the Tribunal by March 11, 2005.

3. The Tribunal received observations from both parties. The Claimants asked the Tribunal to reject the Petition in its entirety and to deny each of the requests it contained. The Respondent, on the other hand, approved of the Petition. This order responds to the three requests made by Petitioners.

II. Access to the Arbitral Hearings

4. Petitioners ask the Tribunal “to concede the applicants access to the hearings” and also suggest that hearings in the present case should be opened to the public, citing the NAFTA cases of *Methanex v. United States of America* and *UPS v. Canada*, both of which involved public hearings. By “access to the hearings,” Petitioners not only request the right to attend hearings but they also seem to suggest that they be given the opportunity to make oral presentations to the Tribunal, asserting “the right of every person to participate and make their voices heard in cases where decisions may affect their rights...” (Petition Page10).

5. The presence and participation of persons at ICSID hearings is expressly regulated by ICSID Arbitration Rule 32 (2), which states:

“The tribunal shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may attend the hearings.” (emphasis supplied).

6. Rule 32 (2) is clear that no other persons, except those specifically named in the Rule, may attend hearings unless both Claimants and Respondent affirmatively agree to the attendance of those persons. In this case, the Claimants, in their observations of 11 March 2005 on the Petition, have expressed their clear refusal to the attendance by Petitioners at the hearings in this case. Although the Tribunal, as the Petition asserts, does have certain inherent powers with respect to arbitral procedure, it has no authority to exercise such power in opposition to a clear directive in the Arbitration Rules, which both Claimants and Respondent have agreed will govern the procedure in this case. While the

Methanex and *UPS* cases (both NAFTA cases under UNCITRAL Arbitration Rules) cited by Petitioners did indeed involve public hearings, both claimants and respondents in those cases specifically consented to allowing the public to attend the hearings. The crucial element of consent by both parties to the dispute is absent in this case.

7. For the foregoing reasons, the Tribunal unanimously concludes that it must deny Petitioner's request to have access to and attend the hearings in this case.

III. Submission of *Amicus Curiae* Briefs

8. Petitioners request the Tribunal to "allow the applicants sufficient opportunity to present legal arguments, as *amicus curiae*." Although Petitioners do not define in detail the role and nature of an *amicus curiae* or "friend of the court" in an ICSID arbitration or the precise form that such proposed intervention is to take, the Tribunal assumes that the *amicus curiae* role the Petitioners seek to play in the present case is similar to that of a friend of the court recognized in certain legal systems and more recently in a number of international proceedings. In such cases, a nonparty to the dispute, as "a friend," offers to provide the court or tribunal its special perspectives, arguments, or expertise on the dispute, usually in the form of a written *amicus curiae* brief or submission. Claimants in their observations of 11 March 2005 asked the Tribunal to refuse such a request, while Respondent expressed its approval.

9. Neither the ICSID Convention nor the Arbitration Rules specifically authorize or specifically prohibit the submission by nonparties of *amicus curiae* briefs or other documents. Moreover, to the knowledge of the Tribunal, no previous tribunal functioning under ICSID Rules has granted a nonparty to a dispute the status of *amicus*

curiae and accepted *amicus curiae* submissions. This lack of specificity in the ICSID Convention and Rules requires the Tribunal in this case to address two basic questions: 1) Does the Tribunal have the power to accept and consider *amicus curiae* submissions by nonparties to the case? and 2) If it has that power, what are the conditions under which it should exercise it?

10. The Powers of the Tribunal to Accept *Amicus Submissions*. Article 44 of the ICSID Convention states:

“Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.” (emphasis supplied)

The last sentence of Article 44 is a grant of residual power to the Tribunal to decide procedural questions not treated in the Convention itself or the rules applicable to a given dispute.

11. In applying this provision to the present case, the Tribunal faces an initial question as to whether permitting an *amicus curiae* submission by a non disputing party is a “procedural question.” At a basic level of interpretation, a procedural question is one which relates to the manner of proceeding or which deals with the way to accomplish a stated end. The admission of an *amicus curiae* submission would fall within this definition of procedural question since it can be viewed as a step in assisting the Tribunal to achieve its fundamental task of arriving at a correct decision in this case.

12. Claimants argue in their Observations that such a procedural measure would have substantive consequences, since “the practical effect would be that Claimants would end up litigating with entities which are not party to the arbitration agreement” (para. 23). They also contend that the Tribunal should interpret the ICSID Convention and Rules as prohibiting the submission of an *amicus curiae* brief since the Convention and Rules provide only for litigation between investors and host states, a factor that implicitly excludes other persons as litigants and parties in an ICSID arbitration.

13. The Tribunal does not accept Claimants’ interpretation of the ICSID Convention and Rules on this point. An *amicus curiae* is, as the Latin words indicate, a “friend of the court,” and is not a party to the proceeding. Its role in other forums and systems has traditionally been that of a nonparty, and the Tribunal believes that an *amicus curiae* in an ICSID proceeding would also be that of a nonparty. The traditional role of an *amicus curiae* in an adversary proceeding is to help the decision maker arrive at its decision by providing the decision maker with arguments, perspectives, and expertise that the litigating parties may not provide. In short, a request to act as *amicus curiae* is an offer of assistance – an offer that the decision maker is free to accept or reject. An *amicus curiae* is a volunteer, a friend of the court, not a party.

14. In *Methanex v. United States of America*, a NAFTA case under the 1976 UNCITRAL Rules, the Decision of the Tribunal on Petitions From Third Parties to Intervene as Amici Curiae of January 15, 2001 (see www.naftalaw.org) supports the conclusion of the present Tribunal with respect to its power to admit *amicus* submissions in this case. The *Methanex* tribunal, interpreting article 15(1) of the UNCITRAL Rules, which is substantially similar to Article 44 of the ICSID Convention, concluded that the

UNCITRAL Rules gave it the power to accept *amicus* briefs. It specifically concluded, as does this Tribunal, that “the receipt of written submissions from a person other than the Disputing Parties is not equivalent to adding that person as a party to the arbitration.” (para.30). Moreover, like the *Methanex* tribunal, the Tribunal in the present case finds that acceptance of *amicus* submissions is a procedural question that does not affect a disputing party’s substantive rights since the parties’ rights remain the same both before and after the submission.

15. Like the claimants in *Methanex*, Claimants in the present case argue that *amicus* submissions would place an increased burden on the parties and the Tribunal. While that result is theoretically possible, it is not inevitable. The Tribunal believes that it can exercise its powers under Article 44 in such a way as to minimize the additional burden on both the parties and the Tribunal, while giving the Tribunal the benefit of the views of suitable *amici curiae* in appropriate circumstances. The Tribunal in the present case finds further support for the admission of *amicus* submissions in international arbitral proceedings in the practices of NAFTA, the Iran-United States Claims Tribunal, and the World Trade Organization.

16. The Tribunal unanimously concludes that Article 44 of the ICSID Convention grants it the power to admit *amicus curiae* submissions from suitable nonparties in appropriate cases. We turn now to consider the conditions under which the Tribunal may exercise that power.

17. The Conditions for the Admission of *Amicus Curiae* Briefs. Based on a review of *amicus* practices in other jurisdictions and fora, the Tribunal has concluded that the exercise of the power conferred on the Tribunal by Article 44 to accept *amicus*

submissions should depend on three basic criteria: a) the appropriateness of the subject matter of the case; b) the suitability of a given nonparty to act as *amicus curiae* in that case, and c) the procedure by which the *amicus* submission is made and considered. The Tribunal believes that the judicious application of these criteria will enable it to balance the interests of concerned nondisputant parties to be heard and at the same time protect the substantive and procedural rights of the disputants to a fair, orderly, and expeditious arbitral process.

18. The appropriateness of the subject matter of the case for amicus curiae submissions. Petitioners base their request to act as *amicus* on the ground that this case involves matters of significant public interest since the underlying dispute relates to water and sewage systems serving millions of people. Claimants, on the other hand, contest that characterization, asserting that such “ ‘public and institutional significance’ of the case does not exist” (para. 40) and that the case is simply about Claimants’ alleged right to compensation for claimed violations of their rights by Respondent.

19. Courts have traditionally accepted the intervention of *amicus curiae* in ostensibly private litigation because those cases have involved issues of public interest and because decisions in those cases have the potential, directly or indirectly, to affect persons beyond those immediately involved as parties in the case. In examining the issues at stake in the present case, the Tribunal finds that the present case potentially involves matters of public interest. This case will consider the legality under international law, not domestic private law, of various actions and measures taken by governments. The international responsibility of a state, the Argentine Republic, is also at stake, as opposed to the liability of a corporation arising out of private law. While these factors are certainly

matters of public interest, they are present in virtually all cases of investment treaty arbitration under ICSID jurisdiction. The factor that gives this case particular public interest is that the investment dispute centers around the water distribution and sewage systems of a large metropolitan area, the city of Buenos Aires and surrounding municipalities. Those systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations. Any decision rendered in this case, whether in favor of the Claimants or the Respondent, has the potential to affect the operation of those systems and thereby the public they serve.

20. These factors lead the Tribunal to conclude that this case does involve matters of public interest of such a nature that have traditionally led courts and other tribunals to receive *amicus* submissions from suitable nonparties. This case is not simply a contract dispute between private parties where nonparties attempting to intervene as friends of the court might be seen as officious intermeddlers.

21. Given the public interest in the subject matter of this case, it is possible that appropriate nonparties may be able to afford the Tribunal perspectives, arguments, and expertise that will help it arrive at a correct decision. Rather than to reject offers of such assistance peremptorily, the Tribunal, while taking care to preserve the procedural and substantive rights of the disputing parties and the orderly and efficient conduct of the arbitration, believes it is appropriate to consider carefully whether to accept or reject such offers.

22. The acceptance of *amicus* submissions would have the additional desirable consequence of increasing the transparency of investor-state arbitration. Public

acceptance of the legitimacy of international arbitral processes, particularly when they involve states and matters of public interest, is strengthened by increased openness and increased knowledge as to how these processes function. It is this imperative that has led to increased transparency in the arbitral processes of the World Trade Organization and the North American Free Trade Agreement. Through the participation of appropriate representatives of civil society in appropriate cases, the public will gain increased understanding of ICSID processes.

23. For the foregoing reasons, the Tribunal unanimously concludes that the present case is an appropriate one in which suitable nonparties may usefully make *amicus curiae* submissions.

24. The Suitability of Specific Nonparties to Act as Amici Curiae. The purpose of *amicus* submissions is to help the Tribunal arrive at a correct decision by providing it with arguments, expertise, and perspectives that the parties may not have provided. The Tribunal will therefore only accept *amicus* submissions from persons who establish to the Tribunal's satisfaction that they have the expertise, experience, and independence to be of assistance in this case. In order for the Tribunal to make that determination, each nonparty wishing to submit an *amicus curiae* brief must first apply to the Tribunal for leave to make an *amicus* submission.

25. Drawing on the experience of relevant NAFTA cases administered by ICSID, as well on the Statement of the North American Free Trade Commission on Non-Disputing Party Participation of October 7, 2003 (available in English at www.ustr.gov and in Spanish at www.economia-snci.gob.mx/sic_php/ls23al.php?s=18&p=1&l=1) the Tribunal has determined that nonparties seeking to make an *amicus* submission in the

present case should file a petition with the Tribunal for leave to submit an *amicus curiae* brief and that such petition should include the following information:

- a. The identity and background of the petitioner, the nature of its membership if it is an organization, and the nature of its relationships, if any, to the parties in the dispute.
 - b. The nature of the petitioner's interest in the case.
 - c. Whether the petitioner has received financial or other material support from any of the parties or from any person connected with the parties in this case.
 - d. The reasons why the Tribunal should accept petitioner's *amicus curiae* brief.
26. Upon receipt of a petition for leave to make an *amicus curiae* submission, the Tribunal will provide copies of the petition to both Claimants and Respondents and ask for their views.
27. In deciding whether to grant a nonparty leave to submit an *amicus curiae* brief, the Tribunal will consider all information contained in the petition; the views of Claimants and Respondent; the extra burden which the acceptance of *amicus curiae* briefs may place on the parties, the Tribunal, and the proceedings; and the degree to which the proposed *amicus curiae* brief is likely to assist the Tribunal in arriving at its decision.
28. In view of the fact that the parties have competently and comprehensively argued all issues regarding jurisdiction, the Tribunal has concluded that it is fully informed on these issues and that *amicus curiae* submissions on jurisdictional questions would not be appropriate, under the standards set forth in paragraph 17 above, as they would not assist the Tribunal in its task of assessing jurisdiction.

29. Procedure for Amicus Briefs. If the Tribunal decides to grant leave to a particular nondisputing party to submit an *amicus curiae* brief, the Tribunal at that time will determine the appropriate procedure governing the brief's submission. The goal of such procedure will be to enable an approved *amicus curiae* to present its views and at the same time to protect the substantive and procedural rights of the parties. In this latter context, the Tribunal will endeavor to establish a procedure which will safeguard due process and equal treatment as well as the efficiency of the proceedings. In the absence of an approved *amicus curiae*, the Tribunal does not believe it necessary or appropriate to formulate such a procedure at present.

III. Access to Documentation in the Case

30. Petitioners request the Tribunal "...to concede ... timely, sufficient, and unrestricted access to the documents of the arbitration, namely the parties' submissions, transcripts of the hearings, statements of witnesses and experts, and any other documents produced in this arbitration"(page 20). This broad request for all documentation in the case raises difficult and delicate questions because of certain constraints in the ICSID Convention and Rules and in the practice of the Centre.

31. At this stage in the present case, the Tribunal does not believe it is necessary to make a ruling on the Petitioners' ability to have access to documents in this case. The purpose in seeking access to the record is to enable a nonparty to act as *amicus curiae* in a meaningful way. Having decided that nonparties must first file an application to make *amicus* submissions before the Tribunal may authorize them to act as *amici curiae*, the

Tribunal has decided to defer a decision on the issue of documentary access until such time as it may grant leave to a particular nondisputing party to file an *amicus curiae* brief.

32. This order is rendered at this stage of the arbitration because the Petition was made at this stage and the Tribunal considers it good practice not to leave such petitions unanswered, even though the Petition proved not to be relevant to the jurisdictional phase. Nothing in this order, however, should be read as implying any determination on jurisdiction.

IV. Conclusion

33. Having reviewed the Petition and the observations thereon of Claimants and Respondent, the Tribunal has unanimously decided to:

- a. deny Petitioners' request to attend the hearings of this case;
- b. grant an opportunity to Petitioners to apply for leave to make *amicus curiae* submissions in accordance with the conditions stated above; and
- c. defer a decision on Petitioners' request for access to documents until such time as a the Tribunal grants leave to a nondisputing party to file an *amicus curiae* brief.

Prof. Jeswald W. Salacuse
President of the Tribunal

Prof. Pedro Nikken
Arbitrator

Prof. Gabrielle Kaufmann-Kohler
Arbitrator

EXHIBIT 289

**International Centre for Settlement
of Investment Disputes**

ICSID Case No. ARB/05/22

**BIWATER GAUFF (TANZANIA) LTD.,
CLAIMANT**

v.

**UNITED REPUBLIC OF TANZANIA,
RESPONDENT**

PROCEDURAL ORDER N° 5

Rendered by an Arbitral Tribunal composed of

**Gary BORN, Arbitrator
Toby LANDAU, Arbitrator,
Bernard HANOTIAU, President**

I. INTRODUCTION

1. On 27 November 2006, the following five Petitioners filed with the Secretariat of ICSID a petition for *amicus curiae* status:
 - The Lawyers' Environmental Action Team (LEAT);
 - The Legal and Human Rights Centre (LHRC);
 - The Tanzania Gender Networking Programme (TGNP);
 - The Center for International Environmental Law (CIEL); and
 - The International Institute for Sustainable Development (IISD);(collectively referred to as the "Petitioners").
2. The Petition and its appendices were forwarded to the Arbitral Tribunal by the ICSID Secretariat on 27 November 2006.
3. On 1 December 2006, the ICSID Secretariat informed the parties that the President of the Arbitral Tribunal invited them to submit by Monday 18 December 2006:
 - (i) in accordance with ICSID Arbitration Rule 37(2), any observations they might have regarding the Petitioners' participation in the written phase of the proceedings; and
 - (ii) in accordance with ICSID Arbitration Rule 32(2), any observations they might have on the Petitioners' attending or observing all or part of any forthcoming hearing in the case.
4. On 13 December 2006, Counsel for Claimant, being in the process of preparing its Reply, invited the Arbitral Tribunal to consider extending the deadline for submissions on the *amicus* petition until 12 January 2007. They further informed the Arbitral Tribunal that they had discussed the matter with the Respondent's Counsel, who had indicated that they were neutral as regards the requested extension.

5. On 15 December 2006, the ICSID Secretariat informed the parties that the Arbitral Tribunal had decided to grant the extension requested by Claimant.
6. On the same date, Counsel for Respondent communicated to the Arbitral Tribunal their observations on the Petition pursuant to ICSID Arbitration Rules 32(2) and 37(2).
7. On 12 January 2007, Counsel for Claimant communicated their observations on the Petition to the ICSID Secretariat.
8. On the same date, Counsel for Respondent reiterated in a letter to the Arbitral Tribunal that they considered it appropriate to have the parties' observations communicated to the Petitioners (subject to verification that the letters do not disclose the content of any confidential material), considering that absent unusual circumstances, an applicant to an arbitral or judicial tribunal should see material submitted to the tribunal advocating the modification or rejection of its application before a ruling is made.
9. The same day, Counsel for Claimant informed the Arbitral Tribunal that they considered it neither appropriate nor necessary to submit the parties' observations to the Petitioners, alleging furthermore that ICSID Arbitration Rule 37, neither requires nor envisages that the Arbitral Tribunal do so.
10. On 22 January 2007, the Arbitral Tribunal informed the parties, through the ICSID Secretariat, that it was sufficiently informed about the Petition and that it would render its decision soon.

II. THE PETITIONERS' REQUEST

A. The identity of the Petitioners

11. The five Petitioners are as follows (the following descriptions being based entirely upon the statements contained in the Petition):

- (a) The Lawyers' Environmental Action Team (LEAT), which describes itself as the first and the premier public interest environmental law organisation in Tanzania. It was established in 1994 as a company limited by guarantee. Its mission is to "ensure sound natural resource management and environmental protection in Tanzania, thereby ensuring that the constitutional and environmental rights of the Tanzanian people are secured and realized by all". LEAT is further described as an independent organisation which is not subject to direction or control by any other organisation, but is open to partner with any public interest organisation in and outside the country in furtherance of its own mission and objective.
- (b) The Legal and Human Rights Centre (LHRC) is registered in Tanzania as a private, non-governmental, non-partisan and non-profit making organisation. It is described as having been established to contribute to the process of democratisation in Tanzania due to the realisation that the majority of the people are unaware of their rights, and most importantly for the indigent who has no means to pursue his or her rights in court for want of legal representation. It is not a membership based organisation, but an independent non-governmental organisation.
- (c) The Tanzania Gender Networking Programme (TGNP), which presents itself as a Tanzanian non-governmental organisation established in 1993, working in the civil society sector, focusing on the practical promotion and application of gender equality and equity objectives. In particular, TGNP works on issues relating to access to water, especially for the poor and women. It is run by an Executive Director appointed by the board, which is itself appointed by the General Assembly of its members.
- (d) The Center for International Environmental Law (CIEL) is a nonprofit organisation under the laws of the United States of America and the regulations of the US Internal Revenue Service and incorporated as such in Washington DC. It is an independent non-governmental organisation whose mission is to use international law, institutions and processes to protect the environment, human health and human rights, seeking to create a just and sustainable world. It was founded in 1989 and has been engaged since the early 1990s in international trade and investment law issues. It was granted *amicus curiae* status in the *Methanex Corp. v. United States*

arbitration as well as in the *Agua Argentinas v. Argentina* case, which will be referred to in the course of this Order.

- (e) Finally, the International Institute for Sustainable Development (IISD) is a Canadian-based international non-governmental organisation originally established by an Act of the Parliament of Canada. Its mandate is to foster local, regional and international policies and practices in support of the achievement of sustainable development. IISD has been actively engaged in international trade law issues since 1991 and international investment law issues since 1998. Its primary concerns have been with regard to the relationship between international investment agreements and sustainable development. It was also granted *amicus curiae* status in the *Methanex* case.

B. The reasons for the Petitions

- 12. The Petitioners contend that this arbitration raises a number of issues of vital concern to the local community in Tanzania, and a wide range of potential issues of concern to developing countries (and indeed all countries) that have privatised, or are contemplating a possible privatisation of, water or other infrastructure services. The dispute is also said to raise issues from a broader sustainable development perspective, and is potentially of relevance for the entire international community.
- 13. The Petitioners further state that in the UN Millennium Declaration, the international community committed itself to halve, by the year 2015, the proportion of people who are unable to reach or to afford safe drinking water. According to the Petitioners, the privatization at issue in the present arbitration was conceived to work towards this goal. It has been described as “*one of the most ambitious in Africa and was intended to be a model for how the world’s poorest communities could be lifted out of poverty and countries could meet their millennium development goal targets.*”
- 14. It is therefore the Petitioners’ position that this arbitration process goes far beyond merely resolving commercial or private conflicts, but rather has a substantial influence on the population’s ability to enjoy basic human rights. Therefore, the process should be

transparent and permit citizens' participation. In particular, the Arbitral Tribunal should hear from the leading civil society groups in Tanzania on these issues. The combination of natural resource and human rights issues is precisely that which the Tanzanian Petitioners focus on in their day-to-day work. They have the leading expertise to identify and discuss the various interests involved in this dispute from a civil society perspective and will be able to inform the Arbitral Tribunal about the implications of this dispute beyond the borders of Tanzania. How international investment agreements, which by and large share similar structures and substantive content, can be applied to govern foreign investments in major infrastructure projects is asserted to be of critical concern for the sustainable development of these countries.

15. Finally, the Petitioners contend that the legal responsibilities of foreign investors are an increasingly important issue in the context of arbitrations concerning such projects. What is the nature of the due diligence to be exercised by such investors before an investment is made; what are the consequences for failing to meet the appropriate standards of conduct; and how could investor-state arbitrations take cognizance of these questions? In short, the Petitioners conclude that this arbitration involves issues of obvious public importance, and it has direct and indirect relevance to the Petitioners' mandates and activities at the local, national and international levels. The interest of the Petitioners in all of these public concerns is, without question, longstanding, genuine, and supported by their well-recognized expertise on these issues.

C. Jurisdiction to accept *amicus* briefs

16. The Petitioners point out that, as recorded in the minutes of the First Session, the President of the Arbitral Tribunal had noted that the question of *amicus* submissions would have to be considered under the new ICSID Arbitration Rules, upon their entry into force (on the assumption that the parties agreed to the application of the new Rules to these proceedings – which subsequently they did). Paragraph 20 of the minutes states that “*the procedure set out in such amended rules will apply to the question of amicus curiae.*”
17. Since 10 April 2006, the amended ICSID Arbitration Rules have explicitly given tribunals the power to allow for submissions of non-disputing parties. Rule 37(2) establishes the

right of third parties to apply for *amicus curiae* status. This right does not extend to a right to have such submissions accepted by the tribunal, or for them to form a basis for the final award if they are so accepted. On the other hand, it does establish a right to make a full presentation to the tribunal in order to be able to meet the test for acceptance as an *amicus curiae*. The Petitioners emphasise that it is now explicit not only that the tribunal has the jurisdiction to accept *amicus curiae* submissions, but also that it may do so without the approval of one or both of the arbitrating parties.

D. The test to apply

18. The full text of ICSID Arbitration Rule 37(2) reads as follows:

“After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “non-disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider among other things, the extent to which:

- (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
- (b) the non-disputing party submission would address a matter within the scope of the dispute;
- (c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.”

19. The Petitioners consider that the above conditions are met in this case. They contend, however, that the impact of the confidentiality order contained in *Procedural Order No. 3*

of the Arbitral Tribunal, limiting the release to the public of certain categories of documents that detail the facts and legal issues in dispute, prevent them from describing the precise scope of their intended legal submissions and hence the extent to which the tests set out in Rule 37(2) are fully met.

20. As to condition (a) of Rule 37(2), and under the reservation noted in paragraph 19 above, the Petitioners submit that their starting perspective, as NGOs with specialized interests and expertise in human rights, environmental and good governance issues locally in Tanzania, and in the multiple critical inter-relationships between international investment law and sustainable development at the international level, will be different than the initial interests, expertise and perspectives of the two contending parties.
21. With respect to condition (b) of Rule 37(2), the Petitioners emphasise that they will comply with this condition and respect this Arbitral Tribunal as a forum for legal issues within the scope of the dispute.
22. In relation to condition (c) of Rule 37(2), the Petitioners, relying upon their general knowledge of the case and the legal issues it is likely to raise, consider that their introductory presentation (see A above) has clearly demonstrated that the public interest involved in the case is directly related to the sphere of expertise and mandate of the Petitioners.
23. Finally, given that Rule 37(2) does not exhaustively list the factors to be considered by the Arbitral Tribunal in deciding upon *amicus* status, the Petitioners also note two other factors that might be relevant to the Arbitral Tribunal's decision on their Petition. The first arises directly from the focus of the Arbitral Tribunal in *Procedural Order No. 3* on the proper functioning of the arbitral process. They underline in this regard that there is a history of practice by *amici* that is growing in investor-state arbitrations. They further note that there is no recorded instance of an abuse of the process by any petitioner or accepted *amicus curiae*. There is therefore no basis to assume that the application of Rule 37(2) will lead to a disruption of the arbitral process.
24. Finally, the Petitioners emphasise the importance of public access to the arbitration from the perspective of the credibility of the arbitration process itself in the eyes of the public,

which often considers investor-state arbitration as a system unfolding in a secret environment that is anathema in a democratic context.

E. Access to the key arbitral documents

25. The Petitioners observe that pursuant to *Procedural Order No. 3* (on confidentiality / procedural integrity), the Arbitral Tribunal has retained the full authority and discretion to allow for access to documents by non-disputing parties. They therefore ask that the Arbitral Tribunal exercise its discretion and provide access to:
- the initial notice of arbitration and statement of defence, if any was prepared;
 - the decisions, orders and directions of the Arbitral Tribunal not already in the public domain, if any;
 - the pleadings and written memorials of the arbitrating parties, and
 - relevant witness statements and transcripts of any witness examinations.
26. The Petitioners rely in particular on paragraph 162 of *Procedural Order No. 3* in which the Arbitral Tribunal expressly reserved to itself the continued review of the application of its Order. They also submit that it has become common practice in international arbitration that where arbitral documents are released to the public, confidential business information be redacted, and suggest that a similar process can be undertaken here.
27. Finally, the Petitioners submit that “*the balance between competing interests*” as that phrase is used in paragraph 162 of *Procedural Order No. 3*, must also be understood to include the interests of potential *amici*, acting properly and fully within their rights and interests pursuant to Rule 37(2).

F. Access to the oral hearings

28. Lastly, the Petitioners seek an Order from the Arbitral Tribunal that the hearings be open to the public and that *amici*, once accepted, be allowed to reply directly to any questions directed to them by the Arbitral Tribunal concerning their submissions.

29. Rule 32(2) of the amended ICSID Arbitration Rules provides that:

“Unless either Party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearings, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information”.

30. Relying on the “*widely recognized public interest in this arbitration*”, the Petitioners seek an Order from the Arbitral Tribunal for open proceedings, and for the enabling of the Petitioners and their Counsel to attend the hearing. They further seek an Order to be allowed to respond to any questions on their submissions, should they be allowed by the Arbitral Tribunal to attend at the oral hearings.

III. THE PARTIES’ OBSERVATIONS

A. Claimant’s position

1. Amicus curiae status

31. Claimant objects to the Petition to grant *amicus* status to the Petitioners. According to Claimant, the Petitioners should only be accorded *amicus* status if the issues they raise and the interests they represent will contribute information and insight in relation to the determinations that are necessary for the Arbitral Tribunal to make in order to resolve this dispute. The Petitioners’ concerns are, according to Claimant, factually and legally irrelevant to the issues to be decided by the Arbitral Tribunal in this arbitration. Moreover, they have not demonstrated any sufficient connection or interest in these proceedings to justify attributing to them *amicus* status.

32. According to Claimant, the fundamental flaw in the Petition is that the Petitioners assume that the issues that concern them must of necessity arise in the arbitration simply because

the background to the arbitration relates to water, and further that such issues will be of concern to the Arbitral Tribunal. This is not the case in the Claimant's submission.

33. The dispute between the parties that the Arbitral Tribunal is mandated to resolve arises out of the privatisation and investment that in fact took place. Claimant submits that, in relation to the privatisation, no issues arise in this arbitration as to whether the Republic ought to have involved the private sector in the water supply process in the first instance; what form of private sector participation should have been employed (if any); or whether the purported termination of the lease contract was a failure of the concept of private sector participation in general.
34. Claimant also submits that no environmental issues arise for determination in this case and that the arbitration raises no issues of sustainable development.
35. Finally, the fact that CIEL and IISD have an asserted expertise in broad international law issues such as the linkage between international investment agreements and national development policy, is irrelevant. Policy and political issues of this nature do not bear on the factual and legal issues in this dispute. The *Aguas Argentinas* case in which CIEL was granted *amicus* status was totally different from this arbitration. In that case, the Tribunal found that the outcome of the decision had the potential to affect the operation of the water distribution and sewerage system in Buenos Aires. That position does not obtain in this case. Claimant has exited Tanzania, City Water is defunct and Claimant seeks compensation from the Republic's wrongdoing. The prayer for relief does not include any requests that would result in City Water's right to operate the water supply system being reinstated or otherwise bear on the provision of water services in Dar es Salaam.
36. Lastly, Claimant notes that the Petition was filed very late while the existence of these proceedings has been in the public domain since about August 2005; the issue of *amici* was already raised at the First Session; and co-counsel for the Petitioners were aware of the arbitration and its subject matter at least by May 2006, as it was referred to in a paper dated May 2006 written by Counsel for one of the Petitioners (Dr. H. Mann). The result of this late filing is that adding the Petitioners to the proceedings now would place intolerable strain on an already tight timetable, since a substantive hearing is scheduled in April 2007.

37. By way of conclusion, Claimant notes that there is nothing the Petitioners can add to the hearing in respect of the issues to be determined which cannot be said by either party and, since this is a clear requirement of Rule 37(2), this factor alone should be enough to cause the Arbitral Tribunal to reject the Petition.

2. Access to key arbitration documents

38. Claimant objects to the Petitioners' request to have access to key arbitration documents.

39. It notes that the scope of documents sought by the Petitioners is potentially extremely wide and covers almost the entire arbitration record. According to Claimant, this would be suggestive of a broader wish on the part of the Petitioners to engage in, and monitor, the proceedings as a matter of general interest, rather than a desire to provide assistance to the Arbitral Tribunal in relation to a particular subject matter.

40. Claimant also draws the Arbitral Tribunal's attention to the sensitive nature of the documents it has disclosed, and the difficulty of their redaction to protect Claimant's interests.

3. Attendance at the hearings

41. Claimant notes that Rule 37(2) does not contemplate that *amici* will be granted access to the oral hearing. Further, Rule 32(2) unequivocally provides that the Arbitral Tribunal may grant permission to attend subject to the objection of the parties. Therefore, despite the Petitioners' attempts to distort Rule 37, Claimant has the right to object to their attendance and for the reasons set out above indeed objects.

B. Respondent's position

1. The *amicus curiae* status

42. Respondent submits that the Petitioners appear to be potentially appropriate *amici* in light of their organisational interests, their experience as *amici* and the experience and reputation of their counsel.

43. Respondent admits on the other hand that it is difficult to come to a firm conclusion as to whether a submission from the Petitioners would be useful to the Arbitral Tribunal in deciding the matters before it. Respondent views the question as rather being whether the Petitioners should be given access to the additional information they claim in order to file an informed petition on the basis of the conditions set out in Rule 37(2). In this regard, Respondent states that it would not object in principle to the Petitioners having access to the four categories of documents identified in the Petition.
44. Finally, with respect to the last paragraph of Rule 37(2), Respondent submits that considering the Petitioners' track record, there does not seem to be any reason to expect the Petitioners' submission or conduct to be in some substantive sense "disruptive". The more practical question is the timing of any submission the Petitioners might make and in particular whether both parties will have an adequate and not unduly burdensome opportunity to present their observations on such a submission within the framework of the existing procedural schedule.

2. The amici's attendance at the hearings

45. Respondent notes that, by the clear terms of Rule 32(2), each party does retain a veto right in relation to the *amici's* attendance at the hearing and that since the First Session on 23 March 2006, Claimant has made clear that it objects to such attendance. The Republic submits that it would be willing to admit the Petitioners to the hearing. It is however up to Claimant to decide whether to make an exception to its own general position.

IV. DECISION OF THE ARBITRAL TRIBUNAL

A. The Petitioners' status as *Amicus Curiae* in the present arbitration

46. *Nature of the Petition:* The application before the Arbitral Tribunal is headed: "*Petition for Amicus Curiae Status*". It might be noted at the outset that the ICSID Rules do not, in terms, provide for an *amicus curiae* "*status*", in so far as this might be taken to denote a standing in the overall arbitration akin to that of a party, with the full range of

procedural privileges that that might entail. Rather, the ICSID Arbitration Rules expressly regulate two specific – and carefully delimited – types of participation by non-parties, namely: (a) the filing of a written submission (Rule 37(2)) and (b) the attendance at hearings (Rule 32(2)). Each of these types of participation is to be addressed by a tribunal on an *ad hoc* basis, rather than by the granting of an overall “*amicus curiae status*” for all purposes. Indeed, Rule 37(2) is specifically drafted in terms of the discretion of a tribunal to accept “a” written submission, rather than all submissions from a particular entity. It follows that there may be some written submissions from any given non-disputing party that are accepted as qualifying under the terms of Rule 37(2), and some that are not. It also follows that a “non-disputing party” does not become a party to the arbitration by virtue of a tribunal’s decision under Rule 37, but is instead afforded a specific and defined opportunity to make a particular submission.

47. The Arbitral Tribunal considers this an important starting point in terms of safeguarding the expectations of all concerned, as well as the integrity of the arbitral process, lest it be misunderstood that once any type of permission to participate is given to a non-disputing party, the latter may then be entitled as of right to all other procedural rights and privileges.
48. Having said this, the Arbitral Tribunal also recognises that to allow effective access to an *amicus curiae*, there may be certain other procedural mechanisms that need to be put in place.
49. *Rule 37(2)*: The test which the Arbitral Tribunal must apply in deciding whether or not to allow any particular Petitioner to file a written submission in these proceedings is set out in Rule 37(2) (which has already been quoted earlier in this Order – see paragraph 18 above).
50. The Arbitral Tribunal has carefully considered each of the conditions in Rule 37(2)(a), (b) and (c). On the basis of the information provided in the Petition, the nature and expertise of each Petitioner, and the submissions summarised above, the Arbitral Tribunal is of the view that it may benefit from a written submission by the Petitioners, and that allowing for the making of such submission by these entities in these proceedings is an important element in the overall discharge of the Arbitral Tribunal’s mandate, and in securing wider confidence in the arbitral process itself. In particular, the Arbitral Tribunal:

- (a) considers that a written submission by the Petitioners appears to have the reasonable potential to assist the Arbitral Tribunal by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties (Rule 37(2)(a));
- (b) accepts the Petitioners indication that their submissions would address matters within the scope of the dispute, and obviously reserves the right to disregard any submission that does not do so (Rule 37(2)(b));
- (c) accepts that each of the Petitioners has a sufficient interest in this proceeding (Rule 37(2)(c)).

51. In this regard, the Arbitral Tribunal respectfully adopts the words of the Arbitral Tribunal in *Methanex Corporation v. United States of America*, (Decision of the Tribunal on Petitions from Third Persons to Intervene as *Amici Curiae*, January 15, 2001) at para. 49:

“there is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater general public interest than a dispute between private persons. The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions. There is also a broader argument, as suggested by the Respondents and Canada: the ... arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal’s willingness to receive amicus submissions might support the process in general and this arbitration in particular, whereas a blanket refusal could do positive harm”.

52. In another recent ICSID case, *Agua Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina* (ARB/03/19), relating to a water concession covering the city of Buenos Aires and the metropolitan area of greater

Buenos Aires, the Tribunal also emphasised the public interest dimension of the dispute, in terms which apply equally to this arbitration :

“In examining the issues at stake in the present case, the tribunal finds that the present case potentially involves matters of public interest. This case will consider the legality under international law, not domestic private law, of various actions and measures taken by Governments. The international responsibility of a State, the Argentine Republic, is also at stake, as opposed to the liability of a corporation arising out of private law. While these factors are certainly matters of public interest, they are present in virtually all cases of investment treaty arbitration under ICSID jurisdiction. The factor that gives this case particular public interest is that the investment dispute centres around the water distribution and sewage systems of a larger metropolitan area, the City of Buenos Aires and surrounding municipalities. Those systems provide basic public services to millions of people and as a result may raise a variety of complex public and international law questions, including human rights considerations. Any decision rendered in this case, whether in favour of the Claimants or the Respondent, has the potential to affect the operation of those systems and thereby the public they serve. These factors lead the tribunal to conclude that this case does involve matters of public interest of such a nature that have traditionally led courts and other tribunals to receive amicus submissions from suitable non parties. ... Given the public interest in the subject matter of this case, it is possible that appropriate non parties may be able to afford the tribunal perspectives, arguments and expertise that will help it arrive at a correct decision”.

(Order in Response to a Petition for Transparency and Participation as *Amicus Curiae*, May 19, 2005, paras. 19, 20 and 21)

53. The Arbitral Tribunal notes Claimant’s submission that this case is different, in that Claimant is no longer seeking to operate in Tanzania. In the Arbitral Tribunal’s view, however, this is not determinative of the issue, since any decision by the Arbitral Tribunal still has the potential to impact upon the same wider interests.
54. Further, even if Claimant ultimately proves that such wider interests, as a matter of fact, are untouched by its claims, the observation of the tribunal in the *Methanex* case still applies with force, namely that:

“the acceptance of amicus submissions would have the additional desirable consequence of increasing the transparency of investor state arbitration” (para. 22).

55. For the above reasons, and subject to the further directions below, the Arbitral Tribunal grants the Petitioners the opportunity to file a written submission in these arbitral proceedings, pursuant to Rule 37(2).

56. *Procedural Safeguards:* Rule 37(2) of the new ICSID Rules also provides that:

“the Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission”.

57. As was pointed out by the Tribunal in *Methanex*:

“the acceptance of amicus submissions might add to the overall costs of the arbitration and, as considered above, there is a possible risk of imposing an extra burden on one or both the Disputing Parties. In this regard, as appears from the Petition, any amicus submissions from these Petitioners are more likely to counter the Claimant’s position and eventually to support the Respondent’s case. This factor has weighed heavily with the tribunal; and it is concerned that the Claimant should receive whatever procedural protection might be necessary”.

58. The same concern was also taken into consideration in the *Aguas Argentinas* case, in which the Tribunal decided that it had to exercise its powers:

“in such a way as to minimize the additional burden on both the parties and the Tribunal, while giving the Tribunal the benefit of the views of suitable amici curiae in appropriate circumstances” (para. 15).

59. Very serious concerns have been expressed by the parties here, and in particular Claimant, as to the timing of the Petition (i.e. the delay in its filing); the proximity of the substantive

hearing (April 2007); and the tight procedural timetable that exists in the meantime. The Arbitral Tribunal has great sympathy with these concerns, and is adamant that no procedural direction be given which might unduly burden any party in their preparation for the forthcoming hearing, or indeed jeopardise the hearing itself.

60. Having said this, the Arbitral Tribunal considers these factors insufficient in themselves to deny the Petition for all purposes. Rather, they militate in favour of a two-stage process, as follows:

- (a) *First Stage:* In the first instance, and no later than 26 March 2007, the Petitioners, jointly, should file a single, initial written submission, articulating whatever arguments, and providing whatever information, they consider appropriate, but limited to a maximum of 50 pages (double-spaced). This submission should not attach any evidence or documentation, but may identify any such material that the Petitioners may wish to introduce at a later stage. If the Arbitral Tribunal considers that it needs to be provided with such documentation, it will request it from the Petitioners on its own initiative.
- (b) This will allow each party a three week period prior to the hearing in order to consider the written submission, and decide how best to address it (if at all). There will be no requirement on the part of either party to respond to the written submission at the April hearing itself, although either side will obviously be free to do so. In this regard, in order to ensure that no disputing party is taken by surprise at the April hearing, the Arbitral Tribunal directs that:
 - i. On or before 2 April 2007, each disputing party shall consult with the other as to whether each intends to address or respond to the Petitioners' written submission at the April hearing;
 - ii. On the basis of the exchange of views, on or before 9 April 2007, each party shall state finally to the Arbitral Tribunal whether or not it intends to address or respond to the Petitioners' written submission at the April hearing.

- (c) *Second Stage:* Following the conclusion of the April hearing, and having consulted with the disputing parties on this matter, the Arbitral Tribunal will issue procedural directions for responses from both parties to the written submission (in so far as any party wishes to respond further or at all), as well as for any further written submissions, documents or evidence from the Petitioners, in so far as the Arbitral Tribunal deems this appropriate. Indeed, the Arbitral Tribunal considers that it will be better placed after the April hearing to make further determinations on this issue, since it will then have a clearer view as to any areas on which it might need further assistance.

61. This two-stage approach also allows for flexibility on the issue of access to documents, as explained below.

B. The Petitioners' request to have access to the key arbitration documents

62. The Petitioners seek an Order to have access to the key arbitration documents notwithstanding the provisions of *Procedural Order No. 3*, by which the Arbitral Tribunal imposed certain limitations on disclosure of documents in order to preserve the integrity of the process for the time being.
63. In order to address this application, it is important to be clear as to the proper role of a “non disputing party”, or *amicus curiae* in any given case.
64. In this case, given the particular qualifications of the Petitioners, and the basis for their intervention as articulated in the Petition, it is envisaged that the Petitioners will address broad policy issues concerning sustainable development, environment, human rights and governmental policy. These, indeed, are the areas that fall within the ambit of Rule 37(2)(a) of the ICSID Rules. What is not expected, however, is that the Petitioners (a) will consider themselves as simply in the same position as either party's lawyers, or (b) that they will see their role as suggesting to the Arbitral Tribunal how issues of fact or law as

presented by the parties ought to be determined (which is the sole mandate of the Arbitral Tribunal itself).

65. This has been a very public and widely reported dispute. The broad policy issues on which the Petitioners are especially qualified are ones which are in the public domain, and about which each Petitioner is already very well acquainted. These, after all, are the very issues that have led to their application to intervene in these proceedings. None of these types of issue ought to require – at least for the time being – disclosure of documents from the arbitration.
66. However, this is an issue that may be revisited after the conclusion of the April hearing. As set out in *Procedural Order No 3*, there were specific reasons of procedural integrity (not necessarily confidentiality) that led the Arbitral Tribunal to impose certain limitations on disclosure. These reasons remain for the time being, and the safeguards now in place would be effectively swept away if access was now given to all categories of documents. Once the April hearing has been concluded, however, the concerns with respect to procedural integrity may be altered, and if so, there may then be less impediment to the disclosure of documents to non-disputing parties. At the same time, the Arbitral Tribunal would also need to address the question of how to ensure compliance by the Petitioners with any restrictions which it was necessary or appropriate to maintain or to impose.
67. This, therefore, is an issue that the Arbitral Tribunal intends to consider in the second stage of this procedure, as outlined in paragraph 60 above.
68. It follows that, for the time being only, and pending a further ruling after the April hearing, the Arbitral Tribunal denies the Petitioners' application for access to the documents filed by the parties in this arbitration.

C. The Petitioners' request to attend the oral hearings and to reply to any specific questions of the Tribunal on the written submissions


69. Lastly, the Petitioners seek an order from the Arbitral Tribunal that the hearings be open to the public and that non-disputing parties or *amici* be allowed to reply directly to any questions directed to them by the Arbitral Tribunal concerning their submissions.
70. Rule 32(2) of the amended Arbitration Rules governs this issue. It has been set out earlier in this Order, but its opening words are clear, and condition the Arbitral Tribunal's powers in this regard: "[u]nless either party objects,"
71. In this case, Claimant objects to the presence of the Petitioners at the hearing. The Arbitral Tribunal therefore has no power to permit the Petitioners' presence or participation at the hearing, and must accordingly reject its application in this regard.
72. On the other hand, the Arbitral Tribunal reserves the right to ask the Petitioners specific questions in relation to their written submission, and to request the filing of further written submissions and/or documents or other evidence, which might assist in better understanding the Petitioners' position, whether before or after the hearing.

D. Publication of this Order

73. Finally, given the public interest in the subject matter of this Procedural Order, and pursuant to its directions in *Procedural Order No 3*, the Arbitral Tribunal hereby directs that this Procedural Order No 5 shall be subject to no confidentiality restrictions, and may be freely disclosed to third parties.

2 February 2007

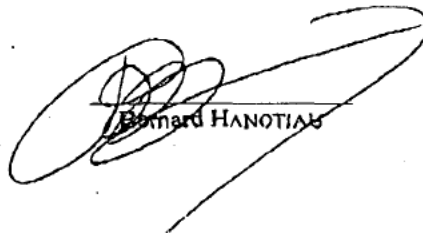
The Arbitral Tribunal



Gary BORN



Toby LANDAU



Bernard HANOTIAUX

EXHIBIT 290

**IN THE MATTER OF AN ARBITRATION UNDER
CHAPTER 11 OF THE NORTH AMERICAN
FREE TRADE AGREEMENT
AND THE UNCITRAL ARBITRATION RULES**

B E T W E E N :

METHANEX CORPORATION

Claimant/Investor

and

UNITED STATES OF AMERICA

Respondent/Party

**DECISION OF THE TRIBUNAL ON
PETITIONS FROM THIRD PERSONS
TO INTERVENE AS "AMICI CURIAE"**

THE TRIBUNAL:

**William Rowley QC;
Warren Christopher Esq;
V.V. Veeder QC (Chairman).**

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**THE TRIBUNAL'S DECISION ON PETITIONS FROM
THIRD PERSONS TO INTERVENE AS "AMICI CURIAE"**

I - INTRODUCTION

1. On 25th August 2000, a petition was submitted to the Tribunal by the International Institute for Sustainable Development requesting permission to submit an *amicus curiae* brief to the Tribunal (the "Institute Petition"). On 6th September 2000, a joint Petition was submitted to the Tribunal by (i) Communities for a Better Environment and (ii) the Earth Island Institute for permission to appear as *amici curiae* (the "Communities/Earth Island Petition").
2. On 7th September 2000, the requests contained in these petitions were addressed by the Claimant and the Respondent at the Second Procedural Hearing, which was also attended by the legal representative from Mexico. At this point, only the Claimant had filed written submissions on the issue of intervention (on 31st August 2000), and these were directed to the Institute Petition only. The Tribunal decided not to rule upon the Petitions at the Hearing. Under Item 3 of the Minutes of Order of that Hearing, as modified on 10th October 2000, the Tribunal laid down a timetable for written submissions on the issue of intervention by third persons as *amicus curiae*, to be decided by the Tribunal as a general principle.
3. The Tribunal's timetable provided as follows:
 - (1) 16th October 2000: Further written submissions of Petitioners for *amicus curiae* status.
 - (2) 27th October 2000: Written submissions from the Claimant and the Respondent in respect of (1).

- (3) 10th November 2000: Written submissions from Canada and Mexico as Non-Disputing State Parties as provided for by Article 1128 of NAFTA.
- (4) 22nd November 2000: Written submissions from the Claimant and the Respondent in respect of (3).

An "Amended Petition" was duly submitted on 13th October 2000 by (i) Communities for a Better Environment, (ii) the Bluewater Network of Earth Island Institute and (iii) the Center for International Environmental Law (the "Communities/Bluewater/Center Petition"); on 16th October 2000, "Final Submissions" were submitted by the International Institute for Sustainable Development (the "Institute Final Petition"); on 27th October 2000, the Claimant and the Respondent filed their written submissions; on 10th November 2000, Canada and Mexico each filed written submissions; and on 22nd November 2000, the Claimant and the Respondent filed their further written submissions.

4. In accordance with the procedure envisaged at the Second Procedural Meeting and agreed with the Disputing Parties, the Tribunal has been able to decide this issue on the basis of these written submissions, without the need for an oral hearing. At the outset, the Tribunal expresses its thanks to all those responsible for researching and drafting these submissions, which touch upon important general principles directly affecting the future conduct of these arbitration proceedings and the potential effect, direct and indirect, of any award on the Disputing Parties' substantive dispute.

II - SUMMARY OF THE PETITIONERS' REQUESTS

5. *The Institute:* The Institute Petition contained requests for permission (i) to file an *amicus* brief (preferably after reading the parties' written pleadings), (ii) to make oral submissions, (iii) to have observer status at oral hearings. Permission was sought on the basis of the immense public importance of the case and the critical impact that the Tribunal's decision will have on environmental and other public welfare law-making in the NAFTA region. It was also contended that the interpretation of Chapter 11 of NAFTA should reflect legal principles underlying the concept of sustainable development; and that the Institute could assist the Tribunal in this respect. A further point was made that participation of an *amicus* would allay public disquiet as to the closed nature of arbitration proceedings under Chapter 11 of NAFTA. As to jurisdiction, it was argued that the Tribunal could grant the Petition under its general procedural powers contained in Article 15 of the UNCITRAL Arbitration Rules, and that there was nothing in Chapter 11 to prevent the granting of the permission requested by the Institute. Reference was also made to the practice of the WTO Appellate Body and courts in Canada and the United States.

6. These submissions were expanded in the Institute Final Petition. It was argued that there was an increased urgency in the need for *amicus* participation in the light of the award dated 30th August 2000 in *Metalclad Corporation v. United Mexican States* and an alleged failure to consider environmental and sustainable development goals in that NAFTA arbitration. It was contended that there was no danger of the Tribunal opening the "floodgates" to other persons seeking to appear as *amici* in future NAFTA arbitrations; and that there was no overriding principle of confidentiality in arbitration that should exclude *amici*. Further, in this respect, the Institute would be entitled eventually to copies of the parties' written pleadings under the US Freedom of Information Act. The Institute would satisfy the special interest tests under both Canadian and US law to enable it to appear as *amicus* in equivalent court proceedings in

those jurisdictions. Finally, it was argued that the absence of any right of appeal from the Tribunal's arbitration award made it all the more important that there should be no errors resulting from the lack of a fresh and relevant perspective which the Institute could provide to the Tribunal.

7. *Communities/Bluewater/Center*: The *Communities/Earth Island* Petition was in effect superseded by the *Communities/Bluewater/Center* Petition (as explained at paragraph 1 of the later submission). This petition requested permission to participate in the proceedings as *amici curiae*, which participation was to include the opportunity to review the parties' written pleadings, to attend hearings and to make written and oral submissions. For practical purposes, the scope of this intervention is the same sought by the Institute.
8. This petition stressed the widespread public support for the participation of *amici* in this arbitration. It argued that the case raised issues of constitutional importance, concerning the balance between (a) governmental authority to implement environmental regulations and (b) property rights. It contended that the outcome in this case might affect the willingness of governments at all levels in the NAFTA States (including the State of California) to implement measures to protect the environment and human health. As with the Institute Petition, it asserted that intervention was consistent with Canadian and US domestic law; and that the Tribunal had jurisdiction to allow the petition under Article 15 of the UNCITRAL Arbitration Rules. It was again contended that there was support for a decision by the Tribunal to allow the petition in the form of various decisions of the WTO Appellate Body. Further, the point was made that the United States had recognised the value of *amicus* participation in cases before the WTO Appellate Body.

III - SUMMARY OF SUBMISSIONS BY MEXICO AND CANADA

9. *Mexico:* Mexico stressed that Chapter 11 of NAFTA did not provide for the involvement of persons other than the Disputing Parties and NAFTA Parties on questions of the interpretation of NAFTA pursuant to Article 1128. It contended that if *amicus curiae* submissions were allowed, the *amici* would have greater rights than the NAFTA Parties themselves because of the limited scope of Article 1128 submissions. Such a result was clearly never intended by the NAFTA Parties; and it could lead to the abrogation of Article 1128 by NAFTA Parties submitting *amicus* briefs where they wished to make submissions on issues other than the interpretation of NAFTA. Mexico argued that the Tribunal's authority to appoint experts was limited by Article 1133 of NAFTA (i.e. subject to the disapproval of the Disputing Parties). In any event, *amici* were not to be confused with independent experts. In addition, Mexico noted that there was no power under Mexican law for its domestic courts to receive *amicus* briefs. The Chapter 11 dispute settlement mechanism established a careful balance between the procedures of common law states, Canada (at least in part) and the United States, on the one hand and on the other a civil law state, Mexico. The existence of a specific procedure in one Party's domestic state court procedure did not mean that it could be transported to a transnational NAFTA arbitration.
10. *Canada:* Canada adopted a different approach from Mexico. In its written submissions, Canada stated its support for greater openness in arbitration proceedings under Chapter 11 of NAFTA. Although mindful of the confidentiality obligations imposed by Article 25(4) of the UNCITRAL Arbitration Rules, Canada supported public disclosure of arbitral submissions, orders and awards to the fullest extent possible. Canada contended that in this case, without prejudice to its position in other arbitrations under NAFTA Chapter 11, the Tribunal should accept the written submissions of the Petitioners, notwithstanding that only NAFTA Parties have the right to make submissions on questions of the interpretation of NAFTA. Canada also stated that it would be asking its

NAFTA partners to work together on the issue of *amicus curiae* participation as a matter of urgency in order to provide guidance to arbitration tribunals under Chapter 11.

IV - SUMMARY OF SUBMISSIONS BY THE DISPUTING PARTIES

11. The Disputing Parties responded differently to the Petitioner's requests for intervention. The Respondent, as summarised later below, requested the Tribunal to accept part of the Petitioner's requests. The Claimant sought the dismissal of these petitions under three principal headings: (i) confidentiality, (ii) jurisdiction, (iii) fairness of process.

(i) The Claimant

12. ***Confidentiality:*** As to confidentiality, the Claimant relied on Article 25(4) of the UNCITRAL Arbitration Rules to the effect that hearings are to be held *in camera*. It argued that this obligation carried with it the requirement that documents prepared for the arbitration be confidential. The authority for this proposition was to be found in the reasoning of the English Commercial Court in *Hassneh Insurance Co. of Israel v. Stuart J. Mew* [1993] 2 Lloyd's Rep 243. Further, the Disputing Parties had come to an agreement on confidentiality by the Consent Order regarding Disclosure and Confidentiality (made by the Tribunal at the Second Procedural Meeting on 7th September 2000); and it was thereby agreed that transcripts, written submissions, witness statements, reports, etc be kept confidential. The Order did not allow for disclosure of material to non-governmental organisations or public interest groups, such as the Petitioners.
13. ***Jurisdiction:*** As to jurisdiction, the Claimant argued that the Tribunal had no jurisdiction to add a party to the proceedings without the agreement of the parties. The ability to appear in the arbitration was limited by Chapter 11 of NAFTA to the Disputing Parties and NAFTA Parties, whereas granting the Petitioners the status of *amicus curiae* would be equivalent to adding them as parties. No such jurisdiction was created by Article 15

of the UNCITRAL Arbitration Rules. That rule was concerned merely with procedural matters and not the substantive issue of who were the parties to the arbitration. There was also no question of jurisdiction under Article 27 of the UNCITRAL Arbitration Rules, as that power to receive expert evidence had been specifically removed from the Tribunal. Further, after a careful search the Claimant stated that it had been unable to find any precedent where a tribunal had granted *amicus curiae* status to non-parties in an arbitration under the UNCITRAL Arbitration Rules.

14. *Fairness:* As to fairness, the Claimant contended that the protection of the public interest was ensured by Article 1128 of NAFTA. Private interest groups wishing to put their views before an arbitration tribunal could convey their information to the NAFTA Parties, who had the right to intervene where there was a question of interpretation of NAFTA. Further, any of the Disputing Parties would be in a position to call upon the Petitioners to offer their testimony as evidence in the proceedings, whereas if the Petitioners were to appear as *amici curiae*, the Disputing Parties would have no opportunity to test by cross-examination (in particular) the factual basis of their contentions. In addition, granting to the Petitioners *amici* status would substantially increase the costs of proceedings and require the Claimant to respond to the submissions of others in a way not contemplated by NAFTA. An undesirable precedent would be set and other groups might be encouraged to seek to appear as *amici* in arbitrations under Chapter 11 of NAFTA.
15. Like Mexico, the Claimant also argued that reliance on the practice relating to *amici* in the domestic courts of certain jurisdictions was inappropriate to these arbitration proceedings. *Amicus* briefs were not permitted in one of the NAFTA States, namely Mexico. The court processes of one NAFTA State should not be preferred over another; and the international rules governing foreign investment should not be made to give way to domestic practices. The Claimant also considered that WTO practice was irrelevant and should be disregarded by the Tribunal. Further, insofar as it was aware, no WTO panel or Appellate Body had accepted for consideration an unsolicited *amicus* brief. Briefs had been filed in each case, but the WTO Panel or Appellate Body had always

determined that these briefs should not be considered, and the power under Article 13 of the Dispute Settlement Understanding to seek information from outside sources had not been used in this respect. Further, in the order of 16th November 2000 in *European Communities - Measures Affecting Asbestos and Asbestos Containing Products*, all seventeen applications for *amicus* status were rejected by the WTO.

(ii) The Respondent

16. The Respondent contended (i) that the procedural rules governing the arbitration permitted the acceptance of *amicus* submissions, and (ii) that *amicus* submissions were suitable when likely to assist the Tribunal and should then be allowed by the Tribunal.
17. *Power*: The Respondent argued that there was an inherent flexibility in the UNCITRAL Arbitration Rules, to be applied in the context of the particular dispute. The powers under the UNCITRAL Arbitration Rules should be exercised in a manner commensurate with the public international law aspects of the case and the fact that it implicated substantial public interests. The NAFTA Parties' view that the UNCITRAL Arbitration Rules were sufficiently flexible in such instances reflected a presumption that arbitration tribunals would use the discretion granted to them in a manner appropriate to the nature of the dispute. In this respect, the current dispute was to be distinguished from a typical commercial arbitration on the basis that a State was the Respondent, the issues had to be decided in accordance with a treaty and the principles of public international law and a decision on that dispute could have a significant effect extending beyond the two Disputing Parties.
18. The Respondent contended that pursuant to Article 15(1) of the UNCITRAL Arbitration Rules the Tribunal had the authority to conduct the proceedings as it deemed appropriate subject to the proviso that the parties be treated with equality and given a full opportunity of presenting their cases. This rule was sufficiently broad to encompass the authority to accept *amicus* briefs. The Respondent cited comments on the application of the UNCITRAL Arbitration Rules by the Iran-US Claims Tribunal in *Baker & Davis, The*

UNCITRAL Arbitration Rules in Practice, 1992, pp. 76 and 98. The Respondent also relied on the practice of the Appellate Body of the WTO in finding that it had broad authority to adopt procedural rules that did not conflict with the express rules of the WTO Dispute Settlement Understanding, therefore allowing *amicus* submissions: see *United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, paragraph 39, [WT/DS138/AB/R], adopted on 7th June 2000.

19. The Respondent considered that there was nothing in the UNCITRAL Arbitration Rules that prohibited acceptance of *amicus* submissions. Article 25(4) of the Rules limited the persons who could attend a hearing, not those who could submit written briefs. In this respect, the Respondent relied on the Australian case of *Esso Australia Resources Ltd. v. Plowman* (1995) 183 CLR 10 at paragraphs 30-32, in which *Hassneh Insurance Co. of Israel v. Stuart J. Mew* was considered but not followed by the High Court of Australia. It also relied on the recent application of the *Esso* case by the Swedish Supreme Court in *Bulgarian Foreign Trade Bank Ltd. v. A. I. Trade Finance Inc* (27.x.2000); and a finding in that case that a party in an international commercial arbitration in Sweden was not bound by a duty of confidentiality unless it had agreed to that duty, and that the presence of an *in camera* rule in an arbitration agreement did not amount to such an agreement. In any event, rules of confidentiality could have no bearing on whether the Tribunal could receive written submissions from *amici*. Further, the Tribunal's discretion was not limited by Article 22 of the UNCITRAL Arbitration Rules, which did deal with written submissions.
20. Similarly, the Respondent contended that there was nothing in Chapter 11 of NAFTA to prohibit the acceptance of *amicus* submissions. Article 1128 of NAFTA gave rights to Non-Disputing Parties, leaving untouched the question of how the Tribunal might exercise its discretion to permit submissions from other non-parties. There was therefore no question of *amici* being granted greater rights than the NAFTA's State Parties. In this respect, the Respondent referred to the rejection of a similar argument in the WTO context: *Hot-Rolled Lead and Carbon Steel*, paragraph 41 [WT/DS138/AB/R]. In

addition, it was contended that Articles 1126(10) and 1137(4) of NAFTA recognised the public interest involved in NAFTA arbitrations in demonstrating that the NAFTA Parties expected the substance of each Chapter 11 dispute and most awards to be made publicly available. Responding to the argument raised by Mexico that the Tribunal's authority to appoint experts was limited to Article 1133 of NAFTA, the Respondent maintained that *amici* did not fulfil the same function as Tribunal appointed experts; and Article 1133 was therefore irrelevant.

21. Finally, under this heading, the Respondent argued that the Petitioners were not seeking the status of parties so the Claimant's comments in this respect were misconceived. A burden would be added if the Tribunal accepted an *amicus* submission, but this would be justified where the Tribunal had made a determination that the *amicus* submission would be helpful. The Consent Order regarding Disclosure and Confidentiality did not address the question of *amicus* briefs, and specifically envisaged that important documents generated during the course of the arbitration would be released to the public, whilst the remainder would be subject to release under the US Freedom of Information Act.

22. *Discretion:* As to the second of its principal contentions, the Respondent argued that a third person might have knowledge or expertise of value to the Tribunal, and that on a showing that the submission would be both relevant and helpful, it should be allowed by the Tribunal. In this respect, the Claimant suggested procedures by which the Tribunal could assess the value of a potential *amicus* submission before deciding to grant leave. Specific reference was made to the procedures adopted in the order of 8th November 2000 adopted in *European Communities - Measures Affecting Asbestos and Asbestos Containing Products* [WT/DS135/9]. By contrast, failure to allow any *amicus* submissions would reinforce the growing perception that Chapter 11 dispute resolution was an exclusionary and secretive process. Moreover, there was no reason to fear a deluge of petitions for *amicus* status - as was clear from what had happened both in this case as well as experience in the WTO.

23. As to the Petitioners' requests that they be allowed to attend hearings and receive copies of all documents filed in the arbitration, the Respondent's position was that the Tribunal's jurisdiction was effectively restricted by Article 25(4) of the UNCITRAL Arbitration Rules and the Consent Order regarding Disclosure and Confidentiality. It nonetheless was in favour of giving public access to the greatest extent possible, and therefore gave its consent to the open and public hearing of all hearings before the Tribunal, supporting disclosure consistent with the Consent Order.

V - THE TRIBUNAL'S REASONS AND DECISION

24. Pursuant to Articles 1120(1)(c) and 1120(2) of NAFTA and the agreement of the Disputing Parties, this arbitration is governed by the UNCITRAL Arbitration Rules save insofar as such Rules are modified by Chapter 11, Section B, of NAFTA. In the Tribunal's view, there is nothing in either the UNCITRAL Arbitration Rules or Chapter 11, Section B, that either expressly confers upon the Tribunal the power to accept *amicus* submissions or expressly provides that the Tribunal shall have no such power.
25. It follows that the Tribunal's powers in this respect must be inferred, if at all, from its more general procedural powers. In the Tribunal's view, the Petitioners' requests must be considered against Article 15(1) of the UNCITRAL Arbitration Rules; and it is not possible or appropriate to look elsewhere for any broader power or jurisdiction.
26. Article 15(1) of the UNCITRAL Arbitration Rules grants to the Tribunal a broad discretion as to the conduct of this arbitration, subject always to the requirements of procedural equality and fairness towards the Disputing Parties. It provides, broken down into numbered sub-paragraphs for ease of reference below, as follows:

"[1] Subject to these Rules, [2] the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, [3] provided that the parties are

treated with equality and that at any stage in the proceedings each party is given a full opportunity of presenting its case."

This provision constitutes one of the essential "hallmarks" of an international arbitration under the UNCITRAL Arbitration Rules, according to the *travaux préparatoires*. Article 15 has also been described as the "heart" of the UNCITRAL Arbitration Rules; and its terms have since been adopted in Articles 18 and 19(2) of the UNCITRAL Model Law on International Commercial Arbitration, where these provisions were considered as the procedural "*Magna Carta*" of international commercial arbitration. Article 15(1) is plainly a very important provision.

27. Article 15(1) is intended to provide the broadest procedural flexibility within fundamental safeguards, to be applied by the arbitration tribunal to fit the particular needs of the particular arbitration. As a procedural provision, however, it cannot grant the Tribunal any power to add further disputing parties to the arbitration, nor to accord to persons who are non-parties the substantive status, rights or privileges of a Disputing Party. Likewise, the Tribunal can have no power to accord to any third person the substantive rights of NAFTA Parties under Article 1128 of NAFTA. The issue is whether Article 15(1) grants the Tribunal any lesser procedural power in regard to non-party third persons, such as the Petitioners here.
28. In addressing this issue, there are four principal matters to be considered:
 - (i) whether the Tribunal's acceptance of *amicus* submissions falls within the general scope of the sub-paragraph numbered [2] of Article 15(1);
 - (ii) if so, whether the acceptance of *amicus* submissions could affect the equal treatment of the Disputing Parties and the opportunity of each fully to present its case, under the sub-paragraph numbered [3] of Article 15(1);
 - (iii) whether there are any provisions in Chapter 11, Section B, of NAFTA that modify the application of Article 15(1) for present purposes; and

(iv) whether other provisions of the UNCITRAL Arbitration Rules likewise modify the application of Article 15(1) in regard to this particular case, given the introductory words of the sub-paragraph numbered [1] of Article 15(1).

It is convenient to consider each matter in turn.

(i) The General Scope of Article 15(1) of the UNCITRAL Arbitration Rules

29. The Tribunal is required to decide a substantive dispute between the Claimant and the Respondent. The Tribunal has no mandate to decide any other substantive dispute or any dispute determining the legal rights of third persons. The legal boundaries of the arbitration are set by this essential legal fact. It is thus self-evident that if the Tribunal cannot directly, without consent, add another person as a party to this dispute or treat a third person as a party to the arbitration or NAFTA, it is equally precluded from achieving this result indirectly by exercising a power over the conduct of the arbitration. Accordingly, in the Tribunal's view, the power under Article 15(1) must be confined to procedural matters. Treating non-parties as Disputing Parties or as NAFTA Parties cannot be matters of mere procedure; and such matters cannot fall within Article 15(1) of the UNCITRAL Arbitration Rules.
30. However, in the Tribunal's view, its receipt of written submissions from a person other than the Disputing Parties is not equivalent to adding that person as a party to the arbitration. The rights of the Disputing Parties in the arbitration and the limited rights of a Non-Disputing Party under Article 1128 of NAFTA are not thereby acquired by such a third person. Their rights, both procedural and substantive, remain juridically exactly the same before and after receipt of such submissions; and the third person acquires no rights at all. The legal nature of the arbitration remains wholly unchanged.
31. The Tribunal considers that allowing a third person to make an *amicus* submission could fall within its procedural powers over the conduct of the arbitration, within the general scope of Article 15(1) of the UNCITRAL Arbitration Rules. The wording of the sub-

paragraph numbered [2] of Article 15(1) suffices, in the Tribunal's view, to support its conclusion: but its approach is supported by the practice of the Iran-US Claims Tribunal and the World Trade Organisation.

32. *Iran-US Claims Tribunal*: Note 5 of the Iran-US Claims Tribunal Notes to Article 15(1), of the UNCITRAL Arbitration Rules states:

"5. The arbitral tribunal may, having satisfied itself that the statement of one of the two Governments - or, under special circumstances, any other person - who is not an arbitrating party in a particular case is likely to assist the arbitral tribunal in carrying out its task, permit such Government or person to assist the arbitral tribunal by presenting written and [or] oral statements."

This provision was specifically drafted for the Iran-US Claims Tribunal as a supplementary guide. Although (so it appears from published commentaries) it was invoked by Iran or the US as non-arbitrating parties, it was also invoked by non-state third persons (albeit infrequently), such as the foreign banks submitting their own memorial to the Tribunal in *Iran v United States, Case A/15*: see the Award No 63-A/15-FT made by the Full Tribunal (President Böckstiegel and Judges Briner, Virally, Bahrami, Holtzmann, Mostafavi, Aldrich, Ansari and Brower) 2 Iran-US C.T.R. 40, at p.43. For present purposes, the authoritative guide to the exercise of the Iran-US Claim Tribunal's discretion under Article 15(1) and this award demonstrate that the receipt of written submissions from a non-party third person does not necessarily offend the philosophy of international arbitration involving states and non-state parties.

33. *WTO*: The distinction between parties to an arbitration and their right to make submissions and a third person having no such right was adopted by the WTO Appellate Body in *Hot-Rolled Lead and Carbon Steel*, paragraph 41: *"Individuals and organisations, which are not Members of the WTO, have no legal 'right' to make submissions to or to be heard by the Appellate Body. The Appellate Body has no legal 'duty' to accept or consider unsolicited amicus curiae briefs submitted by individuals or organisations, not Members of the WTO"* Further, the Appellate Body there found

that it had power to accept *amicus* submissions under Article 17.9 of the Dispute Settlement Understanding to draw up working procedures. That procedural power is significantly less broad than the power accorded to this Tribunal under Article 15(1) to conduct the arbitration in such manner as it considers appropriate. For present purposes, this WTO practice demonstrates that the scope of a procedural power can extend to the receipt of written submissions from non-party third persons, even in a juridical procedure affecting the rights and obligations of state parties; and further it also demonstrates that the receipt of such submissions confers no rights, procedural or substantive, on such persons.

34. *ICJ*: The Tribunal notes, however, that there has been a traditional reluctance on the part of the International Court of Justice to accept *amicus* submissions from non-parties, although Article 62 of the ICJ Statutes allows an interested non-party state to request intervention. As observed by Rosenne, *The Law and Practice of the International Court 1920-1996* (1997), at pp. 653-654, the ICJ does not admit non-governmental organisations (which are treated as individuals); and in regard to individual petitioners, the author states: "The practice of the Court also does not envisage the legal representatives of an individual appearing at the bar of the Court, holding a watching brief, receiving copies of the pleadings, and being allowed - perhaps as *amicus curiae* - to present its own case." The ICJ Registrar refused such a request in the *Namibia Case*, II Pleadings, 636, 638. Nonetheless, more recently, it appears that written submissions were received by the ICJ, unofficially, in *Case Concerning the Gabčíkovo-Nagymaros Project*, ICJ Reports, 1997. In the Tribunal's view, the ICJ's practices provides little assistance to this case. Its jurisdiction in contentious cases is limited solely to disputes between States; its Statute provides for intervention by States; and it would be difficult in these circumstances to infer from its procedural powers a power to allow a non-state third person to intervene.

(ii) *Safeguarding Equal Treatment*

35. The Tribunal notes the argument raised by the Claimant to the effect that a burden will be added if *amicus* submissions are presented to the Tribunal and the Disputing Parties seek to make submissions in response. That burden is indeed a potential risk. It is inherent in any adversarial procedure which admits representations by a non-party third person.
36. However, at least initially, the burden in meeting the Petitioners' written submissions would be shared by both Disputing Parties; and moreover, that burden cannot be regarded as inevitably excessive for either Disputing Party. As envisaged by the Tribunal, the Petitioners would make their submissions in writing, in a form and subject to limitations decided by the Tribunal. The Petitioners could not adduce the evidence of any factual or expert witness; and it would not therefore be necessary for either Disputing Party to cross-examine a witness proffered by the Petitioners: there could be no such witness. As to the contents of the Petitioners' written submissions; it would always be for the Tribunal to decide what weight (if any) to attribute to those submissions. Even if any part of those submissions were arguably to constitute written "evidence", the Tribunal would still retain a complete discretion under Article 25.6 of the UNCITRAL Arbitration Rules to determine its admissibility, relevance, materiality and weight. Of course, if either Disputing Party adopted a Petitioner's written submissions, the other Disputing Party could not then complain at that burden: it was always required to meet its opponent's case; and that case, however supplemented, can form no extra unfair burden or unequal treatment.
37. It would always be the Tribunal's task, assisted by the Disputing Parties, to adopt procedures whereby any burden in meeting written submissions from a Petitioner was mitigated or extinguished. In theory, a difficulty could remain if a point was advanced by a Petitioner to which both Disputing Parties were opposed; but in practice, that risk appears small in this arbitration. In any case, it is not a risk the size or nature of which should swallow the general principle permitting written submissions from third persons.

Accordingly, whilst there is a possible risk of unfair treatment as raised by the Claimant, the Tribunal is aware of that risk and considers that it must be addressed as and when it may arise. There is no immediate risk of unfair or unequal treatment for any Disputing Party or Party.

(iii) Relevant Provisions in Chapter 11, Section B, of NAFTA

38. As already noted by the Tribunal, there are no provisions in Chapter 11 of NAFTA that touch directly on the question of whether a tribunal has the power to accept *amicus* submissions. Of the provisions that have been considered in the submissions received by the Tribunal, neither Article 1128 nor Article 1133 of NAFTA has any bearing on that question. The first is concerned with a right on the part of NAFTA Parties; and the second is concerned solely with a tribunal's authority to appoint experts. *Amici* are not experts; such third persons are advocates (in the non-pejorative sense) and not "independent" in that they advance a particular case to a tribunal.
39. The Respondent referred to Articles 1126(10) and 1137(4) of NAFTA. In the Tribunal's view, there is nothing relevant in these provisions for present purposes. As the Tribunal has already concluded, there is no provision in Chapter 11 that expressly prohibits the acceptance of *amicus* submissions, but likewise nothing that expressly encourages them.

(iv) Other UNCITRAL Arbitration Rules

40. The Claimant's reliance on Article 25(4) of the UNCITRAL Arbitration Rules to the effect that hearings are to be held *in camera* is not relevant to the Petitioners' request to serve written submissions to the Tribunal. In the Tribunal's view, there are no further provisions under the UNCITRAL Arbitration Rules that modify the application of its general power under Article 15(1) to allow the Petitioners to make such submissions in this arbitration.
41. However, the Claimant's reliance on Article 25(4) is relevant to the Petitioners' request

- to attend hearings and to receive copies of all submissions and materials adduced before the Tribunal. Article 25(4) provides that: “[Oral] Hearings shall be held *in camera* unless the parties agree otherwise ...”. The phrase “in camera” is clearly intended to exclude members of the public, i.e. non-party third persons such as the Petitioners. As the *travaux préparatoires* disclose, the UNCITRAL drafting committee deleted a different provision in an earlier draft which could have allowed the arbitration tribunal to admit into an oral hearing persons other than the parties. However, as discussed further below, Article 25(4) relates to the privacy of the oral hearings of the arbitration; and it does not in like terms address the confidentiality of the arbitration.
42. As to privacy, the Respondent has accepted that, as a result of Article 25(4), hearings are to be held *in camera* unless both Disputing Parties consent otherwise. The Respondent has given such consent. The Claimant has given no such consent. The Tribunal must therefore apply Article 25(4); and it has no power (or inclination) to undermine the effect of its terms. It follows that the Tribunal must reject the Petitioners’ requests to attend oral hearings of the arbitration.
43. As to confidentiality, the Tribunal notes the conflicting legal materials as to whether Article 25(4) of the UNCITRAL Arbitration Rules imposes upon the Disputing Parties a further duty of confidentiality (beyond privacy) in regard to materials generated by the parties within the arbitration. The most recent decision of the Swedish Supreme Court in *Bulgarian Foreign Trade Bank Ltd. v. A. I. Trade Finance Inc* (27.x.2000) suggests that a privacy rule in an arbitration agreement does not give rise under Swedish law to a separate duty of confidentiality, at least as regards the award. That approach is strongly supported by the decision of the High Court of Australia in *Esso/BHP v Plowman* (1993) 183 CLR 10 distinguishing between confidentiality and privacy, particularly as subsequently applied by the New South Wales Court in *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd* (1995) 36 NSWLR 662 involving a public corporation (per Kirby J: “Can it be seriously suggested that [the] parties’ private agreement can, endorsed by a procedural direction of an arbitrator, exclude from the public domain matters of legitimate concern ...”).

44. The English legal materials generally point in the other direction, as invoked by the Claimant, with the high water mark being the Court of Appeal's decision in *Ali Shipping Corporation v Shipyard Trogir* [1998] 1 Lloyd's Rep 643. Even in England, however, the present position is arguably equivocal in regard to public authorities (including a state party), particularly given the absence of any statutory rule in the English Arbitration Act 1996 - for reasons explained at length in the official commentary contained in the Departmental Advisory Committee's 1996 Report on the Arbitration Bill (paragraphs 10-17). It is perhaps significant that English law on strict confidentiality is a recent innovation, dating essentially from the decision in *The Eastern Saga* [1983] 2 Lloyd's Rep 373, cited by the Claimant. For example, as the DAC Report noted, the arbitration tribunal in *Lena Goldfields v USSR* (1930) decided in the public interest to publish its procedural orders and final award in the London "Times", without any critical comment at the time (as to publication).
45. The Tribunal has also considered the position on confidentiality in the USA, insofar as it may be relevant as the law of the place of the arbitration, Washington DC. The Federal Arbitration Act is silent on the point; but like Australia and Sweden, US law maintains a distinction between privacy and confidentiality. Indeed Professor Hans Smit's expert report on US law was adduced before the Australian Courts in *Esso/BP v Plowman*. He relied on the decision of United States District Court for the District of Delaware in *USA v Panhandle Eastern Corp* 118 FRD 346, 10 Fed R Serv 3rd 686 (D Del 1988), concerning the non-confidentiality of documentation disclosed by a party in an ICC arbitration. Professor Smit also stressed the significance of a public interest, such as the Petitioners suggest in this case: "*In determining to what extent arbitration is confidential, proper consideration must also be given to the public interest in knowing how disputes are settled ...*" (see [1995] *Arbitration International* 297 & 299 at 300).

46. This is however a difficult area; and for present purposes, the Tribunal does not have to decide the point. Confidentiality is determined by the agreement of the Disputing Parties as recorded in the Consent Order regarding Disclosure and Confidentiality, forming part of the Minutes of Order of the Second Procedural meeting of 7th September 2000. As *amici* have no rights under Chapter 11 of NAFTA to receive any materials generated within the arbitration (or indeed any rights at all), they are to be treated by the Tribunal as any other members of the public. Accordingly materials may be disclosed only as allowed in the Consent Order. Of course, pursuant to paragraph 3 of that Order, either party is at liberty to disclose the major pleadings, orders and awards of the Tribunal into the public domain (subject to redaction of Trade Secret Information). That is however a matter for the Disputing Parties and not the Tribunal.

(v) *The Tribunal's Conclusion*

47. *Power:* The Tribunal concludes that by Article 15(1) of the UNCITRAL Arbitration Rules it has the power to accept *amicus* submissions (in writing) from each of the Petitioners, to be copied simultaneously to the legal representatives of the Disputing Parties, Canada and Mexico. In coming to this conclusion, the Tribunal has not relied on the fact that *amicus* submissions feature in the domestic procedures of the courts in two, but not three, NAFTA Parties. The Tribunal also concludes that it has no power to accept the Petitioners' requests to receive materials generated within the arbitration or to attend oral hearings of the arbitration. Such materials may however be derived from the public domain or disclosed into the public domain within the terms of the Consent Order regarding Disclosure and Confidentiality, or otherwise lawfully; but that is a quite separate matter outwith the scope of this decision.
48. *Discretion:* The next issue is whether, in the particular circumstances of this arbitration, the Tribunal should decide that it is "appropriate" to accept *amicus* submissions from the Petitioners in the exercise of the discretion under Article 15(1) of the UNCITRAL Arbitration Rules. At this early stage, the Tribunal cannot decide definitively that it *would*

be assisted by these submissions on the Disputing Parties' substantive dispute. The Petitions set out the credentials of the Petitioners, which are impressive; but for now, the Tribunal must assume that the Disputing Parties will provide all the necessary assistance and materials required by the Tribunal to decide their dispute. At the least, however, the Tribunal must also assume that the Petitioners' submissions *could* assist the Tribunal. The Tribunal must look to other factors for the exercise of its discretion.

49. There is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties. This is not merely because one of the Disputing Parties is a State: there are of course disputes involving States which are of no greater general public importance than a dispute between private persons. The public interest in this arbitration arises from its subject-matter, as powerfully suggested in the Petitions. There is also a broader argument, as suggested by the Respondent and Canada: the Chapter 11 arbitral process could benefit from being perceived as more open or transparent; or conversely be harmed if seen as unduly secretive. In this regard, the Tribunal's willingness to receive *amicus* submissions might support the process in general and this arbitration in particular; whereas a blanket refusal could do positive harm.
50. There are other competing factors to consider: the acceptance of *amicus* submissions might add significantly to the overall cost of the arbitration and, as considered above, there is a possible risk of imposing an extra burden on one or both the Disputing Parties. In this regard, as appears from the Petitions, any *amicus* submissions from these Petitioners are more likely to run counter to the Claimant's position and eventually to support the Respondent's case. This factor has weighed heavily with the Tribunal; and it is concerned that the Claimant should receive whatever procedural protection might be necessary.
51. These are all relevant circumstances under Article 15(1) of the UNCITRAL Arbitration Rules. Less important is the factor raised by the Claimant as to the danger of setting a precedent. This Tribunal can set no legal precedent, in general or at all. It has no power

to determine for other arbitration tribunals how to interpret Article 15(1); and in a later arbitration, there may be other circumstances leading that tribunal to exercise its discretion differently. For each arbitration, the decision must be made by its tribunal in the particular circumstances of that arbitration only.

52. Weighing all the relevant factors, the Tribunal considers that it could be appropriate to allow *amicus* written submissions from these Petitioners. Whilst the Tribunal is at present minded to allow the Petitioners to make such submissions at a later stage of these arbitration proceedings, it is premature now for the Tribunal finally to decide the question at this relatively early stage. The Tribunal intends first to consider with the Disputing Parties procedural limitations as to the timing, form and content of the Petitioners' submissions. For example, the Tribunal may wish to impose a page-limit on such submissions (including exhibits).

VI - THE TRIBUNAL'S ORDER

53. For the reasons set out above, pursuant to Article 15(1) of the UNCITRAL Arbitration Rules, the Tribunal declares that it has the power to accept *amicus* written submissions from the Petitioners; whilst it is at present minded to receive such submissions subject to procedural limitations still to be determined by the Tribunal (to be considered with the Disputing Parties), it will make a final decision whether or not to receive them at a later stage of these arbitration proceedings; and accordingly the Petitions are accepted by the Tribunal to this extent, but otherwise rejected.

Made by the Tribunal on 15th January 2001, as at Washington DC, USA.



Kan Kaitan Kaitan

William Christopher

EXHIBIT 291

International Centre for Settlement of Investment Disputes

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Telephone: (202) 458-1534 Faxes: (202) 522-2615/2027
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By e-mail

October 5, 2009

Mr. Jason Brickhill
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Johannesburg 2000
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Dr. Carlos Lopez
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Re: Piero Foresti, Laura de Carli and others v. Republic of South Africa
(ICSID Case No. ARB(AF)/07/1)

Dear Sirs,

I refer to the Petition for Limited Participation as Non-Disputing Parties filed on July 17, 2009, by the Centre for Applied Legal Studies, the Center for International Environment Law, the International Centre for the Legal Protection of Human Rights and the Legal Resources Centre, as well as the Petition filed on August 19, 2009, by the International Commission of Jurists.

Please be informed that the Tribunal has decided to allow the above mentioned Non Disputing Parties (NDPs) to participate in this proceeding in accordance with Arbitration (Additional Facility) Rule 41(3). The Tribunal has accordingly fixed the schedule for the involvement of the above mentioned NDPs in the next stages of the case and has given directions for the disclosure of documents to them, having in mind two basic principles:

- (1) NDP participation is intended to enable NDPs to give useful information and accompanying submissions to the Tribunal, but is not intended to be a mechanism for enabling NDPs to obtain information from the Parties.
- (2) Where there is NDP participation, the Tribunal must ensure that it is both effective and compatible with the rights of the Parties and the fairness and efficiency of the arbitral process.

Accordingly, the Tribunal has taken the view that the NDPs must be allowed access to those papers submitted to the Tribunal by the Parties that are necessary to enable the NDPs to focus their submissions upon the issues arising in the case and to see what positions the Parties have taken on those issues. The NDPs must also be given adequate opportunity to prepare and deliver their submissions in sufficient time before the hearing for the Parties to be able to respond to those submissions.


The Tribunal does not at this stage envisage that the NDPs will be permitted to attend or to make oral submissions at the hearing. A final decision on those questions will be taken after March 12, 2010, by which date the Parties will have responded to the NDP submissions.

For the time being, the schedule is as follows:

November 2, 2009	Claimants' Reply
November 6, 2009	Exchange between the Parties of the redacted versions of the documents to be sent to the NDPs
November 16, 2009	Filing by the Parties of the redacted documents for the NDPs – Transmission to the NDPs by the Centre
December 21, 2009	NDP's Submissions to be filed with the Centre
March 12, 2010	- Respondent's Rejoinder; - Parties' response to the NDPs' submissions; and - Claimants' additional submission on compensation mechanism
March 26, 2010	Respondent's reply to Claimants' additional submission
April 12-23, 2010	Hearing

In view of the novelty of the NDP procedure, after all submissions, written and oral, have been made the Tribunal will invite the Parties and the NDPs to offer brief comments on the fairness and effectiveness of the procedures adopted for NDP participation in this case. The Tribunal will then include a section in the award, recording views (both concordant and divergent) on the fairness and efficacy of NDP participation in this case and on any lessons learned from it.

Sincerely yours,



Eloïse M. Obadia
Secretary of the Tribunal

cc:
Tribunal Members and Parties

EXHIBIT 292

 KeyCite to Yeow Fag Negative Treatment
 Disputed by [Haddix v. Johnson](#), 6th Cir.(Mich.), January 22, 1998

940 F.2d 143

United States Court of Appeals,
 Sixth Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

STATE OF MICHIGAN, James J. Blanchard,
 Governor of the State of Michigan, the Michigan
 Corrections Commission, Gwen Andrew, Chairman,
 Michigan Corrections Commission, Thomas
 Eardley, Dwayne Waters, Don P. Leduc, Members,
 Michigan Corrections Commission, [Michigan
 Department of Corrections](#), Perry Johnson, Director,
[Michigan Department of Corrections](#), Robert Brown,
 Jr., Deputy Director, Michigan Department of
 Corrections, Dale Foltz, Regional Administrator,
[State Prison of Southern Michigan](#), John Jabe,
 Warden, Michigan Reformatory, Theodore Koehler,
 Warden, Marquette Branch Prison, John Prelesnik,
 Administrator, Reception and Guidance Center,
[State Prison of Southern Michigan](#), and Jack
 Bergman, Administrator, Michigan Intensive
 Programming Center, Defendants–Appellants.

Nos. 90–1366, 90–1367 and 90–1537.

|
 Argued Sept. 19, 1990.

|
 Decided July 2, 1991.

Synopsis

Appeals were taken from orders of the United States District Court for the Western District of Michigan, [Richard A. Enslen, J.](#), which arose from the implementation of a consent decree resolving a case initiated by the Government against the State of Michigan pursuant to the Civil Rights of Institutionalized Persons Act. The Court of Appeals, [Krupansky](#), Circuit Judge, held that: (1) District Court abused its discretion in overly intruding upon sovereignty of Michigan and the terms and conditions of consent decree by materially extending and modifying the consent decree as it related to affected prison facilities, and (2) trial court should not, either directly or indirectly through special masters, independent experts, or other extraneous participants, impose on a

state overly intrusive remedies for prison conditions, but should exercise restraint and reason in performing its oversight responsibility.

Remanded.


[Boggs](#), Circuit Judge, concurred in the result only.

West Headnotes (5)

[1] Federal Courts

 Injunction

Federal Courts

 Interlocutory, Collateral, and Supplementary Proceedings and Questions; Pending Appellate Jurisdiction

Court of Appeals had jurisdiction over modifications of consent decree which were injunctive in nature; furthermore, Court could also consider all related issues having a common nexus with issues joined in the appeals including citations for contempt and mandate to disclose privileged information. 28 U.S.C.A. § 1292(a)(1).

7 Cases that cite this headnote

[2] Federal Civil Procedure

 Amending, opening, or vacating

Courts retain authority to modify consent decrees upon affirmative proof of a defect or deficiency in an original decree which impedes achieving the objectives of the decree; any modification must be fashioned to achieve the goals of the enabling legislation and must be tailored to address conditions giving rise to a constitutional infringement.

17 Cases that cite this headnote

[3] Federal Civil Procedure

 Amending, opening, or vacating

District court abused its discretion in overly intruding upon sovereignty of Michigan and the terms and conditions of consent decree resolving case initiated by Government

pursuant to Civil Rights of Institutionalized Persons Act by materially extending and modifying the consent decree as it related to affected prison facilities. 42 U.S.C.A. § 1997 *et seq.*

[10 Cases that cite this headnote](#)

[4] Prisons

🔑 Care, Custody, Confinement, and Control

Trial court should not, either directly or indirectly through special masters, independent experts, or other extraneous participants, impose on a state overly intrusive remedies for prison conditions, but should exercise restraint and reason in performing its oversight responsibility.

[13 Cases that cite this headnote](#)

[5] Amicus Curiae

🔑 Right to appear and act in general

In implementing consent decree resolving case initiated by government against State of Michigan pursuant to Civil Rights of Institutionalized Persons Act, trial court erred in conferring named-party/real-party-in-interest status upon inmates in subject prisons under the appellation of “litigating amicus curiae”; class of inmates was without standing to compel disclosure of certain information pursuant to court's order or to exercise any litigating rights equal to a named-party/real-party-in-interest but was not precluded from continued participation in the action in traditional role of amicus curiae. 42 U.S.C.A. § 1997 *et seq.*

[62 Cases that cite this headnote](#)

Attorneys and Law Firms

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Before KRUPANSKY and BOGGS, Circuit Judges, and CELEBREZZE, Senior Circuit Judge.

Opinion

KRUPANSKY, Circuit Judge.

The five orders of the United States District Court for the Western District of Michigan dated November 3, 1989, November 6, 1989, two on January 24, 1990, and April 4, 1990, presently under appellate review, had their common genesis in the ongoing implementation of a consent decree approved by the court on July 16, 1984 resolving a case initiated by the plaintiff-appellee United States of America (United States) against the defendants-appellants State of Michigan, *et al.* (Michigan), pursuant to the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997 *et seq.*

In the first order, issued on November 3, 1989 the district court rejected Michigan's proposed inmate classification plan, including its validation of compliance procedures, dated June 3, 1988, and directed the state to submit, by not later than April 2, 1990, a revised professionally-based classification plan that incorporated court-substituted *145 compliance procedures. The court-dictated compliance procedures detailed the content, nature, and extent of the plan that would satisfy the requirements of the July 16, 1984 consent decree. On

November 6, 1989, the district court also mandated the development of “a plan [by Michigan] illustrating how they plan to manage the correctional population projected by their research division.” *United States v. Michigan*, No. G84 63 CA at 3 (W.D.Mich. Nov. 6, 1989) (order) [hereinafter Nov. 6 Order]. Michigan moved for reconsideration of the November 3 and 6 decisions, which the district court denied in an order issued on January 24, 1990. The district court declared the two orders “final orders for the purposes of appeal.” *United States v. Michigan*, No. G84 63 CA at 5 (W.D.Mich. Jan. 24, 1989) (order denying motion to modify or set aside Nov. 3 and 6 orders) [hereinafter Jan. 24 Order Denying Motion to Modify]. All three orders were timely appealed by Michigan and assigned case number 90 1366 for appellate review.

Also on January 24, 1990, in a separate, concurrent order, the district court amplified and extended its two previous orders entered on November 3 and 6, 1989 by directing an annual projection of the state's prison population to the year 2000 to be “developed by an *independent contractor*, and not by the Department of Corrections or by employees of the State of Michigan.... The contractor ... and the scope of service must be approved by the Court following notice to the plaintiff and amici.” *United States v. Michigan*, No. G84 63 CA at 30 31 (W.D.Mich. Jan. 24, 1990) (contempt order) [hereinafter Jan. 24 Contempt Order]. In the same entry, the district court adjudged Michigan in contempt of two previous orders dated March 31, 1988 and September 28, 1988. This decision was appealed on February 22, 1990 and was assigned appellate number 90 1367.

The fifth judgment on appeal was issued April 4, 1990. To further support the validation procedure addressed by its order of January 24, 1990, in conjunction with its findings of contempt, the trial court modified the consent decree and state plan of July 16, 1984 by mandating the disclosure of privileged medical/mental health/dental care internal peer audits in lieu of summaries thereof. That related appeal was designated as case number 90 1537.

On June 29, 1990, this court granted a temporary stay of execution of the orders dated November 3 and 6, 1989, and January 24, 1990, which stay, following a hearing on July 27, 1990, was continued pending further order. On September 7, 1990, this court granted a temporary stay of execution of the April 4, 1990 order. Because of

their common origins in the July 16, 1984 consent decree, the five orders were consolidated into one appeal. Oral arguments were entertained by this court on September 19, 1990.

1 The appellate history of this case discloses an egregious dissipation of the appellate judicial resource induced by escalating personality conflicts, mutual distrusts, and suspicions, which have, to date, generated ten appeals involving three panels and eight judges of this court. Three additional petitions for review have yet to be scheduled for oral arguments. This calculation excludes three decisions from the United States District Court for the Eastern District of Michigan in *Hadix v. Johnson*, in which essentially identical factual and constitutional issues are being litigated. See note 3.

For purposes of orientation, the evolution of this proceeding may be briefly summarized by an overview of the events that gave rise to this case. In January of 1984, the United States filed a complaint against Michigan pursuant to CRIPA, 42 U.S.C. § 1997,² in which it alleged that Michigan *146 violated the eighth and fourteenth amendments to the United States Constitution by perpetuating conditions and practices which constituted cruel and unusual punishment at the State Prison of Southern Michigan (including the Reception and Guidance Center), the Michigan Reformatory, and the Marquette Branch Prison (including the Michigan Intensive Programming Center) (collectively “the subject prisons”) in the following manner:

2 CRIPA provides, in pertinent part:

Whenever the Attorney General has reasonable cause to believe that any State ... is subjecting persons residing in or confined to an institution, as defined in section 1997 of this title, to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities, the Attorney General, for or in the name of the United States, may institute a civil action ... for such equitable relief as may be appropriate to insure the minimum corrective measures necessary to ensure the full enjoyment of such

rights, privileges, or immunities, except that such equitable relief shall be available under this subchapter to persons residing in or confined to an institution as defined in section 1997(1)(B)(ii) of this title only insofar as such persons are subjected to conditions which deprive them of rights, privileges, or immunities secured or protected by the Constitution of the United States.

42 U.S.C. § 1997a(a) (emphasis added). Section 1997 defines “institution” as, *inter alia*, “a jail, prison, or other correctional facility that is “is owned, operated, or managed by, or provides services on behalf of any State. 42 U.S.C. § 1997(1).

CRIPA also requires that prior to filing an action pursuant to section 1997a(a), the Attorney General must notify the state against whom the action will be initiated, detailing the perceived constitutional violations and *the minimum* measures that the Attorney General deems necessary to remedy the alleged conditions. 42 U.S.C. § 1997b(a)(1). The Attorney General must also aid the target state in locating federal funds that may be available to help defray the costs of remedial measures and must make an effort to correct the alleged conditions informally. 42 U.S.C. § 1997b(a)(2).

18. The subject prisons fail to provide and maintain basic elements of a *safe and sanitary physical and environmental plant* (including fire safety) for the inmates.

19. The subject prisons fail to *provide medical services (including services for suicidal, psychotic, and self-mutilating inmates)* minimally necessary to meet the inmates' serious needs, where the failure to provide such care manifests a deliberate indifference to these needs.

20. The subject prisons fail to *protect inmates from harm*, including harm from increased *violence and serious threats to health associated with overcrowding*.

Complaint at 5, *United States v. Michigan*, No. G84 63 CA (W.D.Mich. filed Jan. 18, 1984) (emphasis added). The United States also charged that Michigan had violated the guarantees of the first, sixth, and fourteenth amendments to the United States Constitution by depriving inmates access to the courts in that the subject prisons (1) failed to provide inmates access by mail to their attorneys, to courts, and to government officials, and (2)

failed to provide inmates sufficient access to law library resources and/or legal assistance. The United States petitioned for preliminary and permanent injunctive relief.

On January 18, 1984, contemporaneously with the filing of the complaint, the United States moved the trial court to enter a judgment memorializing an agreement and a plan of implementation between it and Michigan that, to the *full satisfaction* of the United States, corrected the *totality of the conditions* which anchored its constitutional infringement charges.

On February 24, 1984, prior to the hearing on the consent decree, the National Prison Project of the American Civil Liberties Union (NPP ACLU) and the American Civil Liberties Union Foundation of Michigan (ACLUFM) requested leave to “intervene” as “litigating amici curiae” with the full litigating rights of a named party to the controversy. On March 23, 1984, before the entry of the consent decree, the district court denied the motions of the NPP ACLU and the ACLUFM for “litigating status,” and the motion of the “*Hadix* class” of prisoners for intervention pursuant to Fed.R.Civ.P. 24,³ but permitted their appearance in the traditional role of amici to address, by brief and oral argument, the proposed consent decree. *United States v. Michigan*, 680 F.Supp. 928, 935 43 (W.D.Mich.1987) (order granting amicus curiae status). The court also ordered the real parties in interest, the United States and Michigan, to redraft their agreement to *147 conform with various court suggestions as a condition to endorsing and adopting the consent decree as its judgment. *Id.* at 945 49 (order rejecting proposed consent decree). A hearing on the revised agreement was scheduled for June 22, 1984.

³ The “*Hadix* class” prisoners were plaintiffs in *Hadix v. Johnson*, Civ. No. 80 73501 (E.D.Mich.), a section 1983 class action that addressed conditions similar to those addressed by the case at bar.

Early in June 1984, the NPP ACLU and the ACLUFM filed a 42 U.S.C. § 1983 class action styled *Knop v. Johnson*, Civ. No. G84 651 CA5 (W.D.Mich.) that challenged many of the same conditions of confinement in Michigan prisons as those already challenged by the United States in the instant case. See *Knop v. Johnson*, 667 F.Supp. 467 (W.D.Mich.1987). Sometime subsequent to initiating its class action, the *Knop* class, with the approval of the district court, replaced the NPP ACLU and the ACLUFM as amici curiae in the instant case and

became the surrogate of both special interest groups, which remained as its legal counsel. The *Knop* class thereafter filed formal motions to intervene pursuant to Fed.R.Civ.P. 24 as a real party in interest in the instant case, as did the plaintiffs in a similar section 1983 action, *Jansson v. Johnson*, Civ. No. 84 1263 DT (E.D.Mich.). On June 22, 1984, the district court denied the motions, concluding that the *Knop* class and the *Jansson* plaintiffs did not and could not qualify as intervenors of right or as permissive intervenors pursuant to Fed.R.Civ.P. 24. *United States v. Michigan*, 680 F.Supp. at 950 53 (order denying intervention). That decision was not appealed and remains the law of the case.

On March 31, 1986, the *Knop* class again requested to intervene as “litigating amicus curiae” with the full litigating rights of a named party in the case. The court, in an opinion and order entered August 28, 1987, granted the *Knop* class motion. Accordingly, after previously denying the same status to the NPP ACLU and the ACLUFM and after denying intervention by the *Knop* class, the court indirectly conferred upon the *Knop* class as “litigating amicus curiae” all of the participating rights of a named party in interest to the instant controversy, including the right to file pleadings, to compel discovery, to initiate contempt proceedings, to formulate and join issues, to issue and enforce subpoenas, to compel attendance at compliance hearings, and to file motions to modify and amend the consent decree between the named parties in interest. After receiving “litigating amicus curiae” status, the *Knop* class dismissed its separate section 1983 action. Michigan appealed the order granting “litigating status” to the *Knop* amicus, but this court refused to address the merits of the appeal by concluding that the order granting “litigating amicus curiae” status to the *Knop* class was not a final appealable order. *United States v. Michigan*, No. 88 1869, 1990 WL 46637 (6th Cir. April 20, 1990) (unpublished).

On July 16, 1984, the district court entered its judgment, which embraced the court-mandated, revised agreement and state plan between the United States and Michigan. In deference to defined Supreme Court precedent, the United States in its complaint and petition for relief, the State of Michigan in executing the consent agreement, and the trial court in accepting the consent agreement addressed only those physical conditions of confinement that rose to the level of constitutional prohibitions against cruel and unusual punishment by resulting “in unquestioned

and serious deprivation of *basic human needs* ” or by depriving “inmates of the *minimal* civilized measure of life’s necessities.” *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S.Ct. 2392, 2399, 69 L.Ed.2d 59 (1981) (emphasis added). Thus, consistent with existing legal precedent, the parameters of the trial court’s July 16, 1984 consent decree embraced only the following physical conditions of confinement:

1. Medical and Mental Health Care
2. Fire Safety
3. Sanitation Safety and Hygiene
4. Crowding and Protection from Harm
5. Access to Courts and Legal Mail.

Integral to the effective correction of the alleged constitutional infringements identified in the judgment of July 16, 1984 was the design and development of a professionally-based and professionally-administered plan for entry-level screening and *148 classification of inmates, and the subsequent reclassification of inmates for assignment to appropriate prisoner profile categories. However, professional correctional practices characterized by the trial court and its independent expert as “programming needs,” such as vocational guidance, job assignments, educational counseling, limited work hours, recreational activities, sociological counseling, forced inmate idleness, available educational opportunities, and similar sociologically oriented programs that did not “involve the unnecessary and wanton infliction of pain,” *Chapman*, 452 U.S. at 346, 101 S.Ct. at 2399 (quoting *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976)), were not addressed in the consent decree.

The consent decree required Michigan to “design and implement a professionally based classification plan ... by June 30 of 1988.” Consent Decree at 6, *United States v. Michigan*, No. G84 63 CA (W.D.Mich. entered July 16, 1984). Pursuant to the consent decree, Michigan submitted a classification proposal to assign inmates to an institution consistent with their respective classification designations as early as July 21, 1986. The trial court ordered that plan to be implemented by 1989. However, for reasons not clarified by the record, Michigan submitted a replacement proposal on June 3, 1988. In

essence, this plan defined its security classifications as follows:

<u>NEW</u>	<u>OLD</u>
Level I	minimum
Level II	medium
Level III	medium
Level IV	close
Level V	maximum
Level VI	(no previous equivalent)

Although inmates retained an assigned permanent classification, they could, nevertheless, be temporarily classified in “segregation” or “community status.” Under the proposed plan, inmates were to be classified immediately upon entry. Assigned classifications were to be reviewed at least annually or upon request initiated pursuant to a prescribed procedure.

Classification was predicated upon two scales. The first scale reflected the prisoner’s “confinement” level, defined as the “level of physical restraint determined necessary to reduce escape risk.” The second scale reflected the prisoner’s “management” level, defined as the “level of physical restraint necessary to maintain good institutional order and to protect prisoners and staff from harm.” A prisoner’s “security” level or “true security classification” was the level of control and custody determined by the higher of the confinement and management levels. For example, a prisoner with a confinement level of IV and a management level of III would be assigned security classification level IV. “Wherever possible,” a prisoner would be “placed at a facility of the security level indicated as his/her true security level.” However, the proposal recognized that “[t]here may be reasons unrelated to security, such as medical needs or lack of bed space of the appropriate level, which preclude such placement.” Reasons for placement inconsistent with the prisoner’s true security level classification were to be entered in the prisoner’s file. Michigan also assigned a security level to each of its prison facilities throughout the state. Certain facilities included several physically separated areas of confinement with differing security classifications.

Michigan had not incorporated programming classifications or “program needs” into its proposal, which

it asserted were intentionally excluded from the July 16, 1984 consent decree, because prisoner program needs were already being professionally accommodated and such sociological activities did not spring from constitutional requirements.

The United States and amicus curiae entered objections to Michigan’s June 3, 1988 proposals and charged, among other things, that:

1. entry level screening evaluations and classification assignments failed to accurately reflect inmate security risk propensities;
- *149 2. only 50 percent of housing placements coincided with assigned classifications;
3. an unusually high 80 percent of entry level inmates were initially assigned to the two lowest security risk levels resulting in an inordinately high number of prisoners later being reassigned to higher security levels, which purportedly indicated that a significant number of dangerous prisoners were being commingled and confined with less dangerous inmates; and
4. the proposal failed to couple “program needs” defined as socio-rehabilitation considerations with security and medical criteria in class evaluations and assignments.

On November 3, 1989, subsequent to a hearing conducted on the previous day, the trial court concluded that Michigan’s June 3, 1988 plan did not comply with the consent judgment of July 16, 1984 because (1) the defendants had “not ‘designed and implemented a

professionally-based classification system' as required by the Decree," (2) the disputed term "implementation" meant "that the classification plan must be operated so as to have force and effect on the actual operation of correctional facilities, programs, staff, and prisoners," *United States v. Michigan*, No. G84 63 CA at 1 2 (W.D.Mich. Nov. 3, 1989) (order) [hereinafter Nov. 3 Order],⁴ and (3) the scope of the required classification plan "corresponds with the scope of the Decree itself." Jan. 24 Order Denying Motion to Modify at 5.

⁴ On November 3, 1989, the district court entered both an opinion and an order implementing the terms of the opinion. The district court, the parties, and amicus have consistently referred only to the "order entered on November 3, although actually referring to the terms of the "opinion. This court, therefore, as a convenience, will continue the practice.

In rejecting Michigan's proposed classification plan, the court observed that, as a result of improperly implementing its classification instrument dated June 3, 1986, there was an "excessive disparity between the designated classification (according to the classification system) and actual placement (the classification level of the facility to which the prisoner is actually assigned). This renders the classification almost meaningless." Nov. 3 Order at 3. The court also observed that the state's proposal was severely limited in scope to addressing only inmate medical, mental, safety, and security criteria and ignored prisoner sociological "program needs," which the United States, the court's independent expert, and amicus insisted were a necessary and integral part of any classification system. Finally, the trial court prescribed, in *detail*, the nature, scope, and extent of the compliance validating procedure that the state would be required to incorporate into a revised classification plan to be submitted on or before April 2, 1990.

In an interrelated order issued November 6, 1989, the district court noted that Michigan had failed to address a projected shortfall of 16,000 cell spaces by 1992. Thus, the district court ordered Michigan to evolve a plan "to manage the [projected] correctional population." Nov. 6 Order at 3.

Michigan moved for reconsideration of the trial court's orders, arguing that the court materially modified the July 14, 1984 consent decree by:

1. ordering relief that exceeded the parameters of the consent decree without finding further constitutional violations;
2. ordering implementation of overly intrusive remedies;
3. expanding the scope of the consent decree to embrace the entire correctional system of the State of Michigan; and
4. expanding the consent decree to include sociological programming characterized as "program needs" which did not rise to the level of eighth amendment infringements and which were intentionally excluded from the consent decree.

On January 24, the trial court, treating the motion for reconsideration as a motion to modify or set aside, affirmed its orders of November 3 and 6, 1989. *See* Jan. 24 Order *150 Denying Motion to Modify. The district court acknowledged that the two orders were final, appealable injunctive orders: "Thus, my orders of November 3 and November 6 now become final orders for the purposes of appeal...." *Id.* at 2.

In a separate order issued on the same day, the district court addressed a motion filed by amicus, but without support from the United States, seeking sanctions for contempt against the governor, attorney general, the Michigan Department of Corrections, and others.⁵ However, after several hearings, the court adjudged only the Michigan Department of Corrections in contempt (1) for failing to submit a revised mental health program statement based on prison population projections to the year 2000, and (2) for failing to report that the Marquette Branch Prison had discontinued general library services. Jan. 24 Contempt Order at 15 23.

⁵ The *Knop* amicus not only sought findings in contempt, but also attorney fees and costs in the amount of \$60,575.18.

[1] This appeal arises from various orders that are indisputably modifications of the consent decree, which are injunctive in nature, to which appellate jurisdiction attaches by congressional decree. 28 U.S.C. § 1292(a)(1);⁶ *United States v. Michigan*, No. 88 1869, slip op. at 7 8 (6th Cir. April 20, 1990) (unpublished). *See Musto v. American General Corp.*, 861 F.2d 897, 914 (6th Cir.1988),

cert. denied, 490 U.S. 1020, 109 S.Ct. 1745, 104 L.Ed.2d 182 (1989); *Bradley v. Milliken*, 772 F.2d 266, 270 71 (6th Cir.1985). See also *United States v. Wheeling Pittsburgh Steel Corp.*, 818 F.2d 1077, 1082 (3d Cir.1987); *King v. Ionization Int'l, Inc.*, 825 F.2d 1180, 1184 85 (7th Cir.1987); *Ohntrup v. Firearms Center, Inc.*, 802 F.2d 676 (3d Cir.1986) (per curiam); *Philadelphia Welfare Rights Organization v. Shapp*, 602 F.2d 1114 (3d Cir.1979), *cert. denied*, 444 U.S. 1026, 100 S.Ct. 689, 62 L.Ed.2d 660 (1980); *Gary W. v. State of Louisiana*, 601 F.2d 240, 243 44 (5th Cir.1979); *Mayberry v. Maroney*, 558 F.2d 1159 (3d Cir.1977); *In re Grand Jury Proceedings (U.S. Steel Clairton Works)*, 525 F.2d 151, 154 56 (3d Cir.1975).

⁶ Section 1292(a)(1) provides, in part:

- (a) Courts of appeals shall have jurisdiction of appeals from:
- (1) Interlocutory orders of district courts ... or the judges thereof, ... granting, continuing, modifying, refusing or dissolving injunctions
- 28 U.S.C. § 1292(a)(1).

Supreme Court jurisprudence, as well as the pronouncements of this court, firmly supports the principal that this court has appellate jurisdiction over the modifications of the consent decree. The Supreme Court, in a case involving pretrial injunctions, has stated that the policy behind 28 U.S.C. § 1292(a)(1) was to “permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence.” *Carson v. American Brands, Inc.*, 450 U.S. 79, 84, 101 S.Ct. 993, 996, 67 L.Ed.2d 59 (1981) (quoting *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181, 75 S.Ct. 249, 252, 99 L.Ed. 233 (1957)). As demonstrated, courts have traditionally considered the modification of a consent decree to be serious, leading to “perhaps irreparable” consequences. “A consent decree has attributes of both a contract and a judicial act.” *Williams v. Vukovich*, 720 F.2d 909, 920 (6th Cir.1983). As a contract, a decree does not have a purpose, but reflects a compromise or agreement negotiated between parties who each have a purpose. See *United States v. Armour & Co.*, 402 U.S. 673, 681 82, 91 S.Ct. 1752, 1757, 29 L.Ed.2d 256 (1971). “Judicial approval of a settlement agreement places the power and prestige of the court behind the compromise struck by the parties.” *Williams*, 720 F.2d at 920 (emphasis added). The standard for justifying the modification of a consent decree is a *strict* one and “a consent decree is, after all, a judgment and entitled to a presumption of finality.” *Delaware Valley Citizens' Council for Clean Air v.*

Pennsylvania, 674 F.2d 976, 980 81 (3d Cir.), *cert. denied*, 459 U.S. 905, 103 S.Ct. 206, 74 L.Ed.2d 165 (1982).

Amicus's argument, citing to *Groseclose v. Dutton*, 788 F.2d 356 (6th Cir.1986), that *151 the November 3, 1989 order to design and implement a revised professionally-based classification plan and validating procedure was not a final appealable order is misconceived. Assuming, arguendo, the correctness of amicus curiae's position, it should be noted that the orders of November 3 and November 6, 1989, the two separate orders dated January 24, 1990, as well as the decision of April 4, 1990, had their common origin in the July 16, 1984 consent decree and incorporated state plan.

Read *in pari materia*, the district court's orders dated November 3, 1989, November 6, 1989, and January 24, 1990 mandated, in detail, the content, nature, and scope of the validating procedures that Michigan was to implement in performing its future compliance audits to satisfy its commitments in the July 16, 1984 consent decree. A comparison of Michigan's June 3, 1988 professionally-based classification plan and validating procedures with the court's prescribed classification plan and monitoring procedures, which were mandated to be incorporated into Michigan's revised classification plan, disclosed that they joined legal issues that could be decided without further factual elaboration.

Thus, they were immediately reviewable upon appeal even though the appeal was from an entry of a preliminary injunction. Any future action that could have been taken by the district court would not have changed or affected the legal issues presented in this appeal. Accordingly, appellate review of the injunctive orders of the district court dated November 3, 1989, November 6, 1989, and January 24, 1990 would not be premature. *Groseclose*, 788 F.2d at 359 60; *Liddell v. Board of Educ. of St. Louis*, 693 F.2d 721 (8th Cir.1981); *Spates v. Manson*, 619 F.2d 204 (2d Cir.1980); *Hoots v. Commonwealth of Pennsylvania*, 587 F.2d 1340 (3d Cir.1978); *Frederick L. v. Thomas*, 557 F.2d 373 (3d Cir.1977); *Taylor v. Board of Educ.*, 288 F.2d 600 (2d Cir.1961).

Although the district court's January 24, 1990 contempt citation and its April 4, 1990 order modifying the consent decree by mandating the disclosure of privileged medical/mental health/dental care internal peer audits are independently appealable final orders to this court, as

more fully hereinafter addressed, because of their common genesis with the November 3, 1989, November 6, 1989 and January 24, 1990 orders in the seminal July 16, 1984 consent decree, and because they are inextricably entangled with the November 3, 1989 and November 6, 1989 orders, they may also be umbrellaed under the appeal from those decisions which otherwise invoked the appellate jurisdiction of this court:

[A]s the[] cases indicate, if a district court's ruling rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance, that ruling may be reviewed even though the appeal is from the entry of a preliminary injunction. The Court of Appeals in this case properly recognized and applied these principles when it observed:

“Thus, although this appeal arises from a ruling on a request for a preliminary injunction, we have before us an unusually complete factual and legal presentation from which to address the important constitutional issues at stake. The customary discretion accorded to a District Court's ruling on a preliminary injunction yields to our plenary scope of review as to the applicable law.”

Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 757, 106 S.Ct. 2169, 2177, 90 L.Ed.2d 779 (1986) (footnotes omitted) (quoting *American College of Obstetricians and Gynecologists v. Thornburgh*, 737 F.2d 283, 290 (3d Cir.1984)).

This court has also recognized the scope of appellate jurisdiction over issues involving injunctive relief:

It is elementary that an appeal from the denial of injunctive relief brings the whole record before the appellate court and that the “scope of review may extend further [than the immediate question on which the District Court ruled] to allow disposition of all matters appropriately *152 raised by the record, including entry of final judgment.” 16 Wright & Miller *Federal Practice* § 3921 (1977). We have “jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the Court of Appeals without further trial court development.” *Ibid.* This principle is supported by numerous precedents and by policy considerations. See, e.g., *Hurwitz v. Directors Guild of America, Inc.*, 364

F.2d 67, 69 70 (2d Cir.1966), and the cases cited in Wright & Miller *supra*, § [3921].

Brown & Williamson Tobacco Corp. v. FTC, 717 F.2d 963, 964 (6th Cir.1983) (order denying petition for rehearing en banc).

In particular, when litigation involves a remedial plan, revisions to the plan, and efforts to enforce compliance, an assessment of the afforded injunctive relief will, of necessity, require plenary review of the entire record:

Although an order requiring a party to litigation to submit a proposed remedial plan is not itself an injunctive order appealable under 28 U.S.C.A. § 1292(a)(1), where an order issued by a district court also incorporates injunctive measures which are properly appealable under § 1292(a)(1), the court of appeals has jurisdiction to review the entire order of the district court including the requirement that a defendant submit a remedial plan.

* * * * *

... Because the district court did award injunctive relief in the order from which the appellants perfected an appeal, this court's jurisdiction has been properly invoked to consider all issues joined in that order, including the mandate that the appellants submit a remedial plan

....

Newsom v. Norris, 888 F.2d 371, 380 (6th Cir.1989) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585, 72 S.Ct. 863, 865 66, 96 L.Ed. 1153 (1952); *Highland Avenue & Belt R.R. Co. v. Columbian Equipment Co.*, 168 U.S. 627, 630, 18 S.Ct. 240, 241, 42 L.Ed. 605 (1898); *Smith v. Vulcan Iron Works*, 165 U.S. 518, 525, 17 S.Ct. 407, 41 L.Ed. 810 (1897); *Kohn v. American Metal Climax, Inc.*, 458 F.2d 255, 262 (3d Cir.), *cert. denied*, 409 U.S. 874, 93 S.Ct. 120, 34 L.Ed.2d 126 (1972); *Allstate Ins. Co. v. McNeill*, 382 F.2d 84, 87 (4th Cir.1967), *cert. denied*, 392 U.S. 931, 88 S.Ct. 2290, 20 L.Ed.2d 1390 (1968); *McNally v. Pulitzer Publ. Co.*, 532 F.2d 69 (8th Cir.), *cert. denied*, 429 U.S. 855, 97 S.Ct. 150, 50 L.Ed.2d 131 (1976); *Sierra Club v. Marsh*, 816 F.2d 1376, 1382 (9th Cir.1987); *Noxell Corp. v. Firehouse No. 1 Bar B Que Restaurant*, 760 F.2d 312, 315 (D.C.Cir.1985); *King Instrument Corp. v. Otari Corp.*, 814 F.2d 1560, 1562 (Fed.Cir.1987)).

Because, in the instant case, the district court did award injunctive relief in the interrelated orders of November 3, 1989, November 6, 1989, and January 24, 1990, from which appellants perfected timely appeals, this court's jurisdiction has been properly invoked to review and consider the entire record, including all related issues having a common nexus with issues joined in those appeals. Those related issues include the citations for contempt and the mandate to disclose privileged medical/mental health/dental care internal draft peer audits.

The eighth amendment limitations on conditions of penal confinement, imposed upon the states through the fourteenth amendment, do not join issues of first impression. The Supreme Court turned its attention and consideration to that area over twenty years ago and, among its more current teachings, summarized its unwavering convictions:

Today the Eighth Amendment prohibits punishments which, although not physically barbarous, "involve the unnecessary and wanton infliction of pain," *Gregg v. Georgia, supra*, [428 U.S.] at 173, 96 S.Ct., at 2925, or are grossly disproportionate to the severity of the crime, *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 2866, 53 L.Ed.2d 982 (1977) (plurality opinion); *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 (1910). Among "unnecessary and wanton" inflictions of pain are those that are "totally without penological *153 justification." *Gregg v. Georgia, supra*, 428 U.S., at 183, 96 S.Ct., at 2929; *Estelle v. Gamble*, 429 U.S. 97, 103, 97 S.Ct. 285, 290, 50 L.Ed.2d 251 (1976).

* * * * *

... But conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society.

* * * * *

... [T]he Constitution does not mandate comfortable prisons, and prisons ... which house persons convicted of serious crimes, cannot be free of discomfort. Thus, these considerations properly are weighed by the legislature and prison administration rather than a court.

Chapman, 452 U.S. at 346 47, 349, 101 S.Ct. at 2399 2400 (footnote omitted).

In *Bell v. Wolfish*, the court elaborated on the limits placed by the Constitution on conditions of confinement:

[O]ur cases also have insisted on a second proposition: simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations. "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the consideration underlying our penal system." *Price v. Johnston*, 334 U.S. 266, 285, 68 S.Ct. 1049, 1060, 92 L.Ed. 1356 (1948); see *Jones v. North Carolina Prisoners' Labor Union, supra*, 433 U.S. [119], at 125, 97 S.Ct. [2532], at 2538 [53 L.Ed.2d 629 (1977)]; *Wolff v. McDonnell, supra*, 418 U.S. [539], at 555, 94 S.Ct. [2963], at 2974 [41 L.Ed.2d 935 (1974)]; *Pell v. Procunier, supra*, 417 U.S. [817], at 822, 94 S.Ct. [2800], at 2804 [41 L.Ed.2d 495 (1974)]. The fact of confinement as well as the legitimate goals and policies of the penal institution limits these retained constitutional rights. *Jones v. North Carolina Prisoners' Labor Union, supra*, 433 U.S., at 125, 97 S.Ct., at 2538; *Pell v. Procunier, supra*, 417 U.S., at 822, 94 S.Ct., at 2804. There must be a "mutual accommodation between institutional needs and objectives and the provisions of the Constitution that are of general application." *Wolff v. McDonnell, supra*, 418 U.S., at 556, 94 S.Ct., at 2975. This principle applies equally to pretrial detainees and convicted prisoners. A detainee simply does not possess the full range of freedoms of an unincarcerated individual.

Bell v. Wolfish, 441 U.S. 520, 545 46, 99 S.Ct. 1861, 1877 78, 60 L.Ed.2d 447 (1979). The Court has consistently declared that, even under circumstances when valid institutional security restrictions infringe upon constitutional guarantees, the latter must give way to the former in the interests of safeguarding institutional security:

[M]aintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted prisoners and pretrial detainees. "[C]entral to all other corrections goals is the institutional consideration of internal

security within the corrections facilities themselves.” *Pell v. Procunier*, *supra*, 417 U.S., at 823, 94 S.Ct., at 2804; *see Jones v. North Carolina Prisoners' Labor Union*, *supra*, 433 U.S., at 129, 97 S.Ct., at 2540; *Procunier v. Martinez*, 416 U.S. 396, 412, 94 S.Ct. 1800, 1810, 40 L.Ed.2d 224 (1974). Prison officials must be free to take appropriate action to ensure the safety of inmates and corrections personnel and to prevent escape or unauthorized entry. Accordingly, we have held that even when an institutional restriction infringes a specific constitutional guarantee, such as the First Amendment, the practice must be evaluated in the light of the central objective of prison administration, safeguarding institutional security. *Jones v. North Carolina Prisoners' Labor Union*, *supra*, 433 U.S., at 129, 97 S.Ct., at 2540; *Pell v. Procunier*, *supra*, 417 U.S., at 822, 826, 94 S.Ct., at 2804, 2806; *Procunier v. Martinez*, *supra*, 416 U.S., at 412 414, 94 S.Ct., at 1810 1812.

*154 *Id.* 441 U.S. at 546 47, 99 S.Ct. at 1878 (footnote omitted).

Having identified the boundaries that the eighth amendment has imposed upon the conditions of prisoner detention, the Court later admonished lower courts as to the standards of judicial discretion to be exercised in assessing the validity of inmate-asserted eighth amendment infringements:

No static “test” can exist by which courts determine whether conditions of confinement are cruel and unusual, for the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 596 [630] (1958) (plurality opinion). The Court has held, however, that “Eighth Amendment judgments should neither be *nor appear* to be merely the *subjective views*” of judges. *Rummel v. Estelle*, 445 U.S. 263, 275, 100 S.Ct. 1133, 1139, 63 L.Ed.2d 382 (1980). To be sure, “the Constitution contemplates that in the end [a court's] own judgment will be brought to bear on the question of the acceptability” of a given punishment. *Coker v. Georgia*, *supra*, 433 U.S., at 597, 97 S.Ct., at 2868 (plurality opinion); *Gregg v. Georgia*, *supra*, 428 U.S., at 182, 96 S.Ct., at 2929 (joint opinion). But such “ ‘judgment[s] should be *informed by objective factors to the maximum possible extent.*’ ” *Rummel v. Estelle*, *supra*, 445 U.S., at 274 275, 100 S.Ct., at 1139,

quoting *Coker v. Georgia*, *supra*, at 592, 97 S.Ct., at 2866 (plurality opinion).

Chapman, 452 U.S. at 346, 101 S.Ct. at 2399 (emphasis added).⁷

⁷ This court notes the recent decision of the Supreme Court in *Wilson v. Seiter*, No. 89 7376, 501 U.S. 294, 111 S.Ct. 2321, 115 L.Ed.2d 271 1991 U.S. LEXIS 3490 (June 17, 1991), which has not only reaffirmed the principle that eighth amendment impingements anchored in conditions of confinement must be objectively demonstrated, *id.* at _____, 111 S.Ct. at 2326 27 but also has announced that the plaintiff has the burden of proving that prison authorities subjectively intended such violations. *Id.* at _____, 111 S.Ct. at 2326 27. It is noted, however, that the subjective intentions of prison authorities must be demonstrated by objective manifestations of such intent, and cannot be proved by factually unsupported, conclusory opinions of the court or of the prisoners or their representatives.

Perhaps the most perceptive of the Court's cautionary observations, which, incidentally, addresses the prevailing undercurrent of the case at bar, was incorporated in the following caveat to the judiciary: “Courts must be mindful that these inquiries spring from *constitutional requirements* and that *judicial* answers to them must reflect that fact rather than a *court's idea of how best to operate* a detention facility.” *Wolfish*, 441 U.S. at 539, 99 S.Ct. at 1874 (emphasis added). The court amplified this caveat with a compelling rationale:

[T]he problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security. *Jones v. North Carolina Prisoners' Labor Union*, *supra*, 433 U.S., at 128, 97 S.Ct., at 2539; *Procunier v. Martinez*, *supra*, 416 U.S., at 404 405, 94 S.Ct., at 1807 1808; *Cruz v. Beto*, *supra*, 405 U.S. [319], at 321, 92 S.Ct. [1079], at 1081 [31 L.Ed.2d 263 (1972)]; *see Meachum v. Fano*, 427 U.S. [215], at 228 229, 96 S.Ct. [2532] at 2540 2541, 49 L.Ed.2d 451 (1976)]. “Such considerations are peculiarly within the province and professional expertise of corrections officials, and, *in the absence of substantial evidence in the record* to indicate that

the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.” *Pell v. Procunier*, 417 U.S., at 827, 94 S.Ct., at 2806. We further observe that, on occasion, prison administrators may be “experts” only by Act of Congress or of a state legislature. But judicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but *155 also because the operation of our correctional facilities is peculiarly the province of the Legislative and Executive Branches of our Government, not the Judicial. *Procunier v. Martinez*, supra, 416 U.S., at 405, 94 S.Ct., at 1807; cf. *Meachum v. Fano*, supra, 427 U.S., at 229, 96 S.Ct., at 2540. With these teachings of our cases in mind, we turn to an examination of the ... security practices that are alleged to violate the Constitution.

Wolfish, 441 U.S. at 547 48, 99 S.Ct. at 1878 79 (1979) (footnotes omitted) (emphasis added).

The unabridged teachings of the Court convey the Court's own unequivocal commitment to and its adamant recognition of the state's sovereign authority to operate its penal institutions. Anchored in the sensitive principles of federalism, this sovereign authority is a prerogative of the state, not a privilege recognized through comity.

Apart from the Supreme Court's limitations imposed upon lower courts in eighth amendment prisoner detention cases, the parameters of consideration in the instant case have been further confined by the consent decree executed by the United States and Michigan, dated July 16, 1984, and adopted by the district court as its judgment.

The complaint by the United States charged Michigan with constitutional infringements arising from physical conditions of confinement in “fail[ing] to provide and maintain basic elements of a safe and sanitary physical and environmental plant (including fire safety) for inmates,” failing “to provide medical services (including services for suicidal, psychotic, and self-mutilating inmates),” and failing “to protect inmates from harm” at the named institutions here in controversy. Complaint at 5. Michigan denied the allegations and the issues were never adjudicated. Consequently, the record fails to disclose the existence, scope, or degree, if any, of the asserted constitutional infringements. The controversy

was resolved by a consent decree, including a state plan of implementation which was limited in application to the named facilities. The consent decree, as approved by the trial court, was intended to be “in resolution of *all claims asserted and relief sought, and without a finding of liability or other determination on the merits.*” Consent Decree at 2.

In *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 104 S.Ct. 2576, 81 L.Ed.2d 483 (1984), the Supreme Court directed courts of lesser jurisdiction to interpret the scope of consent decrees disposing of institutional litigation with the following cautionary instruction: “[T]he ‘scope of a consent decree *must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it*’ or by what ‘*might have been written had the plaintiff established his factual claims and legal theories in litigation.*’ ” *Id.* at 574, 104 S.Ct. at 2585 (emphasis added) (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681 82, 91 S.Ct. 1752, 1757, 29 L.Ed.2d 256 (1971)).

[2] Courts, nevertheless, retain the authority to modify consent decrees upon affirmative proof of a defect or deficiency in an original decree which impedes achieving the objectives of the decree because experience has proved the provisions of the decree to be less effective than anticipated or because circumstances and conditions have changed which warrant modifications, provided that the ordered modifications further the purpose of the original decree without upsetting the core intent, purpose, and scope of the basic agreement between the parties. *Heath v. De Courcy*, 888 F.2d 1105, 1108 09 (6th Cir.1989). Moreover, any modification must be fashioned to achieve the goals of the enabling legislation, in this case CRIPA, and must be tailored to address conditions giving rise to a constitutional infringement. *Hoptowit v. Ray*, 682 F.2d 1237, 1247 (9th Cir.1982); *Park View Heights Corp. v. City of Black Jack*, 605 F.2d 1033, 1036, 1040 (8th Cir.1979), cert. denied, 445 U.S. 905, 100 S.Ct. 1081, 63 L.Ed.2d 321 (1980).

Having revisited prevailing Supreme Court precedent, which has charted the course for this court in resolving the issues of the instant appellate review, and having *156 juxtaposed the consent decree dated July 16, 1984 and the state's proposed professionally-based classification plan of June 3, 1988 with the court's material extensions and modifications of those proposals as mandated by its five

orders here in controversy, this court finds it appropriate to address the controversial issues more precisely.⁸

⁸ This court has been handicapped in considering and disposing of individual findings and conclusions incorporated into the various decrees here under review. It has been difficult to precisely correlate the injunctions addressing the consent decree requirement to design and develop a professionally based classification plan with the testimony of United States and amicus experts. This is due, in part, to a failure by the parties and the trial court to adopt a common terminology in discussing the various classification plans proffered by the parties and the district court, and because of various conflicting statements by the district court.

It would appear from the expert testimony that the classification plan is composed of three components. The "classification instrument identifies various security level categories and defines the criteria to be applied in assigning inmates to a security level that differentiates probabilities of misconduct. Thus, by determining the inmates' security level profile, the classification instrument indicates where the inmates *should* be housed or assigned. "Implementation of the classification instrument is a function of coordinating the *actual placement* of inmates into available physical facilities. "Validation of the classification instrument and its implementation is the methodology designed to evaluate their operational effectiveness: the degree and manner of the state's compliance with the demands of the classification instrument.

It is apparent from the agreement that Michigan committed itself to fund a multi-million dollar expenditure to restructure, realign, and upgrade the physical conditions of inmate detention at the subject prisons. Michigan's obligations included programs of new construction, rehabilitation of existing structures, professional medical and psychiatric recruitment, and extensive recruitment and training of non-professional, technical, and other supporting personnel, together with a reassessment of existing practices and procedures at the subject prisons. The agreement, as approved by the trial court, essentially tracked the allegations of the complaint and was limited in its scope to the following physical conditions of confinement:

1. Medical care

2. Fire safety

3. Sanitation, safety and hygiene

4. Crowding and protection from harm

5. Access to the courts.

Of the above five areas identified in the consent decree as the sources of alleged inmate constitutional infringements, the instant appeals implicate only the conditions numbered 1, 4, and 5: Michigan's failure to adequately project the needs for mental health facilities; Michigan's alleged failure to develop and effectively implement a professionally-based classification plan designed to protect prisoners from harm; and Michigan's failure to report the closure of a library at one of its facilities.

The record reflects that Michigan's proposed inmate classification plan, submitted on June 3, 1988, as subsequently revised to incorporate various recommendations suggested by plaintiff's experts, was professionally designed and developed by William L. Kime and endorsed by Robert A. Buchanan II, both recognized expert consultants on penal classification systems. The plan was essentially modeled after systems that had been adopted and successfully implemented by other state correction authorities as well as the Federal Bureau of Prisons. The primary objection of amicus and the United States to Michigan's proposed plan was lodged in the charge that inmates were not actually placed or housed in accordance with their individually developed classification profiles and that Michigan's plan was limited to security considerations and ignored inmate "program needs."

In its decisions, the trial court was primarily concerned with Michigan's implementation of the proposed classification instrument, as is reflected by the court's remarks:

There is excessive disparity between designated classification (according to the classification system) and actual placement (the classification level of the facility to which the prisoner is actually assigned).

This renders classification almost meaningless.

Nov. 3 Order at 3.

The Court finds that the term “implementation” means that the classification *157 plan must be operated so as to have force and effect on the actual operation of correctional facilities, programs, staff, and prisoners. Thus, it will not be sufficient to merely label prisoners if the actions warranted by the labels are not carried out.

Id. at 2. It is apparent from the record that the trial court's assessment was well-taken and that the percentage of “overrides” of designated security classifications have been excessive.⁹ This conclusion was not seriously rejected by Michigan, although it did contest the degree of excessive “override” percentages alleged by amicus and the plaintiff.

⁹ As closely as can be determined from the record, “overrides encompass two distinct concepts. A “departure, an integral part of the security classification system, involves a discretionary professional judgment to adjust the objectively factored security level to improve an inmate's classification. A “waiver, however, essentially ignores the inmate's true classification and results in a placement in accordance with available resources. Waivers, consequently, indicate a resource availability rather than a classification defect. A Michigan Security Classification Audit of May 1988 disclosed a 15.5 percent actual or a 23.1 percent effective “departure override and a 42.3 percent actual or a 54.7 percent effective “waiver override.

In any event, the trial court's concerns are endorsed by this court. Although there is no absolute consensus between the six-odd experts who addressed the issue of an acceptable fixed percentage of “overrides” in designated security classifications, a range of between 10 percent and 20 percent received favorable comment from the participating penological experts. It appears

that the overrides have been more a function of implementation than of the composition of Michigan's security classification instrument. Waivers of designated classifications apparently have resulted from the lack of available appropriate housing facilities combined with a practice of convenience in “waiving” inmates into a lower classified facility.

[3] This court concludes that, although Michigan's proposed security classification instrument is professionally-based and designed to track essentially the same configurations that have been adopted and successfully administered by other states and the Federal Bureau of Prisons, and although the record reflects no evidence that Michigan has deliberately attempted to avoid its commitments under the consent decree and the June 3, 1988 proposed classification plan by initially assigning prisoners to less effective quarters, Michigan's implementation of that plan leaves much to be desired.

Accordingly, Michigan shall *meaningfully* implement the security classification plan filed on June 3, 1988 by actually placing individual inmates in accordance with their classification profiles, recognizing that misplacements due to temporary unavailability of appropriate space does not necessarily require a change in classification designation or the system itself. Upon remand, the trial court shall direct Michigan and the United States to structure a *reasonable* time frame within which Michigan *shall* bring the overrides into an acceptable range of 20 percent. Defendants and the United States *shall* effectively monitor the progress of their efforts with periodic reports to be submitted by the defendants at agreed upon intervals disclosing the level of overrides in the system and assessing those levels in relation to a general norm of 20 percent or less.

In considering the district court's order directing the defendants to incorporate inmate “program needs” into its classification system, this court's attention is directed to the Supreme Court's pronouncements that have recognized and addressed the relationship between “program needs” such as vocational, educational, recreational, guidance, and other similar sociological programs and eighth amendment infringements. In characterizing those aids as desirable, the Court has emphasized that a failure to incorporate programming needs into a classification system does not inflict pain, much less unnecessary and wanton pain. Consequently,

such failure does not rise to the level of an eighth amendment violation:

[J]ob and educational opportunities[, more particularly] *limited work hours *158 and delay before receiving education do not inflict pain, much less unnecessary and wanton pain*; deprivations of this kind simply are not punishments. We would have to wrench the Eighth Amendment from its language and history to hold that delay of these desirable aids to rehabilitation violates the Constitution.

Chapman, 452 U.S. at 348, 101 S.Ct. at 2400 (emphasis added). Moreover, the record reflects that security classifications were and are separate and distinct procedures in Michigan's penal system.

Although an incidental connection was recognized during the negotiation of the consent decree between security levels and some programming classifications in that a limited number of programs were unavailable at particular security levels, programming classification was excluded from the consent decree. Michigan, prior to the execution of the consent decree, had already been implementing an existing programming classification within its penal system. Moreover, a review of the consent decree fails to support any intention of the parties to include a programming classification in either the consent decree or the state plan of implementation. There is no affirmative evidence to support an eighth amendment constitutional basis for extending the consent decree as implemented by the state plan and the security classification instrument dated June 3, 1988 to include programming classification. Thus, the district court-ordered modifications of those instruments to incorporate programming needs as mandated by its various orders here in controversy, including, but not limited to, part I, sections 4, 20, 21, 22, and 23⁰ of the November 3, 1990 order, are REVERSED.

¹⁰ Sections 20, 21, and 23 of part I may be implemented to the extent that they permit, pursuant to the consent

decree, the provision of minimally acceptable medical (including mental health) care and to protect persons from self inflicted harm or harm to others, but not for purposes of classifying prisoners for "program needs as that term is used in this opinion.

¹¹ This does not affect Michigan's obligations to provide programming where it has separately so agreed pursuant to the state plan e.g., State Plan § IV(J) (6) unless Michigan has been otherwise relieved from such obligations by the district court. Nor does this affect any prior court order requiring provision of specific programming where Michigan failed to appeal the order, or an order that has previously been affirmed by this court. But, those separately contracted obligations do not affect the scope or content of the security classification plan that is required by section D(1) of the consent decree. The consent decree is otherwise confined in scope by the limited purpose of CRIPA to enforce *constitutional* rights and the Supreme Court's narrow definition of those rights as they relate to "conditions of confinement.

This court has also conducted an analysis of Michigan's proposed validation procedures, designed to monitor compliance with the classification instrument, and the court-adopted work product of amicus, the United States, and the independent expert. This court concludes that both validation plans are equally effective and comparable in that both procedures generate essentially the same information necessary to adequately evaluate Michigan's compliance efforts. Recognizing the wide diversity of expert opinion available within any given professional peer group to convincingly support an almost unlimited spectrum of desired predicates, one of which may be more appealing to a judicial evaluator than another, when the proposals are comparably equal, as they are here, a court should defer to the expertise of the prison's administrators.

There is no affirmative evidence disclosed in the record before this court that reflects a defect or deficiency of substance in the consent decree, the state plan, or the June 3, 1988 classification plan and its validation procedures that would impede the objectives of the consent decree. There is no affirmative evidence that Michigan's classification and validation proposals are inadequate or would contribute to the potential for violence or pose a threat to the safety of inmates, nor is there affirmative proof that the provisions of the consent decree would be less effective than initially anticipated by the real parties in interest and the court or that conditions

had changed to such a degree as to warrant the material modifications and extensions mandated *159 by the district court. It would appear from the record that the trial court has permitted itself to become inextricably entangled in details of prison administration best left to the judgment of the sovereign State of Michigan.

Moreover, the district court extended the classification plan to prison facilities statewide, in derogation of the consent decree, which, by agreement of the parties, limited the application of the classification plan to the named institutions. Conditions have not changed to such an extent that the trial court could look outside the four corners of the consent decree in determining the obligations of the parties. In addition, the record reveals no affirmative factual proof of constitutional violations to support this material extension and modification of the consent decree. Under the circumstances of this case, it is for Michigan to decide the feasibility of extending the professionally-based classification plan beyond the prisons named in the consent decree to prison facilities statewide.

The dispositive issues considered by this court are summarized with clarity by the Supreme Court in its discussion of the sensitive area of state sovereignty that may be impacted by judicially-imposed federal penal reform:

There was a time not too long ago when the federal judiciary took a completely “hands-off” approach to the problem of prison administration. In recent years, however, these courts largely have discarded this “hands-off” attitude and have waded into this complex arena. The deplorable conditions and Draconian restrictions of some of our Nation's prisons are too well known to require recounting here, and the federal courts rightly have condemned these sordid aspects of our prison systems. But many of these same courts have, in the name of the Constitution, become increasingly enmeshed in the minutiae of prison operations.

Judges, after all, are human. They, no less than others in our society, have a natural tendency to believe that their individual solutions to often intractable problems are better and more workable than those of the persons who are actually charged with and trained in the running of the particular institution under examination. But under the Constitution, *the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan.* This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however, that the *inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution or, in the case of a federal prison, a statute.* The wide range of “judgment calls” that meet constitutional and statutory requirements *are confided to officials outside of the Judicial Branch of Government.*

Wolfish, 441 U.S. at 562, 99 S.Ct. at 1886 (emphasis added).

The Court went on to counsel: “Concern with minutiae of prison administration can only distract the court from detached consideration of the one overriding question presented to it: does the practice or condition violate the Constitution?” *Id.* at 544, 99 S.Ct. at 1877.

The June 3, 1988 professionally-based classification plan and attendant validating techniques were and are at least comparable to the imposed methodology mandated by the November 3, 1989 district court order, as well as subsequent orders that address the issue of a professionally-based classification plan. The district court abused its discretion in overly intruding upon the sovereignty of Michigan and the terms and conditions of the consent decree by materially extending and modifying

the consent decree as it relates to affected prison facilities. Thus, the district court's orders, to the extent that they modified or extended Michigan's submitted classification plan, including any requirements to justify, explain, or further validate the classification instrument, and including all requirements that the plan encompass a statewide system of classification, including, but not necessarily limited to, the first full paragraph of page 10, the first full *160 paragraph of page 11, the first full paragraph of page 12, the first sentence of the second paragraph on page 12, all of section 4 on pages 13 and 14, and all of section 6, on page 15 of the November 3, 1989 opinion are REVERSED.

[4] Although the protracted interim litigation has interrupted a fine-tuned evaluation of its validation efforts, Michigan has committed to conduct ongoing studies, assessments, and reassignments of both the classification instrument and its validation criteria to insure the effectiveness of its overall classification plan. This court concludes from the record that Michigan's proposed validating procedures are equal and comparable to those evolved by amicus and the United States as adopted by the court. Both proposals generate essentially the same data. Accordingly, this court follows the dictates of the Supreme Court in this area of penal administration, which requires the lower courts to avoid intrusion, either directly or indirectly through special masters, independent experts, or other extraneous participants, into the realm of "expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the [state] legislative and executive branches of government." *Procurier v. Martinez*, 416 U.S. 396, 405, 94 S.Ct. 1800, 1807, 40 L.Ed.2d 224 (1974). Thus, this court concludes that Michigan should be permitted to continue developing its implementation of the professionally-based classification instrument and validation procedures until it appears from affirmative proof that the plan and procedures result in a constitutional infringement.

Recognizing that, according to the United States Bureau of Prisons, the constantly fluctuating number of arrests and the dynamics of prosecution policies, sentencing, and parole decisions all directly influence prison populations, and, consequently, make it extremely difficult to project, with any degree of accuracy, extended future prison populations, their management, and facility requirements, this court, nevertheless, AFFIRMS that part of the district court's orders of November 6, 1989 and January 24, 1990

directing Michigan to "develop ... a plan illustrating how they plan to manage the correctional population projected by their research." Issued pursuant to section K of the consent decree, the district court's orders require nothing more than a noncommittal forecast illustrating how Michigan intended to cope with controlling overcrowding, with placing prisoners in accordance with their profile classifications, and with providing adequate capacity for inmate mental health care.

The district court's first judgment of contempt against Michigan was conceived in its September 29, 1988 order directing Michigan to submit a revised program statement for a new mental health facility designed to provide acute and comprehensive mental health care for a population projected to at least the year 2000. Michigan responded by presenting a program that addressed the future needs of an inmate population through at least the year 1990. The program was to be implemented by a 400 bed facility readily expandable to a capacity of 500 beds if additional requirements demanded. A review of the record prompts this court to AFFIRM the district court's adjudication of contempt.

Accordingly, Michigan shall provide a population projection as mandated by the district court order of September 29, 1988 within a reasonable time frame to be determined by the United States and Michigan as approved by the court. The program shall also conform to the district court's directives incorporated in its order of January 24, 1990 in (1) the first sentence of the last paragraph on page 31; and (2) paragraphs 1 and 2 on page 32.

This court further concludes that Michigan is capable of developing the mandated projections without the assistance of an outside independent contractor. The district court's order to the contrary is an overly intrusive directive and an abuse of discretion. The requirement that Michigan retain an independent contractor to develop the projection is, therefore, REVERSED.

Michigan has acknowledged its error in removing from the March 1989 final audit report information disclosing the discontinued *161 library services at Marquette Branch Prison, information that it initially included in its draft audits. Initially, this court notes that the evidence of record fails to disclose any bad faith or intentional effort to withhold information by Barbara Hladki, the consent

decree coordinator, or by the Department of Corrections. Considering the compliance provisions of the consent decree that demand the monitoring of literally hundreds of conditions at the subject prisons, which house over 7500 prisoners, coupled with the virtually free access Michigan has accorded amicus and the United States, including their respective representatives and experts, to the various facilities and to the volume of documents, surveys, and reports generated by the Department of Corrections, the significance of a single oversight, misinterpretation, or misjudgment concerning a condition as obvious as discontinuing library services at Marquette is of little, or no, substantial consequence. The adjudication of contempt for this insignificant infraction constituted an abuse of discretion and is REVERSED.

In ordering its related injunction to restructure the compliance reporting procedures, presently conducted by the consent decree coordinator, the district court found “it impossible to reconcile the defendants’ new assertive and aggressive litigating posture, with the defendants’ obligation to report the facts of compliance with the degree of candor and particularity required by ... paragraph L of the Consent Decree.” Jan. 24 Contempt Order at 8. The compliance procedures were, by the conditions of the consent decree, reserved exclusively to Michigan, and the district court’s restructuring order appears to be anchored, not in the record, but rather in displeasure arising from Michigan’s reluctance to passively submit to a series of recently evolving decisions including the trial court’s decision to confer litigating rights equal to those of a named party/real party in interest upon the *Knop* class under the appellation of “litigating amicus curiae,” and Michigan’s aggressive opposition to litigating amicus’s efforts to exercise those litigating rights by initiating contempt proceedings, without the support of the United States, charging the governor, the attorney general, and other state officials with nonfeasance and misfeasance. Moreover, the record failed to disclose that the existing compliance reporting procedures were defective or deficient in achieving the objectives of the consent decree or that circumstances and conditions had changed since the entry of the consent judgment to warrant the court-ordered restructuring.

Perhaps the most convincing argument advanced by Michigan against the district court’s restructuring was that the order preempted the state’s sovereign domain over employment, tables of administrative organization,

personnel assignments, and reporting responsibilities. Under the court’s order, the appointment of the consent decree coordinator would be subject to approval by the amicus, the United States, and the court. In addition, the order directed the coordinator to withhold initial examination and review of all compliance reports developed by the decree coordinator and staff members from the Michigan Department of Corrections, its employees, the executive branch of state government, and its legal counsel, the state attorney general, until those documents were released to the United States and amici. The district court having abused its discretion, its overly intrusive sanction is accordingly REVERSED in its entirety.

Michigan’s final assignment of error challenges the district court’s order of April 4, 1990, which, like the district court’s orders of November 3, 1989, November 6, 1989, and January 24, 1990, has its common origin in the consent decree and incorporated state plan dated July 16, 1984.² In *163 addressing this issue, Michigan initially challenged the standing of the *Knop* class as “litigating amicus curiae” to compel the disclosure of confidential internal draft medical/mental health/dental care peer audits and its right to exercise the litigating rights of a real party in interest.

12 The methodology for reporting medical, mental health, and dental audits was an issue extensively negotiated between the United States and Michigan. The procedure, intended to accommodate and incorporate the dictates of [Mich.Comp.Laws §§ 333.20175\(6\)](#) and [333.21515](#) with the state plan, was agreed upon by the United States and the *Knop* amicus and was approved by the court. The relevant statutes provide:

(6) The records, data, and knowledge collected for or by individuals or committees assigned a professional review function in a health facility or agency are confidential, shall be used only for the purposes provided in this article, are not public records, and are not subject to court subpoena.

[Mich.Comp.Laws § 333.20175\(6\)](#) (Supp.1991) (formerly § [333.20175\(5\)](#) (1980)).

The records, data, and knowledge collected for or by individuals or committees assigned a review function described in this article are confidential and shall be used only for the purposes provided

in this article, shall not be public records, and shall not be available for court subpoena.

[Mich.Comp.Laws § 333.21515 \(1980\)](#).

The pertinent language in the state plan specified only summaries of the findings of each audit:

Consistent with principles of peer review confidentiality, a professional report *shall summarize* the findings of each audit including an enumeration of any condition inconsistent with contemporary professional health care standards.

State Plan of Compliance at 24. (App. A of Consent Decree).

To totally disregard the precise condition of the agreement between the parties by materially restructuring the reporting procedure to require disclosure of the actual internal peer review audits for medical/mental health/dental care in lieu of summaries was a material modification of magnitude of the terms of the agreement between the named parties to this case in controversy.

Here again, a review of the record fails to disclose any factual support for the magistrate's order of March 16, 1990, as affirmed by the district court on April 4, 1990. The reasoning advanced by the district court on April 4, 1990 to justify its modification of the consent decree, implying, without factual support, a bad faith effort on behalf of Michigan to evade its responsibilities to accurately summarize its internal medical/mental health/dental care peer review audits is less than convincing when considered within the context of its previous complimentary comments addressing the integrity and professionalism of those same summaries thirty nine days earlier in its January 24, 1990 order wherein it attested:

The Court has been impressed with the medical and mental health audits required under Section II.M of the State Plan for Compliance. These audits were conducted by departmental staff along with independent professionals who are not employees of the department. The Court believes that the application of this concept to the other areas of the Consent Decree would do much to strengthen the factfinding process.

Jan. 24 Contempt Order at 8.

Justification for the court's radical revision of the consent order by requiring the disclosure of internal peer review audits in lieu of summaries was the *speculation* that the internal audits *might* contain relevant information that could *possibly* discredit Michigan's integrity in accurately summarizing the internal medical/mental health/

dental care audits, citing to the district court's adjudication of contempt arising from Michigan's inadvertent failure to report the discontinuation of library services at Marquette, which order has now been reversed. In any event, an inaccuracy in another unrelated audit generated by a totally foreign procedure is not imputable to the integrity of the medical/mental health/dental care summarized versions of the internal draft audits of those services. Unfortunately, modification of the consent decree, compelling the submission of privileged draft internal audit reports in lieu of summaries, has been, like a number of the issues joined in these appeals, considered and decided by the district court in the abstract, rather than upon actual factual proof of existing predicate constitutional infringement, contrary to the admonitions of the Supreme Court.

Mindful of the district court's earlier expressed confidence in the accuracy, all inclusive scope, and reliability of the summarized internal audits, based upon an experience factor of approximately five years, a conclusion endorsed by the district court's independent expert, and in the absence of proof of bad faith by Michigan to knowingly suppress or omit material facts and information in an effort to intentionally distort the summarized internal medical/mental health/dental care draft audits; in the absence of proof of a defect or deficiency in the district court's original decree approving the consent agreement that impeded achieving the objectives of the original decree, either because experience proved the provisions of the original decree to be less effective than anticipated or circumstances and conditions had changed to warrant modification; and in the absence of proof that the modification was tailored to address conditions giving rise to a constitutional infringement, this court concludes that the April 4, 1990 order is overly intrusive. This conclusion is reinforced by the record, which disclosed that the court ordered modification is in derogation of the intent, scope, and purpose of the July 14, 1984 consent decree in that compliance commands Michigan to violate its own statutes and to destroy the statutory privilege designed to protect the confidentiality integral to any peer review and evaluation of the medical/mental health/dental care peer audits thereby eviscerating the objectivity, integrity, and reliability of those audits, which, in turn, serve to materially erode accuracy, objectivity, integrity, and reliability of the summarized audits prepared to track

Michigan's compliance with the consent decree. The record also reflects that the wide range of freedom accorded to the independent expert, the *Knop* and *Hadix* amici, the United States, their attorneys, and their experts to tour and inspect the various prisons, to review virtually all prison administration documents and generated reports, and to interview inmates affords a broad collateral information source to verify the accuracy, integrity, and reliability of the summarized internal draft audits without the necessity of an overt intrusion into Michigan's executive and legislative sovereignty.

The district court's reliance upon the Supreme Court's decision in *University of Pennsylvania v. EEOC*, 493 U.S. 182, 110 S.Ct. 577, 107 L.Ed.2d 571 (1990), to support its conclusion to order disclosure of peer review documents is misplaced and easily distinguished from the case at hand. The most obvious of those distinctions include the absence, in *Pennsylvania*, of a legislatively created privilege to protect the confidentiality of peer review material to insure the objectivity, accuracy, integrity, and reliability of the audit, the absence of a consent decree agreement that endorsed the requirement of confidentiality to ensure the objectivity and integrity of the peer review procedure and approved the summarized reporting of the internal audit results, and the ready availability, in the instant case, of collateral sources from which to generate the information without disturbing the confidentiality of the peer review procedures and without forcing Michigan to violate existing valid statutory enactments.

Contrary to the district court's assertions, its concession to permit Michigan to redact individual names from the medical/mental health/dental care internal draft audits does not effectively protect the confidentiality of the procedure because pragmatism dictates that criticisms by the relatively few members of the health care supervisory staff at consent decree institutions are easily attributable to individual peer members charged with conducting the reviews. Accordingly, this court concludes that the summarized reports of the internal draft medical/mental health/dental care audits, which have been available to the participating parties during the last five years of this litigation, and which the court has characterized as all inclusive, objective, accurate, and reliable, satisfy the dictates of the consent decree and more than adequately ensure that appropriate services are provided prisoners, that those services are timely and

performed by qualified providers in accordance with contemporary standards of professional practice, and that any problems, shortcomings, or inadequacies in providing health care are timely identified and corrected. Standing alone, the district court's conjecture that the mandated modification of the consent decree *might* lead to relevant evidence, without valid probative factual support, falls short of convincing this court that the modification here in controversy was justified or that its injunction did not constitute an abuse of discretion.

Neither amicus, the United States, the magistrate, nor the district court have presented a compelling reason to support a departure from the agreement expressed in the consent decree. The mandate of the April 4, 1990 order is, for the reasons discussed herein, an overly intrusive and unnecessary incursion into Michigan's executive and legislative sovereignty which offends the principles of federalism and comity.

[5] As discussed earlier, the "*Knop* plaintiffs," inmates in the subject prisons, were denied the right to intervene in this action. However, the district court permitted them to participate in the traditional role of amicus curiae. In July 1984, Michigan and the United States entered into a consent decree and extended the traditional role of amicus curiae to the extent that the defendants were to furnish amicus curiae with reports, plans, pleadings, memoranda, and other documents submitted to the United States and the court pursuant to paragraphs I, J, K, and L of the consent decree. The United States was also to furnish amicus with its responses, if any. The consent decree also permitted the *Knop* class to respond to any of those materials and to exercise, within the discretion of the trial court, its traditional privileges of participating in any hearing conducted by the court by brief and oral argument.

In July, 1988, after several years of compliance litigation, chronicled in part in *United States v. Michigan*, 680 F.Supp. 928 (W.D.Mich.1987), and *Knop v. Johnson*, 700 F.Supp. 1457 (W.D.Mich.1988), and over the objections of the United States and Michigan, the district court conferred "litigating amicus curiae" status upon the *Knop* class. The *Knop* class subsequently dismissed its pending, parallel civil rights action. This change of status expanded the *Knop* plaintiffs' role in this action beyond that specified in the consent decree. As ordered by the court, the *Knop* class as "litigating amicus curiae" was extended

full litigating rights of a named party to the action including, but not limited to, the right to file pleadings, conduct discovery, introduce evidence at proceedings, issue and enforce subpoenas, present and enforce the attendance of witnesses, initiate and pursue proceedings in contempt, and file motions to modify and amend the *164 agreement between the United States and Michigan embodied in the July 16, 1984 consent decree and state plan.

There can be little doubt from the record of this appeal that the *Knop* class, in its role of “litigating amicus curiae” and exercising the authority of a named party/real party in interest, has virtually assumed effective control of the proceedings in derogation of the original parties to this controversy. The creation of this legal mutant characterized as “litigating amicus curiae,” as demonstrated by the cascading acrimony among the participants to this litigation, if accorded precedential viability, will implicate and erode the future core stability of American adversary jurisprudence as we know it today. Neither the appellees nor the trial court have advanced, beyond conclusory generalizations and conjecture, a persuasive argument that the trial court’s “litigating amicus curiae” order, whatever that term implies, does not seriously impinge the inherent rights of the only real parties in interest to this CRIPA litigation between the United States and Michigan. The district court’s order has, by extrajudicial edict, impressed upon the United States and Michigan a third-party legal interloper in the persona of the NPP ACLU and the ACLUFM acting through their structured willing surrogate, the *Knop* class, all of whom had been denied real-party-in-interest status and whose efforts to achieve that end had been earlier barred by the trial court. The legal consequence of the district court’s order was to achieve, by circumvention, a result that effectively and impermissibly abused all conventional laws and judicial rules of civil practice and procedure for acquiring the status and rights of a named party/real party in interest, including Fed.R.Civ.P. 14 and 17 through 25.

Challenged by the characterization of “litigating amicus curiae,” which is not referenced in any legal dictionary, congressional enactment, judicial promulgation, the Federal Criminal Code and Rules, nor the Federal Civil Judicial Procedures and Rules, this court conducted exhaustive research in an effort to search for the identity of this illusive trial court-created mutant. Although a limited number of district courts within the Fifth, Ninth, and

Eleventh Circuits and the Ninth Circuit Court of Appeals on a single occasion have applied the characterization of “litigating amicus curiae” to nonparties in interest to a cause of action, the cases afford no assistance in defining or positioning the concept within the evolution of American adversary jurisprudence because, in each instance, the participation of a “litigating amicus curiae” was permitted by agreement of the named parties to the controversy.³ Accordingly, integral to this appeal as an issue of first impression is the identification of this elusive apparition “litigating amicus curiae.”

13 Appellees have cited the following cases to support their claim that a “litigating amicus” is an entity recognized by the federal court system: *Hoptowitz v. Ray*, 682 F.2d 1237 (9th Cir.1982); *Dove v. Chattanooga Area Regional Transp. Auth.*, 701 F.2d 50 (6th Cir.1983), *affg* 539 F.Supp. 36 (E.D.Tenn.1981); *In re Estelle*, 516 F.2d 480 (5th Cir.1975); *DeVonish v. Garza*, 510 F.Supp. 658 (W.D.Tex.1981); *Pugh v. Locke*, 406 F.Supp. 318 (M.D.Ala.1976); *Morales v. Turman*, 364 F.Supp. 166 (E.D.Tex.1973); *Wyatt v. Stickney*, 344 F.Supp. 373 (M.D.Ala.1972). These cases do not, however, aid appellee’s proposition. In none of the cases was the concept of “litigating amicus curiae” nor the scope of their participation addressed by the court as an issue, nor was the term defined within the context of a “case or controversy” seeking the resolution of the court. The term “litigating amicus curiae” does not appear nor is it alluded to in the *Estelle*, *Wyatt*, *Pugh*, *Morales*, or *Dove* opinions.

Historically, “amicus curiae” was defined as one who interposes “in a judicial proceeding to assist the court by giving information, or otherwise, or who conduct[s] an investigation or other proceeding on request or appointment therefor by the court.” 4 Am.Jur.2d, Am.Cur. § 1, at 109 (1962). See *Leigh v. Engle*, 535 F.Supp. 418, 419 20 (N.D.Ill.1982). Its purpose was to provide *impartial* information on matters of law about which there was doubt, especially in matters of public interest. *Miller Wohl Co. v. Commissioner of Labor & Indus., State of Montana*, 694 F.2d 203, 204 (9th Cir.1982); 4 Am.Jur.2d, Am.Cur. §§ 1, 2 at 109 10; *Leigh*, 535 F.Supp. at 420. The orthodox view of amicus curiae *165 was, and is, that of an *impartial* friend of the court *not an adversary party in interest in the litigation*. *Miller Wohl*, 694 F.2d at 204. The position of classical amicus in litigation was not to provide a highly partisan account of the facts, but rather to aid the court in resolving doubtful issues of law. *New England*

Patriots Football Club, Inc. v. University of Colorado, 592 F.2d 1196, 1198 n. 3 (1st Cir.1979); *Leigh*, 535 F.Supp. at 420. Over the years, however, some courts have departed from the orthodoxy of amicus curiae as an impartial friend of the court and have recognized a *very limited* adversary support of given issues through brief and/or oral argument. *Funbus Sys., Inc. v. California Pub. Util. Comm'n*, 801 F.2d 1120, 1124 25 (9th Cir.1986); Krislov, *The Amicus Curiae Brief: from Friendship to Advocacy*, 72 Yale L.J. 694 (1963).

Classical participation as an amicus to brief and argue as a friend of the court was, and continues to be, a privilege within “the sound discretion of the courts,” see *Northern Sec. Co. v. United States*, 191 U.S. 555, 24 S.Ct. 119, 48 L.Ed. 299 (1903); 4 Am.Jur.2d, Am.Cur. § 4 at 113, depending upon a finding that the proffered information of amicus is timely, useful, or otherwise necessary to the administration of justice. *Leigh*, 535 F.Supp. at 420. Amicus, however, has never been recognized, elevated to, or accorded the full litigating status of a named party or a real party in interest, *Miller Wohl Co.*, 694 F.2d at 204, and amicus has been consistently precluded from initiating legal proceedings, filing pleadings, or otherwise participating and assuming control of the controversy in a totally adversarial fashion. *Moten v. Bricklayers, Masons and Plasterers Int'l Union of Am.*, 543 F.2d 224, 227 (D.C.Cir.1976) (per curiam) (amicus may not appeal judgments); *State ex rel. Baxley v. Johnson*, 293 Ala. 69, 300 So.2d 106, 111 (1974) (per curiam) (amicus is not a party and cannot assume the functions of a party nor control litigation); *Silverberg v. Industrial Comm'n*, 24 Wis.2d 144, 128 N.W.2d 674, 680 (1964) (amicus brief seeking to challenge validity of testimony in the record stricken because attempt to challenge was not a proper function of amicus); 4 Am.Jur.2d, Am.Cur. §§ 3, 6 at 111, 114. See *City of Winter Haven v. Gillespie*, 84 F.2d 285 (5th Cir.), cert. denied, 299 U.S. 606, 57 S.Ct. 232, 81 L.Ed. 447 (1936). Historically, an amicus could not join issues not joined by the parties in interest, e.g., *National Comm'n on Egg Nutrition v. F.T.C.*, 570 F.2d 157, 160 n. 3 (7th Cir.1977), cert. denied, 439 U.S. 821, 99 S.Ct. 86, 58 L.Ed.2d 113 (1978); *In re Buffalo*, 57 A.D.2d 47, 394 N.Y.S.2d 919, 921 (1977); *Phoenix v. Phoenix Civic Auditorium & Convention Center Ass'n*, 99 Ariz. 270, 408 P.2d 818, 821 (1965) (amicus cannot create, extend, or enlarge issue), and was not bound by the judgments in actions in which amicus was permitted to brief or argue. *Munoz v. County of Imperial*, 667 F.2d 811, 816 17 (9th

Cir.), cert. denied, 459 U.S. 825, 103 S.Ct. 58, 74 L.Ed.2d 62 (1982); *TRW, Inc. v. Ellipse Corp.*, 495 F.2d 314, 318 (7th Cir.1974); 4 Am.Jur.2d, Am.Cur. § 3, at 112.

Historically, there has been a bright-line distinction between amicus curiae and named parties/real parties in interest in a case or controversy. Standing to litigate equal to that exercised by named parties/real parties in interest may be acquired or conferred only pursuant to Fed.R.Civ.P. 14 and 17 through 25. See *Ex parte Cutting*, 94 U.S. 12, 20 21, 24 L.Ed. 69 (1876) (in pre-Civil Rules case, Supreme Court recognized intervention only upon petition for formal intervention, which was granted either expressly or through the actions of the lower court consistent with intervention); *Miller Wohl*, 694 F.2d at 204 (“A petition to intervene and its express or tacit grant are prerequisites to this treatment [as an intervenor].”) The intent and purpose of the Federal Rules should not be evaded by acts of judicial legerdemain. Amicus curiae may not and, at least traditionally, has never been permitted to rise to the level of a named party/real party in interest nor has an amicus curiae been conferred with the authority of an intervening party of right without complying with the requirements of Fed.R.Civ.P. 24(a), nor accorded permissible intervention without meeting the criteria of Fed.R.Civ.P. 24(b). *166 Only a named party or an intervening real party in interest is entitled to litigate on the merits, e.g., *Miller Wohl*, 694 F.2d at 204; *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C.Cir.1985); *Gilbert v. Johnson*, 601 F.2d 761, 768 (5th Cir.1979) (Rubin, J., concurring); cf. *Ross v. Bernhard*, 396 U.S. 531, 541 n. 15, 90 S.Ct. 733, 740 n. 15, 24 L.Ed.2d 729 (1970), and there is little doubt from the record that the district court, in the instant case, has conferred named party/real party in interest status upon the *Knop* class under the appellation of “litigating amicus curiae” and has invested the *Knop* class with equal standing to litigate this CRIPA action on the merits, thus divesting the original parties, the United States and the State of Michigan, of effective control of their litigation. It is reasonable to conclude from the evolution of amicus curiae that the judicial fiat of “litigating amicus curiae” in the instant case transcends the traditional concept of that term within accepted jurisprudence.

Forgetting, for the moment, the lexicology applied by the trial court to its judicial creativity and juxtaposing the broad authority conferred upon the *Knop* class with the rights equal to those of a named party/real party in

interest, it becomes facially apparent that the trial court has, subsequent to the execution of the court-approved consent decree, by judicial legislation, impressed upon the United States as plaintiff and the State of Michigan as defendant in this CRIPA action an intruder with equal litigating rights of a named party/real party in interest, thereby subverting the right of the United States and Michigan to effectively control the future course of the proceedings.

The record of these turbulent proceedings attests to the position, declared in open court, of the NPP ACLU and the ACLUFM that their interests and the interests of the *Knop* class were and continue to be adverse to the interests of both the United States and Michigan, the real parties in interest to this litigation. The unnecessary, overly intrusive, and indiscriminate course of litigating conduct demonstrated by the *Knop* amicus curiae in exercising the court-conferred litigating rights equal to a named party/real party in interest have exacerbated, if not caused, much of the discord, bitter confrontation, and continuing acrimony that has pervaded these proceedings since it moved to secure its domination over the directional course and objectives of these post-judgment proceedings, all of which has noticeably protracted and impeded the orderly implementation of the consent decree and delayed the benefits and results anticipated to be derived therefrom. To condone the fiction of "litigating amicus curiae," in reality an extrajudicial, de facto named party/real party in interest, would extend carte blanche discretion to a trial judge to convert the trial court into a free-wheeling forum of competing special interest groups capable of frustrating and undermining the ability of the named parties/real parties in interest to expeditiously resolve their own dispute and capable of complicating the court's ability to perform its judicial function. The record fails to disclose any result, beyond disrupting the implementation of a court-approved, negotiated consent decree, that the NPP ACLU, the ACLUFM, and the *Knop* class cannot achieve as traditional amicus curiae without the necessity of opening this judicial Pandora's box and releasing a prolific source of legal confusion upon the bench, the bar, and the public in this and future cases in controversy.

Accordingly, it is the conclusion of this court that the *Knop* class is without standing to compel the disclosure of internal medical/mental health/dental care draft peer audits pursuant to the district court's order of April 4, 1990, or to exercise any litigating rights equal to

a named party/real party in interest conferred by the district court under the characterization of "litigating amicus curiae" including, as a condition precedent for court consideration, the right to endorse or veto any state-proposed action. The *Knop* class is, however, not precluded from continued participation in this action in the traditional role of amicus curiae, and may, within the discretion of the court, argue its adversarial position either orally or by written briefs. Michigan *167 shall continue to furnish the *Knop* class with informational copies of all "reports, plans, pleadings, memoranda, or other documentation" it has agreed to furnish to the court and the United States pursuant to paragraphs I, J, K, and L of the consent decree. Accordingly, the April 4, 1990 order of the district court is REVERSED.

To summarize, the common thread of inquiry confronting this appellate review is whether the district court has overzealously breached precepts of federalism and comity by fashioning and imposing overly intrusive prison administrative procedures, more appropriately left to the better understanding, grasp, and expertise of prison administrators and which are within the peculiar province of state executive and legislative sovereignty. The clarion edict of the Supreme Court more than a decade ago, in language that needs no interpretation, declared:

It is difficult to imagine an activity in which a State has a stronger interest, or one that is more intricately bound up with state laws, regulations, and procedures, than the administration of its prisons. * * * The strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors thus also require giving the States the first opportunity to correct the errors made in the internal administration of their prison.

Preiser v. Rodriguez, 411 U.S. 475, 491 92, 93 S.Ct. 1827, 1937 38, 36 L.Ed.2d 439 (1973). See also *Hewitt v. Helms*, 459 U.S. 460, 103 S.Ct. 864, 872, 74 L.Ed.2d 675 (1983); *Chapman*, 452 U.S. at 349 n. 14, 101 S.Ct. at 2400 n. 14;

Procurier v. Martinez, 416 U.S. 396, 404 05, 94 S.Ct. 1800, 1807, 40 L.Ed.2d 224 (1974).

The court's pronouncements in *Rodriguez* have been consistently echoed in a proliferation of its progeny without erosion or departure and adopted by this circuit and virtually every other circuit addressing issues of prison administration:

[The] underlying and restrictive principles of comity and federalism are perhaps nowhere more compelling than in actions seeking relief against unconstitutional practices, policies and conduct manifest in state penal institutions. The rationale was articulated by the Supreme Court more than a decade ago[.]

Federal restraint into intrusion of a state penal institution is counseled for at least two reasons:

[J]udicial deference is accorded not merely because the administrator ordinarily will, as a matter of fact in a particular case, have a better grasp of his domain than the reviewing judge, but also because the operation of our correctional facilities is peculiarly the providence of the Legislative and Executive Branches of our Government not the Judicial.

Kendrick v. Bland, 740 F.2d 432, 437 38 (6th Cir.1984) (quoting *Wolfish*, 441 U.S. at 548, 99 S.Ct. at 1879) (citing *Arruda v. Fair*, 710 F.2d 886 (1st Cir.1983); *Sampson v. King*, 693 F.2d 566 (5th Cir.1982); *Newman v. Alabama*, 683 F.2d 1312, 1320 (11th Cir.1982)).

This circuit has also directed that federal equity courts, in fashioning a remedy designed to correct constitutional infringements, must afford relief which is "no broader than necessary to remedy the constitutional violation." *Newman v. Alabama*, 683 F.2d 1312, 1319 (11th Cir.1982) (quoted in *Kendrick*, 740 F.2d at 437). See also *Dayton Bd. of Educ. v. Brinkman*, 433 U.S. 406, 419 20, 97 S.Ct. 2766, 2775, 53 L.Ed.2d 851, 862 63 (1977); *Hills v. Gautreaux*, 425 U.S. 284, 293 94, 96 S.Ct. 1538, 1544 45, 47 L.Ed.2d 792, 801 (1976); *Ruiz v. Estelle*, 679 F.2d 1115, 1145 (5th Cir.1982) *vacated in part on other grounds*, 688 F.2d 266 (5th Cir.1982), *cert. denied*, 460 U.S. 1042, 103 S.Ct. 1438, 75 L.Ed.2d 795 (1983) ("We should, therefore, fashion 'the least intrusive remedy that will still be effective' "); *Newman v. Alabama*, 559 F.2d 283, 287

(5th Cir.1977), *cert. denied*, 438 U.S. 915, 98 S.Ct. 3144, 57 L.Ed.2d 1160 (1978). Accordingly, it was incumbent upon the district court in the action sub judice to impose the least intrusive remedies available in resolving the issues *168 reviewed in this appeal. The trial court, having acknowledged the teachings of the Supreme Court addressing state penal institutional administration, was remiss in not fashioning its dispositions in accordance with those directional dictates:

[T]he problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible to resolution by decree. Most require expertise, comprehensive planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government. For all of those reasons, courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform. Judicial recognition of that fact reflects no more than a healthy sense of realism.

Martinez, 416 U.S. at 404 05, 94 S.Ct. at 1807 (footnote omitted) (quoted in *Chapman*, 452 U.S. at 351 n. 16, 101 S.Ct. at 2401 02 n. 16). See also *Wolff v. McDonnell*, 418 U.S. 539, 561 62, 568, 94 S.Ct. 2963, 2977, 41 L.Ed.2d 935 (1974); *North Carolina Prisoners' Labor Union*, 433 U.S. at 125, 97 S.Ct. at 2537.

Recognizing the oversight responsibility of the trial court in the instant case to scrutinize charges of cruel and unusual conditions of confinement in the identified institutions of correction here in controversy and to discharge its duty to protect the constitutional rights of inmates detained therein, the trial court should not have assumed that Michigan's legislature and prison officials were and continue to be insensitive to requirements of the Constitution or to the perplexing problems of how best to achieve the ultimate objectives of the penal function in the criminal justice system. *Chapman*, 452 U.S. at 352, 101 S.Ct. at 2402. The trial court should

have assiduously avoided its inextricable entanglements in the minutiae of prison administration which only distracted it from a detached consideration and resolution of the single overriding issue of the constitutional infringements seeking resolution. The trial court should have been mindful that charges of cruel and unusual punishment spring from *affirmative proof of constitutional infringements and that judicial answers "must reflect that fact rather [a] trial court's idea of how best to operate a detention facility."* *Wolfish*, 441 U.S. at 539, 99 S.Ct. at 1874 (emphasis added).

Michigan has demonstrated a good faith effort to accomplish prison reforms of magnitude at the institutions named in the complaint involving a commitment of millions of dollars as evidenced by the scope of its agreement with the United States memorialized in the consent decree and state plan endorsed by the trial court on July 16, 1984. The United States, with its unlimited

pool of financial and capable professional resources, has aggressively and effectively pursued the implementation of that decree with Michigan within the congressional intent of CRIPA, and the trial court, should not, directly or indirectly through a special master, independent expert, or some extraneous participant, impose overly intrusive remedies upon the state, but should exercise restraint and reason in performing its oversight responsibility.

It is ordered that this consolidated appeal is REMANDED to the district court for further proceedings not inconsistent with this decision.

Judge **BOGGS** concurs in the result only.

All Citations

940 F.2d 143, 20 Fed.R.Serv.3d 576

EXHIBIT 293

694 F.2d 203

United States Court of Appeals,
Ninth Circuit.

The MILLER-WOHL CO., INC., Plaintiff-Appellant,

v.

COMMISSIONER OF LABOR AND
INDUSTRY, STATE OF MONTANA, and
Tamara L. Buley, Defendants-Appellees.

Equal Employment Opportunity Commission,

California Dep't of Fair Employment &
Housing, Employment Law Center, and
Equal Rights Advocates, Inc., Amici Curiae.

No. 81-3333.

Argued and Submitted July 9, 1982.

Decided Aug. 27, 1982.

Order Dec. 7, 1982.

Synopsis

On motion of amici curiae for award of attorney fees from the unsuccessful plaintiff, the Court of Appeals, held that, amici were not entitled to award, from unsuccessful plaintiff, since their extensive participation did not make them parties to litigation, and even if they could be deemed parties, "common benefit" exception to rule requiring each party to bear its own attorney fees did not apply; moreover they were not entitled to a fee for services to the court.

Motion denied.

See also, 9th Cir., 685 F.2d 1088 and D.C., 515 F.Supp. 1264.

West Headnotes (9)

[1] Amicus Curiae

🔑 Powers, Functions, and Proceedings

Amicus curiae is not party to litigation.

25 Cases that cite this headnote

[2] Amicus Curiae

🔑 Compensation

Federal Civil Procedure

🔑 Particular Types of Cases

Amici curiae were not entitled to award of attorney fees from unsuccessful plaintiff, since their extensive participation did not make them parties to litigation, and even if they could be deemed parties, "common benefit" exception to rule requiring each party to bear its own attorney fees did not apply; moreover, they were not entitled to a fee for services to the court, since they were volunteers, not appointees.

4 Cases that cite this headnote

[3] Federal Civil Procedure

🔑 Intervention

Petition to intervene and its express or tacit grant are prerequisites to being given party prerogatives.

Cases that cite this headnote

[4] Federal Civil Procedure

🔑 Result;Prevailing Parties;"American Rule"

American rule requires each party to bear its own attorney fees absent contrary contractual or statutory provisions; exceptions are narrowly circumscribed.

10 Cases that cite this headnote

[5] Federal Civil Procedure

🔑 Public Interest or Common Benefit;
Private Attorneys General

"Common benefit" exception to rule requiring each party to bear its own attorney fees applies only when court can accurately shift litigant's expenses to those who benefited from them.

1 Cases that cite this headnote

[6] Amicus Curiae

🔑 Compensation

Federal Civil Procedure

🔑 Miscellaneous Matters

Common law permits award of fee for services to court if court-appointed amicus rendered services that helped resolve question presented, and the party taxed caused situation prompting the appointment.

8 Cases that cite this headnote

[7] **Federal Civil Procedure**

🔑 Discretion of Court

Federal courts exercise sparingly their discretion to tax costs not statutorily authorized.

1 Cases that cite this headnote

[8] **Amicus Curiae**

🔑 Compensation

Federal Civil Procedure

🔑 Miscellaneous Matters

Amicus curiae was not entitled to fee award defraying its expenses, and only parties were entitled to costs. U.S.Ct. of App. 9th Cir. Rule 14(f), 28 U.S.C.A.; F.R.A.P.Rule 39(d), 28 U.S.C.A.; Fed.Rules Civ.Proc., Rule 54(d), 28 U.S.C.A.

Cases that cite this headnote

[9] **Federal Civil Procedure**

🔑 Intervention

Petition to intervene and its express or tacit grant are prerequisites to those not formal parties being given party prerogatives.

Cases that cite this headnote

Attorneys and Law Firms

*204 Charles L. Fine, Phoenix, Ariz., for plaintiff-appellant.

Paul Van Tricht, Helena, Mont., argued, for Com'r of Labor.

Richard R. Buley, Missoula, Mont., argued, for T.L. Buley; Tipp, Hoven, Skjelset & Fizzell, Missoula, Mont., on brief.

Linda Krieger, San Francisco, Cal., for Dept. of Fair Employment.

Karen MacRae Smith, Washington, D.C., for E.E.O.C.

Before WRIGHT, KILKENNY and CANBY, Circuit Judges:

ORDER

Amici curiae Employment Law Center and Equal Rights Advocates, Inc. raised, briefed, and argued, at the appellate level, the jurisdictional issue that disposed of this case. They now present us with an extraordinary request: they move for an award of attorney fees from the unsuccessful plaintiff-appellant, Miller-Wohl Co. They contend that their extensive participation has made them parties to this litigation.

1 Miller Wohl Co. fired employee Tamara Buley for pregnancy related absences. It then brought this declaratory judgment action seeking to have the Montana Maternity Leave Act invalidated as conflicting with federal law. These amici were the first to realize that Miller Wohl's federal "claims were, in reality, anticipated federal defenses to the employee's state claim. The complaint thus failed to plead a federal question. *Miller Wohl Co. v. Commissioner of Labor and Industry*, 685 F.2d 1088 (9th Cir.1982).

[1] [2] An amicus curiae is not a party to litigation. *Clark v. Sandusky*, 205 F.2d 915, 917 (7th Cir.1953). These amici fulfilled the classic role of amicus curiae by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the court's attention to law that escaped consideration. See *Alexander v. Hall*, 64 F.R.D. 152, 155 (D.S.C.1974); 3A C.J.S. *Amicus Curiae* § 6, at 427 (1973). They argue that by doing so they have become parties to the case. The argument is self-contradictory.

[3] Courts have rarely given party prerogatives to those not formal parties. A petition to intervene and its express or tacit grant are prerequisites to this treatment. *Ex parte*

Cutting, 94 U.S. 14, 20-21, 24 L.Ed. 49 (1876); see *Brennan v. Silvergate District Lodge No. 50*, 503 F.2d 800, 803 (9th Cir.1974). These amici never attempted to intervene.

[4] Even if we could deem them parties, the American rule requires each party to bear its own attorney fees absent contrary contractual or statutory provisions. Exceptions are narrowly circumscribed. *United States v. Standard Oil Co. of California*, 603 F.2d 100, 103 (9th Cir.1979).

[5] Amici argue the “common benefit” exception. The purpose of this equitable exception is to prevent the unjust enrichment of those who benefit from the litigant's efforts. *Boeing v. Van Gemert*, 444 U.S. 472, 478-79, 100 S.Ct. 745, 749, 62 L.Ed.2d 676 (1980). It applies only when the court can accurately shift the litigant's expenses to those who benefited from them. *Stevens v. Municipal Court*, 603 F.2d 111, 112-13 (9th Cir.1979).

Amici say they bestowed a benefit on the court, the state of Montana, defendant Tamara Buley, and pregnant women. To require *205 the unbenefited plaintiff, Miller-Wohl, to pay these amici attorney fees would conflict with the rationale of the exception and is impermissible. See *Alyeska Pipeline Co. v. Wilderness Society*, 421 U.S. 240, 245 & n. 14, 269, 271, 95 S.Ct. 1612, 1615 & n. 14, 1627, 1628, 44 L.Ed.2d 141 (1975).

[6] There remains the possibility of awarding amici a fee for services to the court. Common law permits such an award if (1) a court-appointed amicus rendered services that helped resolve the question presented, and (2) the party taxed caused the situation prompting the appointment. See *Schneider v. Lockheed Aircraft Corp.*,

658 F.2d 835, 853-54 (D.C.Cir.1981), *cert. denied*, 455 U.S. 994, 102 S.Ct. 1622, 71 L.Ed.2d 855 (1982).

[7] Miller-Wohl may have satisfied the second condition by bringing a case without federal jurisdiction. But these amici fail to satisfy the underlying requirement: they were volunteers, not appointees.²

² 28 U.S.C. § 1920 enumerates costs that any federal court may tax. Subsection (6), compensation of court appointed experts, is the only provision that could encompass an amicus fee. Thus the common law prerequisite of appointment by the court is for us a statutory prescription. Federal courts exercise sparingly their discretion to tax costs not statutorily authorized. *Farmer v. Arabian Oil Co.*, 379 U.S. 227, 235, 85 S.Ct. 411, 416, 13 L.Ed.2d 248 (1964).

These amici performed a valuable service for the court. Admirably fulfilling the role of amicus does not, however, entitle them to compensation.

[8] Motion denied.³

³ We also must reject amicus Employment Law Center's cost bill. The language of the applicable rules indicates that only parties are entitled to costs. See *Fed.R.Civ.P.* 54(d); *Fed.R.App.P.* 39(d); 9th Cir.R. 14(f). An amicus fee award defraying the Center's expenses is precluded for the reasons given.

All Citations

694 F.2d 203, 30 Fair Empl.Prac.Cas. (BNA) 866

EXHIBIT 294

562 Pa. 32

Supreme Court of Pennsylvania.

COMMONWEALTH of Pennsylvania, Appellee,

v.

Abraham Martinez COTTO, Appellant.

Argued Oct. 20, 1999.

|

Decided June 20, 2000.

Synopsis

Juvenile pleaded guilty in the Court of Common Pleas, Lancaster County, Criminal Division, Nos. 1878-1996 and 3167-1996, [D. Richard Eckman, J.](#), to robbery and criminal conspiracy, but reserved his right to appeal challenges to constitutionality of amendments to Juvenile Act. On appeal, the Superior Court, No. 2375 Philadelphia 1997, [708 A.2d 806](#), affirmed. Juvenile appealed. The Supreme Court, No. 160 M.D. Appeal Docket 1998, [Castille, J.](#), held that provision of Juvenile Act governing transfer from adult court to juvenile court did not violate due process clause.

Affirmed.

[Newman, J.](#), concurred in result.

West Headnotes (7)

[1] Constitutional Law

➤ Presumptions and Construction as to Constitutionality

Constitutional Law

➤ Burden of Proof

Statute is presumed to be constitutional and will not be declared unconstitutional unless it clearly, palpably, and plainly violates the Constitution; therefore, the party challenging the constitutionality of a statute has a heavy burden of persuasion.

[12 Cases that cite this headnote](#)

[2] Constitutional Law

➤ [Statutes in general](#)

A statute is constitutionally void only if it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.

[10 Cases that cite this headnote](#)

[3] Constitutional Law

➤ [Delegation of Powers](#)

An unconstitutionally vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

[3 Cases that cite this headnote](#)

[4] Constitutional Law

➤ [Statutes](#)

Statute will not be deemed unconstitutionally vague if the terms, when read in context, are sufficiently specific that they are not subject to arbitrary and discriminatory application.

[8 Cases that cite this headnote](#)

[5] Constitutional Law

➤ [Transfer to and from adult court](#)

Infants

➤ [Juvenile transfers and certifications; adult prosecution](#)

Statutory provision allowing minor to prove that his case should be transferred to juvenile court, if the transfer would serve the public interest, is not unconstitutionally vague in violation of due process, even though statute did not assign weight to various factors that were to be considered in determining whether transfer was in the public interest. [U.S.C.A. Const.Amend. 14; Const. Art. 1, § 9; 42 Pa.C.S.A. §§ 6322\(a\), 6355\(a\)\(4\)\(iii\)](#).

[8 Cases that cite this headnote](#)

[6] Constitutional Law

🔑 [Transfer to and from adult court](#)

Under due process clause, in a proceeding to determine whether to transfer a juvenile to juvenile court, the youth is entitled to notice of the charges against him, to a counseled hearing where he may present evidence and cross-examine witnesses, access to social records and probation or similar reports, and a statement of the reasons for the court's determination. [U.S.C.A. Const.Amend. 14](#).

[2 Cases that cite this headnote](#)

[7] **Constitutional Law**

🔑 [Transfer to and from adult court](#)

Infants

🔑 [Juvenile transfers and certifications; adult prosecution](#)

Juvenile Act does not violate due process clause by placing burden of proof on juvenile seeking transfer from adult court to juvenile court. [U.S.C.A. Const.Amend. 14](#); [Const. Art. 1, § 9](#); [42 Pa.C.S.A. § 6322](#).

[9 Cases that cite this headnote](#)

Attorneys and Law Firms

****218 *33** James J. Karl, Chief Public Defender, Office of the Public Defender, Mark Scott Sedley, Asst. Defender, Defender's Association of Phila., for Abraham Martinez Cotto.

***34** Joseph C. Madenspacher, Dist. Atty., [Hugh J. Burns, Jr.](#), Special Prosecutor, Phila. Cty., [Susan E. Moyer](#), Asst. Dist. Atty., [Bruce A. Roth](#), Asst. Dist. Atty., Office of the Dist. Atty., for Commonwealth.

Before [FLAHERTY](#), C.J., and [ZAPPALA](#), CAPPY, [CASTILLE](#), [NIGRO](#), [NEWMAN](#) and [SAYLOR](#), JJ.

OPINION

[CASTILLE](#), Justice.

This Court granted allocatur in this matter to determine whether certain 1995 amendments to the Juvenile Act, [42](#)

[Pa.C.S. § 6301 et seq.](#), violate the Fourteenth Amendment of the United States Constitution and [Article I, Section 9, of the Pennsylvania Constitution](#). For the reasons that follow, we hold that the amendments are constitutional and, therefore, we affirm.

On April 23, 1996, appellant and two accomplices, armed with a handgun, robbed the owner, an employee and two customers of the Mane Magic Beauty Salon in Lancaster, Pennsylvania. Subsequently, on May 8, 1996, appellant and three accomplices, again armed with a handgun, robbed the Parkhill Jewelry Store, its employees and one customer. On July 29, 1996, appellant was charged with four counts of robbery and one count of criminal conspiracy arising out of the April 23 incident and with two counts of robbery and one count of criminal conspiracy arising out of the May 8 incident.

Appellant, who was fifteen years old at the time of both robberies, was charged in criminal court as an adult pursuant to § 6302 of the Juvenile Act, which excludes ****219** robbery from the definition of a delinquent act when, as in the case *sub judice*, (1) it was committed by a child who was fifteen years old or older and (2) a deadly weapon was used during the commission of the offense. On February 28, 1997, appellant ***35** filed a motion to transfer the proceedings to juvenile court and a petition for a writ of *habeas corpus* alleging that the 1995 amendments to the Juvenile Act governing transfer were unconstitutional on two grounds: because they were void for vagueness and because they unconstitutionally placed the burden of proof on the juvenile seeking transfer to juvenile court.

¹ Those offenses that the amended Juvenile Act requires to be initiated in criminal court when committed by juveniles are known as “direct file cases.”

The trial court promptly scheduled a hearing, which was held on March 20, 1997. After receiving briefs from the parties, the trial court issued an opinion on May 12, 1997, denying both motions. In the opinion, the trial court engaged in an exhaustive analysis of the statutory factors governing the decision to transfer a case to juvenile court. *See* [42 Pa.C.S. § 6355\(a\)\(4\)\(iii\)](#).

One week later, on May 19, 1997, appellant entered a negotiated guilty plea to all charges and was sentenced to eight concurrent terms of five to ten years' imprisonment.

Pursuant to the plea agreement, appellant specifically reserved the right to appeal his twin challenges to the constitutionality of the amendments to the Juvenile Act. On appeal, appellant did not challenge the trial court's discretionary denial of his transfer motion, but raised only his two challenges to the constitutionality of the amendments. The Superior Court held that the amendments were constitutional. *Commonwealth v. Cotto*, 708 A.2d 806 (Pa.Super.1998).

[1] In his appeal to this Court, as in the Superior Court, appellant contends that the 1995 amendments to the Juvenile Act are unconstitutional in two respects. Initially, we note that a statute is presumed to be constitutional and will not be declared unconstitutional unless it clearly, palpably and plainly violates the Constitution. *Commonwealth v. Hendrickson*, 555 Pa. 277, 280 81, 724 A.2d 315, 317 (1999); *Commonwealth v. Barud*, 545 Pa. 297, 304, 681 A.2d 162, 165 (1996). Therefore, the party challenging the constitutionality of a statute has a heavy burden of persuasion. *Barud*, *supra*.

As amended in 1995, the Juvenile Act vests original jurisdiction in the criminal courts for specified violent felonies, e.g., rape, aggravated assault and robbery committed by minors *36 aged fifteen or older who either used a deadly weapon in the commission of the offense or were previously adjudicated delinquent for such crimes.² Prior to the amendments, those *37 serious **220 felonies initially came within the jurisdiction of the juvenile courts, subject to certification and transfer to adult court. The 1995 amendments reflect a legislative judgment that the most serious violent felonies should be treated in the same manner as murder charges, i.e., as adult crimes in adult court, at least in the first instance.

² 42 Pa.C.S. § 6302 defines "Delinquent Act" as follows: "Delinquent act.

(1) The term means an act designated a crime under the law of this Commonwealth, or of another state if the act occurred in that state, or under Federal law, or under local ordinances or an act which constitutes indirect criminal contempt under 23 Pa.C.S. Ch. 61 (relating to protection from abuse).

(2) The term shall not include:

(i) The crime of murder.
(ii) Any of the following prohibited conduct where the child was 15 years of age or older at the time of the alleged conduct and a deadly

weapon as defined in 18 Pa.C.S. § 2301 (relating to definitions) was used during the commission of the offense, which, if committed by an adult, would be classified as:

(A) Rape as defined in 18 Pa.C.S. § 3121 (relating to rape).

(B) Involuntary deviate sexual intercourse as defined in 18 Pa.C.S. § 3123 (relating to involuntary deviate sexual intercourse).

(C) Aggravated assault as defined in 18 Pa.C.S. § 2702(a)(1) or (2) (relating to aggravated assault).

(D) Robbery as defined in 18 Pa.C.S. § 3701(a)(1)(i), (ii) or (iii) (relating to robbery).

(E) Robbery of motor vehicle as defined in 18 Pa.C.S. § 3702 (relating to robbery of motor vehicle).

(F) Aggravated indecent assault as defined in 18 Pa.C.S. § 3125 (relating to aggravated indecent assault).

(G) Kidnapping as defined in 18 Pa.C.S. § 2901 (relating to kidnapping).

(H) Voluntary manslaughter.

(I) An attempt, conspiracy or solicitation to commit murder or any of these crimes, as provided in 18 Pa.C.S. §§ 901 (relating to criminal attempt), 902 (relating to criminal solicitation) and 903 (relating to criminal conspiracy).

(iii) Any of the following prohibited conduct where the child was 15 years of age or older at the time of the alleged conduct and has been previously adjudicated delinquent of any of the following prohibited conduct which, if committed by an adult, would be classified as:

(A) Rape as defined in 18 Pa.C.S. § 3121.

(B) Involuntary deviate sexual intercourse as defined in 18 Pa.C.S. § 3123.

(C) Robbery as defined in 18 Pa.C.S. § 3701(a)(1)(i), (ii) or (iii).

(D) Robbery of motor vehicle as defined in 18 Pa.C.S. § 3702.

(E) Aggravated indecent assault as defined in 18 Pa.C.S. § 3125.

(F) Kidnapping as defined in 18 Pa.C.S. § 2901.

(G) Voluntary manslaughter.

(H) An attempt, conspiracy or solicitation to commit murder or any of these crimes as provided in 18 Pa.C.S. §§ 901, 902 and 903.

(iv) Summary offenses, unless the child fails to comply with a lawful sentence imposed thereunder, in which event notice of such fact shall be certified to the court.

(v) A crime committed by a child who has been found guilty in a criminal proceeding for other than a summary offense.

The amendments, however, also provide a mechanism for a minor to prove to the court that he does not belong in criminal court. Thus, § 6322 of the Juvenile Act allows a defendant to petition to have his case transferred to juvenile court. The standard governing such transfers is as follows:

... In determining whether to transfer a case charging murder or any of the offenses excluded from the definition of “delinquent act” in section 6302, the child shall be required to establish by a preponderance of the evidence that the transfer will serve the public interest. In determining whether the child has so established that the transfer will serve the public interest, the court shall consider the factors contained in section 6355(a)(4)(iii) (relating to transfer to criminal proceedings).

42 Pa.C.S. § 6322(a).

[2] [3] [4] First, appellant contends that this section is unconstitutionally vague because the “serve the public interest” standard is not defined. A statute is constitutionally void only if it is so vague that “persons of ‘common intelligence must necessarily guess at its meaning and differ as to its application.’ ” *Fabio v. Civil Service Commission of the City of Philadelphia*, 489 Pa. 309, 314, 414 A.2d 82, 84 (1980), quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). “A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” *38 *Grayned v. City of Rockford*, 408 U.S. 104, 108 09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). However, a statute will not be deemed unconstitutionally vague if the terms, when read in context, are sufficiently specific that they are not subject to arbitrary and

discriminatory application. *Hendrickson, supra; Barud, supra.*

[5] In support of his vagueness argument, appellant cites several cases in which this and other courts have held that statutes that provide for determinations to be made based upon the “public interest” standard have been found to be void for vagueness. See *Bell Telephone Co. of Pa.* **221 v. *Driscoll*, 343 Pa. 109, 21 A.2d 912 (1941); *Bykofsky v. Borough of Middletown*, 401 F.Supp. 1242 (M.D.Pa.1975), *aff'd per curiam*, 535 F.2d 1245 (3d Cir.1976), *cert. denied*, 429 U.S. 964, 97 S.Ct. 394, 50 L.Ed.2d 333 (1976); *People v. Saad*, 105 Cal.App.2d Supp. 851, 234 P.2d 785 (Cal.App. Dep't Super.Ct.1951); *Whitaker v. Dept. of Ins. and Treasurer*, 680 So.2d 528 (Fla. Dist.Ct.App.1996). What appellant fails to recognize, however, is that in each of those cases the determination that the statute was unconstitutionally vague was based on the fact that the term “public interest” was not further defined in the statute. *E.g.*, *Bell Telephone, supra* at 116, 21 A.2d at 915 (implied standard of public interest not proper unless further defined or limited in its meaning).

The amended Juvenile Act decidedly does not suffer from this infirmity. The amendments further define “public interest” by mandating that the court consider the factors set forth in § 6355, which provides, in pertinent part:

In determining whether the public interest can be served, the court shall consider the following factors:

- (A) the impact of the offense on the victim or victims;
- (B) the impact of the offense on the community;
- (C) the threat to the safety of the public or any individual posed by the child;
- (D) the nature and circumstances of the offense allegedly committed by the child;
- (E) the degree of the child's culpability;
- *39 (F) the adequacy and duration of dispositional alternatives available under this chapter and in the adult criminal justice system; and
- (G) whether the child is amenable to treatment, supervision or rehabilitation as a juvenile by considering the following factors:

(I) age;

- (II) mental capacity;
- (III) maturity;
- (IV) the degree of criminal sophistication exhibited by the child;
- (V) previous records, if any;
- (VI) the nature and extent of any prior delinquent history, including the success or failure of any previous attempts by the juvenile court to rehabilitate the child;
- (VII) whether the child can be rehabilitated prior to the expiration of the juvenile court jurisdiction;
- (VIII) probation or institutional reports, if any;
- (IX) any other relevant factors ...

42 Pa.C.S. § 6355(a)(4)(iii). This extensive list of factors specifically focusing on the background of the juvenile, the impact of his crime, the safety of the community and the juvenile's treatment and rehabilitation prospects clearly provides definite standards for a court to apply in determining whether the public interest would be served by transfer of the matter to juvenile court.

Moreover, the purpose of the amended Act itself provides guidance as to the meaning of “public interest.” The Statement of Purpose provides, in pertinent part:

Consistent with the protection of the public interest, to provide for children committing delinquent acts programs of supervision, care and rehabilitation which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable children to become responsible and productive members of the community.

*40 42 Pa.C.S. § 6301(b)(2). When read in the context of the clearly elaborated legislative purpose, and given the

extensive list of factors to be considered in determining whether to transfer a case to juvenile court, the term “public interest” is not **222 vague at all. To the contrary, courts are provided with a carefully crafted framework for evaluating these often-difficult issues. Therefore, we find that the statute as amended is not unconstitutionally vague.

Appellant also claims that the Juvenile Act as amended is unconstitutional because the factors set forth may be mutually exclusive i.e., the rehabilitative needs of the defendant and the safety of the community may weigh in favor of different conclusions and the Juvenile Act does not provide any guidance as to the weight to be given individual factors. Appellant argues that such a construct invites arbitrary and discriminatory application. However, both this Court and the United States Supreme Court have held that a legislative decision not to assign specific weight to a series of various relevant factors does not render a statutory scheme unconstitutional. This Court addressed a similar challenge in *Commonwealth v. Zettlemoyer*, 500 Pa. 16, 454 A.2d 937, (1982), cert. denied, 461 U.S. 970, 103 S.Ct. 2444, 77 L.Ed.2d 1327 (1983), reh'g denied, 463 U.S. 1236, 104 S.Ct. 31, 77 L.Ed.2d 1452 (1983). In *Zettlemoyer*, the appellant argued that Pennsylvania's death penalty statute was unconstitutionally vague because the jury was not given guidance as to the specific weight to be given to the competing aggravating and mitigating factors that a jury is required to consider in the penalty phase. In rejecting that claim, the Court, quoting federal precedent, stated:

While these questions and decisions may be hard, they require no more line drawing than is commonly required of a factfinder in a lawsuit. For example, juries have traditionally evaluated the validity of defenses such as insanity or reduced capacity, both of which involve the same considerations as some of the above-mentioned mitigating circumstances. While the various factors to be considered by the sentencing authorities do not have numerical weights assigned *41 to them, the requirements of *Furman [v. Georgia]*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972),] are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

Id. at 66-67, 454 A.2d at 963-64, quoting *Proffitt v. Florida*, 428 U.S. 242, 257-58, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Under the Juvenile Act, the decision-maker has discretion in determining whether to transfer a direct file case to juvenile court. However, that discretion, like the discretion provided to juries under the death penalty statute, is guided by the specific factors that must be considered in making that determination. That the relevant factors may weigh in favor of different results is neither surprising nor problematic; rather, it reflects reality. Although each juvenile is an individual, he is also a member of a community. The needs of an individual are often at odds with the needs of society. The exercise of discretion routinely requires a balancing of competing concerns. Furthermore, nothing in the Juvenile Act countenances or encourages arbitrariness in the balancing process. In contrast, the interpretation that appellant suggests is constitutionally required would essentially eliminate discretion entirely. But the constitution does not disfavor discretion. Therefore, the transfer provisions of the Juvenile Act are not unconstitutional **223 merely because they provide for flexibility and discretion rather than for the rigid assignment of a *42 specific weight to each of the factors to be considered in determining whether transfer is in the public interest.³

³ We note that other jurisdictions faced with similar challenges have also held that juvenile transfer provisions based on the public interest are not unconstitutionally vague, even where the statute does not set forth factors to be considered at transfer hearings. See, e.g., *People v. Moseley*, 193 Colo. 256, 259-60, 566 P.2d 331 (1977) (six statutory factors with no weight assigned to the factors); *State v. Stanley*, 60 Haw. 527, 592 P.2d 422, 426-27 (1979), cert. denied, 444 U.S. 871, 100 S.Ct. 149, 62 L.Ed.2d 97 (1979) (no factors); *People v. Taylor*, 76 Ill.2d 289, 29 Ill.Dec. 103, 391 N.E.2d 366, 373-74 (1979)

(six statutory factors with no weight assigned to the factors); *State v. Speck*, 242 N.W.2d 287, 289-94 (Iowa 1976) (no factors); *State ex rel. Londerholm v. Owens*, 197 Kan. 212, 416 P.2d 259, 271 (1966) (no factors); *In re a Juvenile*, 364 Mass. 531, 306 N.E.2d 822, 826-27 (1974) (no factors); *Lewis v. State*, 86 Nev. 889, 478 P.2d 168, 171 (1970) (no factors); *State v. Doyal*, 59 N.M. 454, 286 P.2d 306, 310-11 (1955) (no factors); *In the Interest of L.V.A.*, 248 N.W.2d 864, 866 (S.D.1976) (no factors); *State in Interest of Salas*, 520 P.2d 874, 875 (Utah 1974) (no factors); and *State v. F.R.W.*, 61 Wis.2d 193, 212 N.W.2d 130 (1973) (no factors).

[6] Second, appellant contends that the amended Act is unconstitutional because it impermissibly places the burden of proof for transfer on the accused. At the outset, we should emphasize that, as this Court noted in *Commonwealth v. Williams*, 514 Pa. 62, 522 A.2d 1058 (1987), the special treatment provided to criminal offenders by the Juvenile Act is not a constitutional requirement. It is a statutory creation. That does not mean, of course, that the due process clause plays no role in questions of transfer. As we recognized in a matter construing a former version of the Juvenile Act, in a proceeding to determine whether to transfer a juvenile, “the youth is entitled to notice of the charges against him, to a counseled hearing where he may present evidence and cross-examine witnesses, access to social records and probation or similar reports, and a statement of the reasons for the Court's determination.” *Commonwealth v. Pyle*, 462 Pa. 613, 621 n. 10, 342 A.2d 101, 105 n. 10 (1975), citing *Kent v. United States*, 383 U.S. 541, 557, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966).

[7] With respect to the specific question of the constitutional propriety of placing the burden on a juvenile defendant to prove that he is amenable to treatment in juvenile court, we do not write upon a blank slate. To the contrary, the burden *43 of showing amenability to treatment justifying transfer to juvenile court was first placed on Pennsylvania juveniles not by the legislature, but by this Court in *Pyle*. In determining that it does not violate the Constitution to place the burden of proof for transfer of a murder case to juvenile court on the juvenile, the *Pyle* Court reasoned that:

The decision to transfer has no bearing on either the procedural or substantive aspects of the criminal

conviction in criminal court (I.e., it is still the Commonwealth's burden to prove every fact necessary to constitute murder beyond a reasonable doubt). Consequently, placing the burden on a petitioner in this manner in no way denied him his due process safeguards.

Id. at 623 n. 12, 342 A.2d at 107 n. 12 (citations omitted). We have reaffirmed this holding in later cases. *Commonwealth v. Johnson*, 542 Pa. 568, 579, 669 A.2d 315, 321 (1995); *Williams, supra* at 71 74, 522 A.2d at 1063 64; *Commonwealth v. Pettus*, 492 Pa. 558, 561, 424 A.2d 1332, 1335 36 (1981); *Commonwealth v. Sourbeer*, 492 Pa. 17, 25, 422 A.2d 116, 119 (1980); *Commonwealth v. Greiner*, 479 Pa. 364, 369 71, 388 A.2d 698, 701 02 (1978). Furthermore, this Court has held that the rationale of *Pyle* is applicable to charges other than murder where those charges arise out of the same criminal transaction as a murder charge. *Commonwealth v. Romeri*, 504 Pa. 124, 137 39, 470 A.2d 498, 505 (1983), *cert. denied*, 466 U.S. 942, 104 S.Ct. 1922, 80 L.Ed.2d 469 (1984); *Commonwealth v. Keefer*, 470 Pa. 142, 147 48, 367 A.2d 1082, 1084 85 (1976). The rationale of these cases is equally applicable here. The only distinction is that the legislature has determined in its judgment that, in certain instances, violent felonies in addition to murder are sufficiently serious to merit vesting original jurisdiction in the criminal courts, while affording the defendant an opportunity to show that his is the exceptional case warranting juvenile treatment.

Appellant contends, however, that *Pyle* and its progeny must be limited to the murder cases at issue therein. Obviously, those cases spoke only of murder prosecutions because, under the previous version of the Juvenile Act, those were the *44 only cases directly filed in criminal court. But there is nothing unconstitutional in the legislature determining, in light of continued experience with violent juvenile crime, that other serious conduct also warrants criminal court treatment. In *Williams, supra*, this Court, in addressing the propriety of the legislature's determination that a juvenile charged with murder should be prosecuted as an adult, noted that “[m]urder is a heinous and serious crime, and the legislature's assumption that one who commits murder is in need of adult discipline and restraint is a reasonable

one.” *Williams, supra* at 71, 522 A.2d at 1063. That rationale is equally applicable to the violent offenses that were excluded from the definition of a delinquent act under the most recent amendments to the Juvenile Act. Armed robbery, too, for example, is a heinous and serious crime, and the legislature's informed determination that juveniles fifteen years of age and older who commit such offenses are not initially amenable to rehabilitation under the Juvenile Act, unless they prove otherwise by a preponderance of the evidence, is equally reasonable. There is nothing in the Constitution to prevent the legislature from making such a judgment.

Although it is true, as appellant notes, that murder has always been excluded from the jurisdiction of the juvenile courts, it is also true that, prior to the twentieth century, there were no juvenile courts in this Commonwealth at all.⁴ The fact that the legislature chose in the past to presumptively extend the benefits of the juvenile system to older juveniles charged with armed robbery and other serious violent offenses does not act as a *constitutional* restraint upon it to make a different judgment in response to changing societal conditions. It is no less the legislature's prerogative now to limit those benefits than it was to extend them in the first place. Therefore, appellant's claim that it was unconstitutional to place the burden of proof upon him to prove that it would serve the *45 public interest if he were transferred to juvenile court must fail.^{5, 6}

⁴ Juvenile courts were first established in this Commonwealth by the Act of May 21, 1901, P.L. 279.

⁵ The parties requested, and were granted, leave to file supplemental briefs addressing this Court's recent decision in *Commonwealth v. Williams*, 557 Pa. 285, 733 A.2d 593 (1999), *cert. denied*, 528 U.S. 1077, 120 S.Ct. 792, 145 L.Ed.2d 668 (2000). In *Williams*, the Court held, over this author's objection, that 42 Pa.C.S. §§ 9791 9799.6 (“Megan's Law”) violated federal due process requirements by imposing a presumption that a person convicted of a sexually violent offense is a sexually violent predator, placing the burden on the offender to rebut that presumption, and providing for significantly enhanced penalties, up to a mandatory life term of imprisonment, if the offender failed to rebut the presumption. The transfer provision of the amended Juvenile Act is distinguishable from Megan's Law's sentencing procedure in several respects.

First, Megan's Law created a statutory presumption that persons convicted of certain crimes were sexually violent predators. 42 Pa.C.S. § 9794(b). The Juvenile Act, on the other hand, does not create any statutory presumption about the juvenile, but merely excludes certain violent offenses from the definition of delinquent acts and provides a transfer provision that places the burden of proof on the defendant. 42 Pa.C.S. § 6302. More significantly, the *Williams* Court concluded that the “full panoply” of due process protections, including placing the burden of proof on the Commonwealth, *see* 557 Pa. at 304 n. 12, 733 A.2d at 602 n. 12, was required because the enhanced punishment proceeding was “a separate factual determination, *the end result of which is the imposition of criminal punishment*” *Williams*, *supra* at 304, 733 A.2d at 603 (emphasis added). In such a circumstance, this Court held that the United States Supreme Court's decision in *Specht v. Patterson*, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967), controlled. *Specht* held that separate proceedings, requiring new findings of fact and leading to additional punishment, required that the “full panoply” of due process rights be provided. 386 U.S. at 608-09, 87 S.Ct. 1209. The transfer proceeding in the Juvenile Act is not a separate factual proceeding leading to punishment. Even if the defendant fails to establish that it would serve the public interest to transfer his case to juvenile court, *punishment* will result only if and when the defendant is convicted. That conviction, in turn, will only occur following a trial at which all due process protections are afforded. As this Court noted in *Pyle*, because the Commonwealth continues to bear the burden of establishing every element of the crime charged before any punishment will result, there is no due process infirmity. *Pyle*, *supra* at 623 n. 12, 342 A.2d at 107 n. 12. Accordingly, *Williams* is inapplicable to the Juvenile Act.

6 Appellant makes two additional claims in this argument. First, he argues that the statute suffers from a “due process infirmity” because it does not immunize any testimony given by a juvenile at the transfer hearing. Second, he argues that the burden of proof is greater under the statute as amended. Neither of these claims has been developed beyond these unsupported assertions and we, of course, will not develop the claims for appellant. In addition, although the Superior Court *sua sponte* discussed the absence of immunity in *dicta*, 708 A.2d at 815 n. 3, neither that claim nor the greater burden of proof claim was actually raised by appellant at any previous stage of the proceedings. Therefore, these claims are waived. Pa.R.A.P. 302(a) (issues not raised below cannot be raised on appeal).

In addition, *amicus curiae*, Defender Association of Philadelphia, raises several issues in its brief in support of appellant that appellant has not raised. An *amicus curiae* is not a party and cannot raise issues that have not been preserved by the parties. Pa.R.A.P. 531(a) (*amicus curiae* may file a brief regarding *those questions before the Court*).

****225 *46** For the foregoing reasons, we hold that the 1995 amendments to the Juvenile Act are constitutional and, accordingly, we affirm the order of the Superior Court.⁷

7 Appellant also argues that the amendments to the Juvenile Act are not severable and must all be stricken if any provisions are found to be unconstitutional. Because we find that the amendments are constitutional, we need not address this derivative issue.

Justice **NEWMAN** concurs in the result.

All Citations

562 Pa. 32, 753 A.2d 217

EXHIBIT 295

 KeyCite to Yeow Fag Negative Treatment
 Disputed by *Toussaint v. McCarthy*, 9th Cir.(Ca.), September 30,
 1986

667 F.2d 77

Temporary Emergency Court of Appeals.

WIGGINS BROTHERS, INC.,

et al., Plaintiffs-Appellees,

v.

DEPARTMENT OF ENERGY, and

James B. Edwards, Secretary of

Energy, Defendants-Appellants.

Nos. 5-53, 5-57.

|

Argued Jan. 20, 1981.

|

Decided Oct. 14, 1981.

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As Amended Oct. 26, Nov. 2 and Nov. 12, 1981.

Synopsis

On cross motions for summary judgment, the United States District Court for the Northern District of Texas, Lubbock Division, Halbert O. Woodward, Chief Judge, allowed injection wells to be counted as “wells that produced crude oil” under marginal property rule and enjoined Department of Energy from excluding count of injection wells in application of rule to plaintiffs' property, and DOE and Secretary of Energy appealed. The Temporary Emergency Court of Appeals, William H. Becker, J., held that: (1) injection wells may not be counted as “wells that produced crude oil” in application of rule; (2) district court was not free to disregard obvious intention of DOE to exclude injection wells from count; (3) selected oral testimony was not admissible to rebut preamble of rule, interpretation of DOE and interpretation of Temporary Emergency Court of Appeals; and (4) reported practices and interpretations of state regulatory commission and Department of Interior for other purposes were not effective to rebut contrary meaning and administrative interpretation of rule by DOE.

Reversed and remanded, appeal dismissed.

West Headnotes (12)

[1] Amicus Curiae

 Powers, functions, and proceedings

Absent exceptional circumstances, amicus curiae cannot expand scope of appeal to implicate issues that were not presented by parties.

6 Cases that cite this headnote


[2] Amicus Curiae

 Powers, functions, and proceedings

In absence of exceptional circumstances, amicus curiae is not entitled to introduce additional evidence.

5 Cases that cite this headnote

[3] War and National Emergency

 Construction and operation of regulations

Injection wells may not be counted as “wells that produced crude oil” in application of marginal property rule, promulgated with purpose of regulating price of crude oil produced from marginal property.

1 Cases that cite this headnote

[4] War and National Emergency

 Review of Orders and Regulations

Federal district court was not free to disregard obvious intention of Department of Energy to exclude injection wells from count of “wells that produced crude oil” in application of marginal property rule, promulgated with purpose of regulating price of crude oil produced from marginal property.

1 Cases that cite this headnote

[5] Administrative Law and Procedure

 Construction

Preamble to regulation of Department of Energy and its predecessors should be considered in construing regulation and determining meaning of regulation.

[5 Cases that cite this headnote](#)

[6] Constitutional Law

[Intrinsic Aids to Construction](#)

Statutes

[Introductory statements;preambles and prologues](#)

In construction of Constitution of the United States, statutes and regulations, federal rule permits and requires consideration of preambles in appropriate cases.

[Cases that cite this headnote](#)

[7] Administrative Law and Procedure

[Administrative construction](#)

In absence of exceptional circumstances, interpretation given by administrative agency to regulations promulgated by it are entitled to deference unless plainly erroneous or inconsistent with regulations.

[Cases that cite this headnote](#)

[8] Administrative Law and Procedure

[Sufficiency](#)

Failure to publish preamble of regulation in Code of Federal Regulations was not significant as reason for disregarding preamble.

[2 Cases that cite this headnote](#)

[9] Administrative Law and Procedure

[Publication or Notice After Adoption](#)

Failure to publish preamble of federal regulation in Code of Federal Regulations may be important in proceeding to impose criminal penalties based on criminal intent.

[Cases that cite this headnote](#)

[10] War and National Emergency

[Proceedings on review](#)

Selected oral testimony was not admissible to rebut preamble of marginal property rule, promulgated with purpose of regulating price of crude oil produced from marginal property, interpretation of Department of Energy and interpretation of Temporary Emergency Court of Appeals.

[2 Cases that cite this headnote](#)

[11] War and National Emergency

[Proceedings on review](#)

In construing and reviewing administrative regulations of Department of Energy and its predecessors, federal district court must focus on how Department and predecessors, not refiners, interpreted regulations.

[Cases that cite this headnote](#)

[12] War and National Emergency

[Proceedings on review](#)

Reported practices and interpretations of state regulatory commissions and Department of Interior for other purposes are not effective to rebut contrary meaning and administrative interpretation of marginal property rule, promulgated with purpose of regulating price of crude oil produced from marginal property.

[2 Cases that cite this headnote](#)

Attorneys and Law Firms

*78 John P. McKenna, Dept. of Energy, Washington, D.C., with whom Alice Daniel, Asst. Atty. Gen., Civ. Div., Dept. of Justice, Nancy C. Crisman, Frank W. Krogh and Samuel Soopper, Dept. of Energy, Washington, D.C., were on the brief, for defendants-appellants.

A. B. Conant, Jr., of Shank, Irwin, Conant, Williamson & Greville, Dallas, Tex., with whom Karen S. Bedell and Richard L. Allen, Dallas, Tex., were on the brief, for plaintiffs-appellees.

David J. Beck, Ronald D. Secrest, Fulbright & Jaworski, Houston, Tex., for Exxon Corp., amicus curiae.

Before HOFFMAN, INGRAHAM and BECKER, Judges.

WILLIAM H. BECKER, Judge.

THE RECORD ON APPEAL

The massive record filed in this Court (with disparate typed numbers and mechanically stamped numbers, which latter are used as page references, all inclusive cited with zeros omitted) includes the following:

- A. "Record on Appeal-Pleadings File" (R.) in two volumes with pages 1-336 (000001-000336) in Volume 1, and pages 337-628 (000337-000628) in Volume 2;
- B. "Record on Appeal-Administrative Record" in five volumes, with pages 1-79 in Volume 3, pages 80-170 in Volume 4, pages 171-601 in Volume 5, pages 602-1051 in Volume 6, and pages 1052-1614 in Volume 7;
- C. Joint Appendix (J.A.), pages 108-628; and
- D. Exhibits A, B, C and D submitted in this Court November 4, 1980, under seal by Exxon Corporation, Amicus Curiae. These exhibits purport to be a memorandum dated September 20, 1974, and copies of depositions and deposition exhibits taken by plaintiffs in this case, in the multidistrict stripper well litigation in the District of Kansas entitled In Re: Department of Energy Stripper Well Exemption Litigation, M.D.L. No. 378, as follows:
 1. Exhibit A, Deposition of George V. Biondi taken September 10, 1980;
 2. Exhibit B, Deposition of William N. Walker taken September 11, 1980;
 - *79 3. Exhibit C, Deposition of Linda Elizabeth Buck taken September 10, 1980; and
 4. Exhibit D, Memorandum dated September 20, 1974, to John Vernon, Associate Assistant Administrator for Fuels Management, from Randall B. Alldrodge, through Edmund Winterbottom,

Manager, Crude Oil, Refinery Yield, Petroleum Feedstocks, discussing effects of excluding and including injection wells in the well count under the stripper well litigation.

All deponents were lawyers formerly employed by one or more predecessors of the Department of Energy (DOE) before the issuance of the stripper well regulations and Ruling 1974-29. Biondi and Buck were subordinate employees. Walker was general counsel for the Cost of Living Council (CLC) until January 1974, and thereafter for the Federal Energy Office (FEO) until June 1974, when he was consultant for the Federal Energy Administration (FEA) until August 1974.

These depositions were taken over objections by DOE on grounds of "predecisional" and attorney-client privileges.

THE JUDGMENT OF THE DISTRICT COURT

The DOE and the Secretary of Energy, defendants-appellants (appellants hereinafter), appeal from a judgment of the United States District Court for the Northern District of Texas (1) declaring that injection wells may be counted as "wells that produced crude oil" under the Marginal Property Rule, 10 C.F.R. 212.72 (as amended effective June 1, 1979), and (2) enjoining the DOE "from excluding the counting of injection wells in the application of the Marginal Property Rule to the plaintiffs' property" (J.A. 273).

The judgment, from which this appeal was taken, was entered July 23, 1980 and was accompanied by a Memorandum containing findings of fact and conclusions of law (J.A. 274-279).

The issues were heard in the District Court on cross motions for summary judgment described hereinafter. The judgment for the plaintiffs-appellees (appellees hereinafter) (J.A. 273) was entered on the grant of appellees' motion for summary judgment (J.A. 108). Appellants' motion for summary judgment or in the alternative to dismiss (J.A. 137) was denied (J.A. 273).

DECISION

We reverse the judgment in favor of the appellees and direct entry of an order for appellants denying appellees' motion for summary judgment, and remand the action to the District Court for further proceedings consistent with this opinion.

The summary of the material facts and the reasons for this decision follow.

The Reasoning of the District Court

The reasoning of the District Court is set forth in its memorandum containing its findings of fact and conclusions of law (J.A. 274-279) as follows:

This suit is an action challenging the Department of Energy's ability to attach its unexpressed but intended meaning to a regulation promulgated under the Department of Energy's rule making authority. The plaintiffs are property owners in Cochran County, Texas who claim that their oil producing property is entitled to treatment as marginal property under Department of Energy rules. The Department of Energy maintains, however, that the plaintiffs' property is not marginal property and that therefore the plaintiffs are not entitled to the price allowances made for oil produced on marginal property. This difference of opinion concerns the definition of the phrase "wells that produced crude oil" and this court is called upon to construe and declare the meaning of that phrase. The action is now before the court on cross motions for summary judgment and the defendants' motion to dismiss.

The facts in this case are fairly simple and for the most part have been stipulated. The parties have agreed that under the plaintiffs (sic) definition of the phrase "wells that produced crude oil", the Cochran County property is marginal property. *80 On the other hand, the parties have also agreed that if the Department of Energy's definition is proper the Cochran County property is not marginal property. Additionally, the property has been certified as marginal property by the plaintiffs effective June 1, 1979.

The reason there is a conflict over the proper classification for the plaintiffs' property lies in the Marginal Property Rule itself. Appearing at 10 C.F.R. s 212.72, the rule was promulgated in 1979, with the purpose of regulating

the price of crude oil produced from marginal property. Marginal property is defined as property whose average daily production per well in 1978 did not exceed specified maximums at various completion depths. Average daily production is defined as the total production of crude oil produced from a property, divided by 365 times the number of wells that produced crude oil from the property in 1978. Unfortunately, the body of the rule does not define "wells that produced crude oil" or "well" and the parties to this suit are claiming differing definitions to these terms.

The plaintiffs assert that a well that produces crude oil is any well that assists in the production of crude oil. Under their definition of the regulatory term, recovery wells as well as injection wells would be included in the definition of "wells that produced crude oil." The Department of Energy adopts the position that only recovery wells are included in the phrase "wells that produced crude oil."

For the purposes of this opinion, recovery wells can be described as wells from which crude oil actually flows. Injection wells can be described as wells through which substances are forced into the sub-surface. The purpose of this injection procedure is to increase pressure in subterranean petroleum reservoirs forcing more crude oil to the surface through recovery wells.

Before the court can consider whether it may construe the disputed terms, the defendants' motion to dismiss for failure to state a claim upon which relief can be granted must be considered. The Department of Energy asks that the complaint be dismissed because, they contend, it impermissibly asks the court to rewrite the Marginal Property Rule to include the counting of injection wells. In support of this argument the Department of Energy states that a court may not rewrite an administrative regulation nor may it invalidate one part and allow the remaining parts to stand. While the court is in agreement with this statement of the law, it does not find it applicable in this case. The court does not perceive that the plaintiffs seek to have any portion of the Marginal Property Rule struck down or expanded. Rather, it appears to the court that they only seek to have a portion of the rule defined in order to avoid possible civil and criminal sanctions. Since the terms they seek to have defined are not defined within the body of the regulation, this court does not find that it is being asked to impermissibly rewrite or strike down

any portion of the regulation. Accordingly, the motion to dismiss is denied.

Both parties have also filed motions for summary judgment and while the parties have differed in their approach to resolution of this case upon summary judgment they basically argue the same issue. That issue being a definition of “wells that produced crude oil.” The plaintiffs go directly to the dispute and simply ask the court to construe the term and give the regulation its plain meaning. On the other hand, the Department of Energy has colored the question before the court as one of procedural and substantive validity. Nevertheless, the court is of the opinion that the proper resolution of this case requires the court to construe the words “wells that produced crude oil” and that after that determination is made, summary judgment will be proper.

The Department of Energy contends that it is clear in the body of the regulation that they did not intend to count injection wells when enumerating “wells that produced crude oil.” In support of this position the Department of Energy contends *81 that the plaintiffs have not even attempted to dispute the facts that their present position has been the definitive agency position since Ruling 1974-29, a 1974 Department of Energy regulation dealing with stripper wells. Moreover, the Department of Energy states that it was abundantly clear in the Preamble to the Marginal Property Rule published in the Federal Register that the Department of Energy did not intend to include injection wells as “wells that produced crude oil.” The Department of Energy has failed, however, to show this court precisely where in the regulation that one could turn, to know their intended meaning. Contending that they have long held their present position and pointing to the Preamble, which does not appear in the Code of Federal Regulations, does not indicate to this court that an individual subject to regulations could operate free from fear of civil and criminal sanctions if he were to be guided only by the rules appearing in the Code of Federal Regulations. Further, it appears to the court that absent the definition an individual could violate the intended but unexpressed terms of the regulation. Such an effect cannot be condoned because agency regulations must be reasonably apprehensible to individuals subject to regulation. [Tenneco v. Federal Energy Administration](#), 613 F.2d 298, 302 (Em.App.1979).

The determination that the Department of Energy has not sufficiently expressed itself does not resolve the issue before the court. The question is still one of construction and in this regard the court has considered whether the term is ambiguous. Both parties have asserted that the term is unambiguous and that the court should give it its plain meaning. 1 (Footnote 1 Alternatively, the Department of Energy has asserted that the term is ambiguous. The court understands the Department to take this position in the event the court should rule adversely to it. The reason for this assertion is because they would like the court to consider the regulation's history in construing the regulation if it is ambiguous. How the court could consider this evidence only after it has ruled, however, was not indicated to the court.) Unfortunately, the parties disagree regarding that plain meaning.

In the eyes of the court this difference of opinion raises a separate question whether the two parties claiming differing meanings to the same word can create ambiguity themselves or whether the words of the regulation itself must reflect the ambiguity. The court is mindful, however, that parties should not be allowed to refer to extrinsic aids in order to create ambiguity but only to resolve it. 2A Sands, Statutes and Statutory Construction s 46.04 (3d ed. 1973). Accordingly, it is the duty of this court to determine first if the words “wells that produced crude oil” have a plain meaning and then, only if they don't, to allow extrinsic aids to resolve any ambiguity. Moreover, the court is of the opinion that since the term used is used in a regulatory framework it must be viewed from an industry standpoint. The court reaches this conclusion because the term has no relevant meaning outside the industry and the regulations subject only those within the industry to their control.

In investigating the plain meaning of “wells that produced crude oil” the court has examined the transcripts of two prior hearings held before this court on February 26, 1979 and before Judge Robert M. Hill on April 7, 1978, which the parties have made part of the record in this case. Additionally, the court has reviewed other materials submitted to the court by the parties in support of their motions. After a careful and thorough reading of these transcripts and the other materials the court has reached the conclusion that the regulatory term has a plain meaning and that the plain meaning would include the counting of injection wells. At several points throughout the transcripts the petroleum experts examined made it

clear that injection wells are wells that produce crude oil and that injection wells are normally counted as such. (April 7, 1978 Transcript pp. 13-16, 35, 63-65; February 26, 1979 Transcript pp. 72-73). While the court is aware that the Department of Energy would argue a contrary reading the court finds that the portions of the transcripts that the Department directs the court to examine not persuasive. The Department of Energy seeks to persuade the court that the dichotomy drawn between “producing wells” and “injection wells” in the transcripts is the same one that exists between “wells that produced crude oil” and “injection wells.” The court does not find that argument accurate and instead is of the opinion that the terms “producing *82 wells” and “wells that produced crude oil” cannot be equated with each other. The general context of the transcripts leads the court to this conclusion as well as specific testimony within the transcripts that establishes that a hydraulic relationship exists between injection and recovery wells and with the absence of one or the other there would be no production in a secondary recovery unit. This testimony evidences the clear interdependence of the wells upon each other in order to produce crude oil.

Moreover, the court has considered the treatment given injection wells by other energy regulatory bodies. In examining what other regulatory bodies have done the court is cognizant that their interpretation would not be binding upon the Department of Energy in promulgating its rules, but the court does believe that other agency and commission interpretations would be illustrative of industry usage. The Texas Railroad Commission appears to consider injection wells as wells that produce crude oil by allowing the counting of injection wells in the determination of production allowables. Similarly the Commission of Conservation of Louisiana and the Oil Conservation Commission of New Mexico provide for the counting of injection wells in calculating allowables. Further, the United States Department of Interior has recognized the counting of injection wells as wells that produce crude oil in allocating royalties on leased public lands. See *Marathon Oil Co. v. Kleppe*, 556 F.2d 982, 985 (10th Cir. 1977). From the foregoing it is clear to the court that producers subject to regulation from these agencies would normally believe that the plain meaning of the words “wells that produced crude oil” would include injection wells.

The court is aware that the conclusion it reaches today is contrary to the intent of the Department of Energy expressed in the Preamble to the rule and published in the Federal Register. This regulatory history is relevant but since the court is of the opinion that “wells that produced crude oil” has a plain or unambiguous meaning the court chooses to disregard it in favor of the plain meaning. This decision is made on a basis that language of a regulation must reasonably bear its intended meaning and a court may not sanction a regulation that was intended but never enacted. *Tenneco Oil Co. v. Federal Energy Administration*, 613 F.2d 298, 303 (Em.App.1979); *Diamond Roofing v. Occupational Safety & Health Review Commission*, 528 F.2d 645, 649 (5th Cir. 1976). Moreover, fundamental fairness requires that when one may become subject to civil or criminal sanctions the language creating that possibility must adequately express it. *Longview Refining Co. v. Shore*, 554 F.2d 1006, 1014 n.20 (Em.App.), cert. denied, 434 U.S. 836, 98 S.Ct. 126, 54 L.Ed.2d 98. Here, the Department of Energy has failed to adequately express their intention and therefore the plain meaning of the words must control.

¹ Note 20 of *Longview Refining Co. v. Shore*, 554 F.2d 1006 at 1014 (Em.App.1977), cert. denied, 434 U.S. 836, 98 S.Ct. 126, 54 L.Ed.2d 98 (1977) cited by the District Court was explained on other issues in *Dyke v. Gulf Oil Corp.*, 601 F.2d 557 (Em.App.1979).

Accordingly the court declares and construes that injection wells are included within the term “wells that produced crude oil.” The plaintiffs' motion for summary judgment is granted and the defendants' motions for summary judgment and to dismiss are denied.

A judgment will be entered in accordance with the above and the Department of Energy is hereby enjoined from excluding the counting of injection wells in the application of the Marginal Property Rule to the plaintiffs' property. (Emphasis and footnote added.)

*83 *The Contentions of the Parties on Appeal*

On appeal appellants assert the following contentions:

- A. The Marginal Property Rule precludes the counting of injection wells in determining eligibility for the exemption (Appellants' Brief, 6) relying on prior decisions of this Court; and

- B. The District Court's application of the "Plain Meaning" rule was clearly erroneous (Appellants' Brief, 11).

In opposition the appellees contend that:

- A. The prior decisions of this Court are unapplicable (Brief of Appellees, 5); and
- B. The "Plain Meaning" of the term "wells that produced crude oil" includes injection wells (Brief of Appellees, 11).

Contentions of Amicus Curiae on Appeal

The brief of amicus curiae Exxon attempts to support the judgment of the District Court on the same grounds relied on by the District Court and asserted by appellees, and also on additional grounds (1) contending that there are differences in this appeal and the continuing "stripper well" litigation of which *Energy Reserves Group, Inc. v. Department of Energy*, 589 F.2d 1082 (Em.App.1978) and *Duncan v. Theis*, 613 F.2d 305 (Em.App.1979) are a part, and (2) drawing in issue the effect of decisions of the Judicial Panel on Multidistrict Litigation in *In re The Department of Energy Stripper Well Exemption Litigation*, 472 F.Supp. 1282 (Jud.Pan.Mult.Lit.1979).

[1] [2] In the absence of exceptional circumstances not present in this case, amicus curiae cannot expand the scope of this appeal to implicate issues that were not presented by the parties. *National Commission on Egg Nutrition v. FTC*, 570 F.2d 157, at 160 (n.3) (7th Cir. 1977), cert. denied, 439 U.S. 821, 99 S.Ct. 86, 58 L.Ed.2d 113 (1978); *Knetsch v. U.S.*, 364 U.S. 361, 81 S.Ct. 132, 5 L.Ed.2d 128, at 134 (1960). And in the absence of exceptional circumstances, amicus curiae is not entitled to introduce additional evidence (particularly evidence offered in another action after entry of the judgment which is the subject of this appeal). *Petition of Oskar Tiedemann and Co.*, 289 F.2d 237 (3rd Cir. 1961). But all germane arguments of amicus curiae supporting the position of the appellees will be considered.

The Complaint in the District Court

In their comprehensive complaint (R. 2-11), accompanied by their motion for preliminary injunction (R. 12-15), appellees sought (a) a declaratory judgment that Ruling 1974-29, described hereinafter, and the Marginal Property Rule as limited thereby were both invalidly issued in violation of the Emergency Petroleum Allocation Act of 1973 (EPAA), 15 U.S.C. 751 et seq., the Administrative Procedure Act (APA), 5 U.S.C. 551 et seq., and the Federal Energy Administration Act (FEAA), 15 U.S.C. 761 et seq.; and (b) a declaration of the illegality of, and an injunction against the actions of the appellants for violations of rights of appellees under the Constitution of the United States.

Jurisdiction, which is not controverted, was asserted under s 5(a)(1) of the EPAA incorporating s 210(a) and s 211(a) of the Economic Stabilization Act (ESA), now published as a note to 12 U.S.C. s 1904, and under 28 U.S.C. ss 1331, 2201 and 2202.

In their complaint appellees further stated in substance the following allegations.

1. Appellees are owners of "working interests" in the C.S. Dean "A" Unit (Dean Unit), a petroleum producing property, on which secondary water injection operations were initiated in July 1966; then there were 82 active "recovery wells" and 12 injection wells; that to increase production "significantly" from the Dean Unit it was necessary to drill new wells and convert several of the (recovery) wells to water injection wells; and that during 1978 there were 94 "recovery wells" in the Dean Unit and 73 injection wells (R. 4).

2. In 1973 Congress mandated a program of price controls for domestic crude oil sales, specifically exempting crude oil *84 produced from low volume "stripper oil properties" (or "stripper wells") defined as "... Any lease whose average daily production of (crude oil) for the preceding calendar month does not exceed ten barrels per well" s 406(a) of the Trans-Alaska Pipeline Authorization Act (TAPAA) (current version at 43 U.S.C. s 1651 et seq.)² (R. 4).

² The exemption was reenacted in Section 4(e)(2)(A) of the Emergency Petroleum Allocation Act of 1973, 15 U.S.C. ss 751 et seq., repealed for a brief time in 1975 by Section 401(b)(1) of the Energy Policy and Conservation Act, Pub.L. 94 163, and later

reinstated by Section 121 of the Federal Energy Administration Amendments of 1976, Pub.L. 94 385, 15 U.S.C. s 757(i). See history in [Energy Reserves Group, Inc. v. DOE](#), 589 F.2d 1082, at 1087 1091 (Em.App.1978), clarified in [Duncan v. Theis](#), 613 F.2d 305 (Em.App.1979).

3. In November 1973 the CLC promulgated a regulation, 6 C.F.R. 150.54(s), to implement the “stripper well” exemption which (was misquoted by appellees, but properly quoted) provided in part as follows:

- (1) Rule. Effective November 27, 1973, the price charged for the first sale of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from any stripper well lease is exempt

‘Average daily production’ means the qualified maximum total production of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from a property during the preceding calendar year, divided by a number equal to the number of calendar days in that year times the number of wells which produced crude petroleum and petroleum condensates including natural gas liquids from that property in that year

‘Stripper well lease’ means a ‘property’ whose average daily production of crude petroleum and petroleum condensates, including natural gas liquids, per well did not exceed 10 barrels per day during the preceding calendar year.

This regulation, with an amendment changing the qualifying period to any 12 month period after December 31, 1972, remains in effect in 10 C.F.R. s 212.54 (R. 5).

4. On December 24, 1974 the FEA, predecessor of DOE, published Ruling 1974-29 in which it was ruled that injection wells were not considered “wells” for the purpose of determining whether a property qualified for the stripper well exemption (R. 5). Ruling 1974-29, incorporated by reference in the preamble of the Marginal Property Rule published in the Federal Register, reads as follows:

PRODUCTION WELLS FOR PURPOSES OF THE “STRIPPER WELL LEASE” EXEMPTION

Facts. Firm P, a producer of petroleum, produced during the preceding calendar year 150,000 barrels of

crude petroleum and petroleum condensates, including natural gas liquids from 40 production wells located on Property A, as defined in 10 CFR 210.32. In addition, there were five injection wells in operation on that property last year. An injection well is one which is used to inject water, air, gas, steam or other materials into the ground to assist in the recovery of crude petroleum through producing wells. Wells which formerly produced crude petroleum may be used for injection purposes, or new wells may be drilled solely for the purpose of injecting materials into oil-bearing formations and reservoirs.

The average daily production per well from Property A was 10.27 barrels, based on the 40 production wells, whereas the average daily production per well would be 9.13 barrels if 45 wells, including the 5 injection wells, were used to calculate the average daily production figure.

Issue. Is an “injection” well a “well” for the purpose of determining whether the average daily production of a property was 10 barrels or less per well in the preceding calendar year, for purposes of the stripper well lease exemption of 10 CFR 210.32?

Ruling. No. Under the FEA regulations, the first sale of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced *85 from any stripper well lease, is exempt from the mandatory price and allocation regulations. A stripper well lease is defined as a property whose average daily production did not exceed 10 barrels per day per well during the preceding calendar year. “Average daily production” is further defined in 10 CFR 210.32(b) as:

The qualified maximum total production of domestic crude petroleum and petroleum condensates, including natural gas liquids, produced from a property during the preceding calendar year, divided by a number equal to the number of days in that year times the number of wells which produce crude petroleum and petroleum condensates, including natural gas liquids, from that property in that year.

Thus, the FEA regulations by their specific language provide that only wells “which produce crude petroleum” are to be counted in calculating average daily production for the purpose of determining whether the stripper well lease exemption applies. While injection techniques help to “produce” crude

petroleum, they are not wells which themselves “produce” crude petroleum. Therefore, wells which did not actually yield or produce crude petroleum during the preceding calendar year are not production wells for this purpose. Whether the non-producing well was an “injection” well, a disposal well, a dry well, a spent well or a shut-in well will not change this result.

Ruling 1974-29 was upheld as an interpretative rule in [Energy Reserves Group, Inc. v. DOE](#), 589 F.2d 1082 (Em.App.1978), clarified in [Duncan v. Theis](#), 613 F.2d 305 (Em.App.1979).

5. On April 12, 1979 the DOE, successor to CLC and FEA, published a regulation, effective June 1, 1979, known as **[Average completion depth in feet]**

	[Barrels per day]
2000 or more but less than 4000	20
4000 or more but less than 6000	25
6000 or more but less than 8000	30
8000 or more	35

6. The Marginal Property Rule also provides that a producer with properly qualifying marginal property under the rule can sell most of the crude oil from the property at upper tier prices effective June 1, 1979, and all of the crude oil at upper tier prices beginning January 1, 1980. (R. 6).

7. In the preamble of the Marginal Property Rule, DOE stated its intention to apply Ruling 1974-29 in determining whether a property qualified as a Marginal Property (R. 6; [44 Fed.Reg. 22010](#), supra, and to exclude injection wells in the count of “wells that produced crude oil”. [44 Fed.Reg. 22014](#), supra).

8. Appellees' complaint states five grounds for relief (each probably unnecessarily designated serially as a “Claim For Relief”, 2A Moore's Federal Practice P 10.03).

9. Appellees state in a “First Claim for Relief” (R. 6-7) that:

(1) the Marginal Property Rule “as modified by Ruling 1974-29 was not issued in accordance with applicable rulemaking procedure” for reasons (a)

the “Marginal Property Rule”, [44 Fed.Reg. 22010](#) (April 12, 1979) 10 C.F.R. 212.72,³ which provides, in part, as follows (R. 5-6):

3 The Marginal Property Rule was later published with corrections that are immaterial here on April 27, 1979. [44 Fed.Reg. 25160](#).

‘Marginal property’ means a property whose average daily production of crude oil (excluding condensate recovered in non-associated production) per well during calendar year 1978 did not exceed the number of barrels shown in the following table for the corresponding average completion depth:

failure to define “well” and to exclude injection wells from that definition; (b) publication of the Marginal Property Rule without opportunity for comment from interested parties; (c) stating its intent to apply Ruling 1974-29; (d) Ruling 1974-29 was published in 1974 without prior notice or opportunity for comment and purported *86 to define the term “well” only for purposes of the “stripper well” exemption, and in a manner contrary to the meaning of “well” in the petroleum industry, and as historically defined by state regulatory agencies, the Department of Interior and the Internal Revenue Service; and (e) that implementation in the Marginal Property Rule of the definition of “well” in Ruling 1974-29 would substantially affect the price and appellees financially; and

(2) the Marginal Property Rule, as interpreted by DOE amends the term “well” as used in the regulations and therefore is a new “rule” as defined in the APA and has a substantial impact on individuals and businesses in the national economy; and promulgation of the Marginal Property Rule was an attempt to contravene the mandatory notice

and comment statutory procedures of the APA and FEAA, and therefore is invalid.

10. Appellees state in a “Second Claim for Relief” (R. 7-8) that: (a) “Ruling 1974-29 as applied to the Marginal Property Rule is invalid for the reason that it was issued in excess of FEA's statutory authority”; (b) the definition of the term “well” in Ruling 1974-29 is contrary to the clear meaning of “well” as understood by Congress, the industry, and state and federal regulatory agencies; (c) the Marginal Property Rule does not state that injection wells may not be counted as wells that produce crude oil for purposes of the rule; (d) injection wells are an integral part of the production of crude oil from secondary recovery projects; (e) without injection wells the recovery of crude oil would be reduced and possibly cease; and (f) application of Ruling 1974-29 discourages production of domestic crude oil and therefore contravenes the EPAA.

11. Appellees state in “Third Claim for Relief” (R. 8-9) that: (a) the issuance of Ruling 1974-29 and the limitation thereby of the Marginal Property Rule was arbitrary, capricious and an abuse of discretion prohibited by the APA; (b) there was no rational basis for the ruling of FEA that injection wells may not be considered to be wells for purposes of the Marginal Property Rule because these wells “are an integral part of the operation of a water-flood project space ... (and) often incur the same drilling and maintenance costs as active recovery wells”; and (c) the limited construction of the term “well” ignores a substantial part of the cost of operating secondary recovery properties and discourages domestic crude oil production.

12. Appellees state in their “Fourth Claim for Relief” (R. 9) that: (a) their domestic crude oil producing operations are substantially less profitable because they are unable to sell the production from their Dean Unit at upper tier prices; (b) the inability of appellees to sell the production from their Dean Unit at upper tier prices is the requirement of Ruling 1974-29 as a limitation on the Marginal Property Rule; and (c) appellees have suffered legal wrongs because of the rulings issued by FEA and DOE, now enforced by DOE.

13. Appellees in their “Fifth Claim for Relief” (R. 10) summarizes its foregoing allegations and contentions.

Appellees Motion for Summary Judgment

Appellees filed a Motion for Summary Judgment “on the ground that there is no genuine issue as to any material fact and Plaintiffs are entitled to judgment as a matter of law” (J.A. 108). This motion was accompanied by a verified Statement of Uncontroverted Facts and Issues of Law, under Local Rule 5.2 of the District Court (J.A. 109-115), and a Memorandum in Support of Plaintiffs' Motion for Summary Judgment (J.A. 116-133). Appellants in opposition filed a Response to Plaintiffs' Motion for Summary Judgment (J.A. 134-136). Appellants filed a Motion for Summary Judgment, or in the Alternative, Motion To Dismiss (J.A. 137), which was accompanied by a Memorandum of Law in Support of Defendants' Motion to Dismiss and Motion for Summary Judgment (J.A. 138-150) with Exhibits (J.A. 151-204). Appellees filed a Response to this latter Memorandum (J.A. *87 205-207) and a Supplemental Memorandum in support of Appellees' Motion for Summary Judgment (J.A. 208-216). Appellants filed a Response to the latter Appellees' Memorandum of Authorities (J.A. 217-221) with Exhibits (J.A. 222-271).

The parties stipulated and agreed that testimony (J.A. 337-513) given “in certain preliminary injunction hearings previously had before (the District) Court or courts from which the cases were transferred to this Court may be utilized or taken judicial notice of in this action” (J.A. 118).

We conclude that this testimony described in this stipulation and contained in the record (J.A. 337-513) is inadmissible and ineffective to support the contentions of the appellees contrary to the unambiguous meaning of the Marginal Property Rule, described hereinafter.

The Stipulation of the Parties In The District Court Narrowing The Issue

Despite the wide range of the claims and contentions of the appellees the crucial issue on this appeal was clearly identified in the District Court wherein it was stipulated (J.A. 118) as follows:

“Stipulations -The parties have agreed in open court that (a) if injection wells are included within the

regulatory term, the property in question, the C. S. Dean "A" Unit, Cochran County, Texas (herein called "the Dean Unit"), is a marginal property, (b) if injection wells are not so included, the Dean Unit is not a marginal property ... effective June 1, 1979." (Emphasis added.)

The question for decision by this Court on this appeal is simply whether, under a proper construction of the Marginal Property Rule, injection wells may be counted "as wells that produced oil".

[3] We conclude that injection wells may not be counted as "wells that produced oil" in the application of the Marginal Property Rule; and that the summary judgment for appellees of the District Court to the contrary must be reversed, and the cause remanded for further proceedings consistent with this conclusion.

The District Court reached a conclusion that, under the Marginal Property Rule, injection wells may be counted "as wells that produced oil" for two principal reasons, namely: (1) the obvious contrary intent of DOE expressed in the preamble by reference to Ruling 1974-29 should be disregarded; and (2) without the preamble the regulation had a plain meaning that injection wells could be counted as "wells that produced oil". If either, or both, of these reasons are erroneous, the judgment of the District Court should be reversed. We conclude that both reasons given by the District Court are erroneous.

Reasons for Decision

I

[4] The District Court was not free to disregard the obvious intention of DOE to exclude injection wells from the count of "wells that produced oil" which DOE clearly expressed: (a) by including in the preamble to the Marginal Property Rule an incorporation by reference to Ruling 1974-29; (b) by including the following definition concerning "average completion depth"

In order to determine whether a particular property qualifies as a marginal property, the producer

must first calculate the property's "average completion depth" of all wells that produced crude oil on the property during the qualifying period. This calculation involves dividing the sum of the completion depths for all such wells by the number of those wells. Injection wells and other wells that did not produce crude oil during the qualifying period may not be counted for purposes of these calculations. (Emphasis added.) 44 Fed.Reg. 22014 (R. 151-160 at 155);

and (c) by including the following definition concerning "average daily production"

A property's average daily production during the qualifying period must be determined in the same way as it is done for stripper well properties, and the provisions of the relevant stripper well property rulings will be applicable with respect to such computations. Accordingly, *88 in calculating a property's average daily production, for example, a producer may not count injection wells or other wells that did not produce crude oil during the qualifying period. (Emphasis added.) 44 Fed.Reg. 22014 (R. 151-160 at 155).

[5] It is well settled by decisions of this Court that the preamble to a regulation of DOE and its predecessors should be considered in construing the regulation and determining the meaning of the regulation. Part I of *UPG, Inc. v. Edwards, Secretary of DOE*, 647 F.2d 147 (Em.App.1981); *Sauder v. DOE*, 648 F.2d 1341 (Em.App.1981); *McWhirter v. Texaco, Inc.*, - F.2d - (Em.App.1981); *Mountain Fuel Supply Co. v. DOE*, 656 F.2d 690 (Em.App.1981).

[6] In the construction of the Constitution of the United States, statutes and regulations, the federal rule permits and requires consideration of preambles in appropriate cases. For examples, the preamble to the Constitution of the United States was considered in *Dred Scott v. Sanford*, 60 U.S. 393, 410, 19 How. 393, 410, 15 L.Ed. 691, at 703 (1857); *M'Culloch v. Maryland*, 17 U.S. 159, 247, 4 Wheat 316, 404, 4 L.Ed. 579, at 601 (1819); and in other cases. Cf. 16 Am.Jur.2d, *Constitutional Law*, s 87, 414.

A rule that, in construing a regulation of DOE, excludes consideration of materials not in the codification of the regulation in the Code of Federal Regulations is erroneous because: (1) the rule is contrary to the requirement of the Federal Register Act, s 1507, Title 44 U.S.C. that the publication of the regulation be judicially noticed; (2) the rule is contrary to the necessity of considering the separate underlying statute; and (3) the rule is contrary to the necessity to consider the legislative history of the underlying statute in appropriate cases. 2A Sands, *Sutherland Statutory Construction* (4th ed.) Chapter 48, ss 48.01-48.20, 181-227.

Further, there is no support for the view that, under federal rules of construction of statutes and legislative regulations, definitions in a preamble may be ignored. The rule is contrary to this view. *Western Union Telegraph Co. v. Lenroot*, 323 U.S. 490, at 501, 65 S.Ct. 335, at 341, 89 L.Ed. 414, at 423 (1944). 1A Sands, *Sutherland Statutory Construction* (4th ed.), s 20.08, 59-61; 2A Sands, *Sutherland Statutory Construction* (4th ed.), s 47.04, 76-80.

Appellees' reliance on Sands, *Sutherland Statutory Construction* (3rd ed.), s 46.04 (now s 47.04 in the 4th edition), is misplaced. While noting some undesirable variations in statutory construction, the treatise cited clearly and strongly supports reference to the preamble as one of the means of statutory construction.

[7] Furthermore, in the absence of exceptional circumstances not present in this action, the interpretation given by an administrative agency to regulations promulgated by it are entitled to deference unless it is plainly erroneous or inconsistent with the regulation. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, at 413-414, 65 S.Ct. 1215, 1217, 89 L.Ed. 1700 (1945); Cf. *Udall v. Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965), reh. denied, 380 U.S. 989, 85 S.Ct. 1325, 14

L.Ed.2d 283 (1965), involving construction of a statute by an administrative agency possessing expertise. 2 Davis, *Administrative Law Treatise* (2d ed.), s 7:22, 105-108.

[8] Appellees contend and the District Court concludes that failure to publish the preamble in the Code of Federal Regulations (C.F.R.) is significant as a reason for disregarding the preamble. This conclusion is clearly erroneous.

The C.F.R. in each volume contains an accurate "Explanation" of the legal status of the C.F.R. and the Federal Register (as in Volume 10, Energy, Parts 200 to 499, revised as of January 1, 1980) which is in part as follows:

The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The Code is divided into 50 titles which represent broad areas subject to Federal regulation. Each title is divided into chapters which usually bear the name of *89 the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas.

LEGAL STATUS

The contents of the Federal Register are required to be judicially noticed (44 U.S.C. 1507). The Code of Federal Regulations is prima facie evidence of the text of the original documents (44 U.S.C. 1510).

HOW TO USE THE CODE OF FEDERAL REGULATIONS

The Code of Federal Regulations is kept up to date by the individual issues of the Federal Register. These two publications must be used together to determine the latest version of any given rule. (Emphasis added.)

The C.F.R. is part of the Federal Register system provided by the Federal Register Act, 44 U.S.C. ss 1501-1511 inclusive, supplemented by 1 C.F.R. ss 1.1-51.12 inclusive. See 2 Mezones, Stein, and Gruff, *Administrative Law* ss 7.02(1) and 8.01.

[9] The failure to publish the preamble in C.F.R. may be important in a proceeding to impose criminal penalties based on criminal intent. *National Helium Corp. v. FEA*,

569 F.2d 1137, at 1145 (Em.App.1978). But the failure does not support appellees in this civil proceeding.

Finally, the prior decisions construing the interpretative stripper well Ruling 1974-29 to be consistent with a similar underlying statute are decisive. [Energy Reserves Group, Inc. v. DOE](#), 589 F.2d 1082 (Em.App.1978), clarified in [Duncan v. Theis](#), 613 F.2d 305 (Em.App.1979).

II

The second reason given by the District Court for its judgment was that, disregarding the preamble, the remainder of the regulation supported the judgment under the “plain meaning” rule of construction. We find this application of the plain meaning rule to be error whether the preamble was considered or disregarded.

The critical phrase “average daily production” had earlier acquired a meaning by administrative interpretation in Ruling 1974-29 that excluded injection wells in calculating whether average daily production was 10 barrels or less for the purpose of the statutory stripper well lease exemption and regulation 10 C.F.R. s 210.32(b) (the latter of two consistent implementing regulations). [Energy Reserves Group, Inc. v. DOE](#), 589 F.2d 1082 (Em.App.1978), clarified in [Duncan v. Theis](#), 613 F.2d 305 (Em.App.1979).

[10] [11] In reaching a conclusion that the Marginal Property Rule (disregarding the preamble) had a plain meaning contrary to the preamble to the Marginal Property Rule, contrary to the interpretation by DOE and contrary to the interpretation by this Court in the stripper well exemption cases, the District Court relied on extrinsic evidence consisting of selected portions of oral testimony by witnesses (much of which was consistent with the preamble) (J.A. 337-513) from the industry before another judge (J.A. 277-278), and practices of state regulatory bodies and the Department of Interior in calculating allowables and royalties (J.A. 278). The contrary selected oral testimony (J.A. 277-278) was not admissible to rebut the preamble of the Marginal Property Rule, the interpretation of DOE, and the interpretation of this Court. In construing and reviewing administrative regulations of DOE, and its predecessors, the District Court must focus on “how the FEA, not the refiners, interpreted the regulations” [Standard Oil Co. v. DOE](#), 596 F.2d 1029, at 1067 (Em.App.1978).

The exclusion of injection wells in determining the average daily production of crude oil is consistent with even the general definitions recognized by the industry and published in Williams and Meyers, *Manual of Oil and Gas Terms*, 4th ed. 1976.

Injection Well (at page 291)

A well employed for the introduction into an underground stratum of water or gas under pressure. Injection wells are employed for the disposal of salt water *90 produced with oil. They are also employed in a pressure maintenance, secondary recovery or recycling operation to introduce a fluid into the producing formation to maintain underground pressures which would otherwise be reduced by virtue of the production of oil and/or gas. Syn.: Input well.

An injection well is treated for Federal income tax purposes as part of production, and costs of drilling may be capitalized or deducted as intangibles. [Breeding and Burton](#), *Income Taxation of Natural Resources* PP 14.13, 15.21 (1971).

When a sliding scale (step-scale) royalty is based on average daily production per well, the lease or unit agreement involved should be specific as to which (if any) injection wells may be counted as producing wells for the purposes of determining average daily production per well. See [Marathon Oil Co.](#), 81 I.D. 447, 16 IBLA 298, GFS (O&G) 62 (1974); [Atlantic Richfield Co.](#), [Marathon Oil Co.](#), 81 I.D. 457, 16 IBLA 329, GFS (O&G) 63 (1974). The decisions in these cases were set aside in [Marathon Oil Co. v. Kleppe](#), 407 F.Supp. 1301 (D.Wyo.1975).

Producing Well (at pages 453 and 454)

A well that produces oil or gas. It is not a term of art, for it may mean a well that produces in paying quantities (that is, a well for which proceeds from production exceed operating expenses) or it may mean a well that produces in any quantity whatsoever. The term does not include a well that has discovered oil or gas but does not produce either. [Rogers v. Osborn](#), 152 Tex. 540, 261 S.W.2d 311, 2 O. & G. R. 1439 (1953); [Holchak v. Clark](#), 284 S.W.2d 399, 5 O. & G. R. 595 (Tex.Civ.App.1955, error ref'd). When the meaning of the term arises in connection with the termination of an interest created for a term of years and so long thereafter as oil or gas is

produced, it is usually held that producing well means a well producing in paying quantities. See [Alsip's Adm'r v. Onstott](#), 283 S.W.2d 711, 5 O. & G. R. 334 (Ky.1955).

See PRODUCTION IN PAYING QUANTITIES; WELL.

In [Aeroplane Oil & Refining Co. v. Disch](#), 203 Ky. 561, 262 S.W. 939 (1924), the court declared that it was shown by proof that oil men do not consider a well a producing well unless it produces at least five barrels a day, but in construing an instrument that contained this term, it applied the meaning of the term in ordinary speech, that is, a well that is producing some oil. (Emphasis added.)

[12] The reported practices and interpretations of state regulatory commissions and the Department of Interior for other purposes, relied on by the District Court, are not effective to rebut the contrary meaning and administrative interpretation of the Marginal Property Rule by DOE. This was expressly held in [Energy Reserves Group, Inc. v. DOE](#), 589 F.2d 1082, at 1098-1099 (Em.App.1978), clarified in [Duncan v. Theis](#), 613 F.2d 305 (Em.App.1979).

Remaining Issues

The record in this case is probably sufficient to permit consideration of the propriety of the denial by the District Court of the motion of appellant DOE for

summary judgment or in the alternative to dismiss (J.A. 137). The District Court, however, did not pass on the remaining issues in its memorandum of findings of fact and conclusions of law. And the remaining issues were not briefed and argued in this appeal. Therefore they will not be decided now. Without suggesting that there is any merit in appellees' remaining contentions, the action will be remanded for further proceedings consistent with this opinion.

Conclusion

For the foregoing reasons, the judgment of the District Court, including but not limited to the grant of injunctive and declaratory relief, is reversed and the action is *91 remanded for further proceedings consistent with this opinion.

In No. 5-53 appellants filed a premature notice of appeal while appellants' timely motion under [Rule 59, F.R.Civ.P.](#), for reconsideration (to alter and amend the judgment) was pending. It is hereby

ORDERED that this premature appeal be, and it is hereby, dismissed.

All Citations

667 F.2d 77, Energy Mgt. P 26,343

EXHIBIT 296

570 F.2d 157

United States Court of Appeals,
Seventh Circuit.NATIONAL COMMISSION ON EGG NUTRITION
and Richard Weiner, Inc., Petitioners-Appellants,

v.

FEDERAL TRADE COMMISSION,
Respondent-Appellee.

Nos. 76-1969 and 76-1975.

|
Argued June 17, 1977.|
Decided Nov. 29, 1977.|
As Amended Dec. 6, 1977.|
Supplemental Opinion on FTC's Motion
to Amend Judgment Jan. 23, 1978.**Synopsis**

Following remand, 517 F.2d 485, Federal Trade Commission entered order prohibiting false and misleading advertising by egg industry trade association concerning the relationship between cholesterol, eggs, and heart disease. The Court of Appeals, Tone, Circuit Judge, held that: (1) evidence sustained determination that representations made by the industry and various advertisements had been false; (2) the statements complained of were not immune under the First Amendment from FTC action; (3) order was not unconstitutionally vague, but (4) industry should not have been required to include, in any future statements concerning the relationship between eggs and heart disease, information that many medical experts believe that increased consumption of cholesterol may increase the risk of heart disease.

Enforced in part.

West Headnotes (9)

[1] Amicus Curiae

🔑 Right to Appear and Act in General

Argument which was not made before the Federal Trade Commission or by the parties themselves in the Court of Appeals was not properly before the Court of Appeals when presented in brief filed by amicus curiae.

8 Cases that cite this headnote

[2] Antitrust and Trade Regulation

🔑 Weight and Sufficiency

Evidence sustained determination of Federal Trade Commission that advertising statements made by trade association of the egg industry concerning lack of relationship between cholesterol, eggs, and heart disease were false.

2 Cases that cite this headnote

[3] Constitutional Law

🔑 Freedom of Speech, Expression, and Press

Constitutional Law

🔑 Receipt of Information or Ideas; Listeners' Rights

First Amendment embraces the interests of both the speaker and the prospective audience. U.S.C.A.Const. Amend. 1.

2 Cases that cite this headnote

[4] Constitutional Law

🔑 Product Advertisements

Advertising statements of egg industry which categorically and falsely denied the existence of evidence considering relationship between cholesterol, eggs, and heart disease, which evidence in fact existed, were not immune under the First Amendment from FTC order prohibiting false advertising. U.S.C.A.Const. Amend. 1; Federal Trade Commission Act, §§ 5, 12, 15 U.S.C.A. §§ 45, 52.

9 Cases that cite this headnote

[5] Antitrust and Trade Regulation

🔑 Definiteness and Certainty

Neither the use of the term “advertisement” in FTC order prohibiting certain misleading statements in advertising nor statement of the Administrative Law Judge that he did not predicate a finding of violation on certain materials published by the respondent rendered the order unconstitutionally vague. Federal Trade Commission Act, §§ 5, 12, 15 U.S.C.A. §§ 45, 52.

[Cases that cite this headnote](#)

[6] Antitrust and Trade Regulation

Definiteness and Certainty

Provision of Federal Trade Commission order prohibiting advertising which represented as insignificant the available scientific evidence that the consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease or which otherwise misrepresented the amount of scientific evidence that eating eggs does not increase the risk of heart attacks was not unconstitutionally vague. Federal Trade Commission Act, §§ 5, 12, 15 U.S.C.A. §§ 45, 52; U.S.C.A.Const. Amend. 1.

[2 Cases that cite this headnote](#)

[7] Antitrust and Trade Regulation

Representations, Advertisements, and Labels, Remedial Orders Relating To

Federal Trade Commission, in barring false and misleading advertisements, was not limited to prohibiting the precise misrepresentations which had occurred in the past. Federal Trade Commission Act, §§ 5, 12, 15 U.S.C.A. §§ 45, 52.

[Cases that cite this headnote](#)

[8] Constitutional Law

False or Deceptive Claims; Misrepresentation

First Amendment does not permit Federal Trade Commission to impose a remedy for false and misleading advertising which is broader than that necessary to prevent

deception or correct the effects of past deception. U.S.C.A.Const. Amend. 1; Federal Trade Commission Act, §§ 5, 12, 15 U.S.C.A. §§ 45, 52.

[9 Cases that cite this headnote](#)

[9] Antitrust and Trade Regulation

Representations, Advertisements, and Labels, Remedial Orders Relating To

In the absence of showing of long history of deception on the part of egg industry with respect to advertisements concerning relationship between cholesterol, eggs, and heart disease, Federal Trade Commission requirement that the industry include in any future advertisements concerning the relationship between eggs and heart disease the statement that many medical experts believe the increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart attack; egg industry should not have been required to argue the other side of the controversy; the requirement could be imposed only when the industry chose to make a representation as to the state of available evidence or information concerning the controversy. U.S.C.A.Const. Amend. 1; Federal Trade Commission Act, §§ 5, 12, 15 U.S.C.A. §§ 45, 52.

[6 Cases that cite this headnote](#)

Attorneys and Law Firms

***158** James L. Fox, Donald P. Colleton, Chicago, Ill., for petitioners-appellants.

John T. Fischbach, Atty., F. T. C., Washington, D. C., for respondent-appellee.

Before SPRECHER and TONE, Circuit Judges, and CAMPBELL, Senior District Judge. *

* The Honorable William J. Campbell, Senior District Judge of the United States District Court for the Northern District of Illinois, is sitting by designation.

Opinion

TONE, Circuit Judge.

The subject of this appeal is commercial speech under the First Amendment. Acting pursuant to its power to prohibit false and misleading advertising, the Federal Trade Commission has entered a final order directing petitioners to cease and desist from disseminating advertisements containing statements to the effect that there is no scientific evidence that eating eggs increases the risk of heart and circulatory disease. Certain statements ancillary to the one just described are also prohibited, and the right to make still others is limited and conditioned *159 by the order. We sustain the order, except for a provision which we hold to be overbroad.

¹ The term "heart and circulatory disease" is used in this opinion to include, in the Commission's phrase, "heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition."

Petitioners are a trade association that calls itself the National Commission on Egg Nutrition (NCEN), and its advertising agency, Richard Weiner, Inc. Despite its official-sounding title, NCEN was formed by members of the egg industry, to counteract what the FTC described as "anti-cholesterol attacks on eggs which had resulted in steadily declining per capita egg consumption." To carry out this mission, NCEN, with Weiner's assistance, mounted an advertising and public relations campaign to convey the message that eggs are harmless and are needed in human nutrition. In 1974 the FTC filed a complaint charging petitioners with having violated ss 5 and 12 of the Federal Trade Commission Act, 15 U.S.C. ss 45, 52, by placing newspaper advertisements containing various false and misleading statements with respect to the relationship between eating eggs and heart and circulatory disease. In its answer, NCEN admitted that it had made representations in its advertising concerning the absence of scientific evidence that eating eggs increases the risk of heart and circulatory disease and also had represented that eating eggs does not increase the blood cholesterol level in a normal person, but stated that it was no longer making such representations in its advertising. NCEN did not contest that other representations charged were misleading but denied having made them.

After filing its complaint, the FTC sought a temporary injunction in the District Court under s 13(a) of the

Federal Trade Commission Act, 15 U.S.C. s 53(a), to prohibit NCEN from continuing its allegedly false advertising while the administrative proceeding was pending. The District Court denied the relief sought by the FTC. We reversed and directed the entry of an injunction forbidding the misrepresentations complained of but allowing NCEN to make "a fair presentation of its side of the controversy." *FTC v. National Commission on Egg Nutrition*, 517 F.2d 485, 489 (7th Cir. 1975), cert. denied, 426 U.S. 919, 96 S.Ct. 2623, 49 L.Ed.2d 372 (1976).

After hearing the evidence, an administrative law judge sustained the allegations of the complaint and recommended a cease and desist order. On appeal to the FTC, the ALJ's findings were sustained and the recommended order was adopted with some modifications. NCEN and Weiner have filed petitions for review of that order by this court. Only NCEN has filed a brief.

The order directs NCEN and Weiner to cease and desist from disseminating, by mail or means in or affecting commerce, advertising which directly or indirectly makes certain specified representations. The one which is of principal concern here is "that there is no scientific evidence that eating eggs increases the risk of . . . heart (and circulatory) disease . . ." Other specifically prohibited statements, which the FTC found petitioners had made in the past, are variations on the same general theme.² In addition, any representation concerning the relationship of eating eggs, or of dietary cholesterol, including *160 that in eggs, to heart and circulatory disease, is permissible only if

² Petitioners are forbidden from making any statement which directly or indirectly represents . . . that there is scientific evidence that dietary cholesterol, including that in eggs, decreases the risk of . . . heart (and circulatory) disease . . . ; . . . that there is scientific evidence that avoiding dietary cholesterol, including that in eggs, increases the risk of . . . heart (and circulatory) disease . . . ; . . . that eating eggs does not increase the blood cholesterol level in a normal person; . . . that the blood cholesterol level is prevented from being raised or lowered by dietary cholesterol intake; . . . that the human body increases its manufacture of cholesterol in an amount equal to a decrease in dietary cholesterol intake; . . . that the average human body eliminates the same amount of cholesterol as that eaten;

. . . that dietary cholesterol, including that in eggs, is needed by the body for building sex hormones, for transmitting nerve impulses and for maintaining life in cells . . .

it is clearly and conspicuously disclosed in immediate conjunction therewith that many medical experts believe that existing evidence indicates that increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease.

Also forbidden is any statement which

(r)epresents as insignificant the available scientific evidence that the consumption of dietary cholesterol, including that in eggs, may increase the risk of . . . heart disease, . . . or represents that there is overwhelming scientific evidence or otherwise misrepresents the amount of scientific evidence that eating eggs does not increase the risk of . . . heart disease . . . (or) (m)isrepresents in any other manner the physiological effects of consuming dietary cholesterol or eggs.

The order also prohibits NCEN from using its name “. . . unless it is clearly and conspicuously disclosed in immediate conjunction with the name that the National Commission on Egg Nutrition is composed of egg producers and other individuals and organizations of, or relating to, the egg industry.”

[1] NCEN does not challenge the requirement that it identify itself as a trade association if it wishes to continue using its current title. Nor does it specifically challenge the findings that the various statements found to have been made, other than the “no scientific evidence” statement, were false and misleading. The debate before us is focused on that statement, i. e., that there is no scientific evidence linking the eating of eggs to an increased risk of heart and circulatory disease. NCEN argues, first, that the statement is true; second, that even if it is misleading, the FTC's prohibition infringes upon NCEN's First Amendment rights; and, finally, that even if the FTC's holding of a violation is upheld, its order is unconstitutionally vague

and overbroad, going beyond what is necessary to remedy that violation.³

³ The Association of National Advertisers, Inc., in an amicus brief filed in support of NCEN, argues that the FTC's hearing procedures violated the First Amendment standards set forth in *Blount v. Rizzi*, 400 U.S. 410, 417, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971). As the FTC points out, however, this argument was not made before the FTC or even by the petitioners themselves in this court and is therefore not properly before us. See *American Meat Institute v. Environmental Protection Agency*, 526 F.2d 442, 449 (7th Cir. 1975).

I. Falsity

[2] What the FTC describes as the “diet/heart disease” hypothesis, subscribed to by “many well-qualified medical science experts . . ., with varying degrees of conviction,” is as follows: For many people, the amounts of cholesterol and saturated fats which are ingested affect the risk of heart and circulatory disease; increasing the amounts increases the risk, and decreasing the amounts decreases the risk.

Egg yolks contain substantially more cholesterol than any other commonly eaten food and are a major contributor of cholesterol in the American diet. The yoke of one egg provides cholesterol in an amount equal to about one-third of the average daily per capita consumption of cholesterol. (Although the yoke also contains saturated fat, the amount per egg is equal to less than four percent of the average per capita intake of that substance.)

The diet/heart disease hypothesis is based on several propositions: First, in many people the cholesterol level in the blood stream (serum cholesterol) is affected by the amount of cholesterol and saturated fat in the diet. Second, relatively high levels of serum cholesterol have been associated with relatively high incidence of coronary heart disease in sample populations. Third, relatively high levels of serum cholesterol contribute to the formation of atherosclerotic lesions, which precipitate heart disease. These propositions have been formulated by scientists based upon, in the FTC's words, “the results of a large body of clinical-pathological, experimental, and epidemiological studies.” After describing these studies, the ALJ had found that they

*161 were conducted using scientific methodologies, were performed by competent and highly regarded investigators, have been reported in recognized scientific journals after peer review, and have been generally accepted by experts in the field and by the scientific community.

These administrative findings of fact are not challenged by NCEN. Instead, it relies upon testimony of its own expert witnesses that some scientists and doctors are not persuaded by the studies, and that in the opinion of the witnesses the studies are not “evidence” and, in the words of one witness, “would not convince anybody that the number of eggs consumed does increase the risk of ischemic heart disease.”

The FTC concluded that, impossible though it may be to determine whether consuming eggs in fact increases the risk of heart and circulatory disease, it is possible to determine the existence and amount of evidence on that issue. Referring to the testimony of NCEN's experts that, in their opinion, there was no evidence of a connection between eggs and heart and circulatory disease, the FTC said that

in rendering their testimony respondents' witnesses did not dispute the fact that many experts, in the exercise of reasonable, albeit disputed, scientific judgment, have relied upon a large body of scientific studies in formulating the diet/heart disease hypothesis.

Responding to the argument that the “no evidence” statement would be recognized by readers as merely an expression of opinion, the FTC said,

Unfortunately, however, the phrase “there is no evidence” is also, and perhaps more reasonably subject to the interpretation that “there do not exist competent and reliable scientific studies from which well-qualified experts

could reasonably hypothesize that eating eggs increases the risk of heart disease.” This latter message is patently false and misleading.⁴

⁴ The FTC went on to say, It is well established, and critical to the notion of preventing false advertising, that where an advertisement conveys more than one meaning, one of which is false, the advertiser is liable for the misleading variation. *Murray Space Shoe Corp. v. FTC*, 304 F.2d 270, 272 (2d Cir. 1963); *Rhodes Pharmacal Co. v. Federal Trade Commission*, 208 F.2d 382, 387 (7th Cir. 1953), modified by restating the Commission's order, 348 U.S. 940, 75 S.Ct. 361, 99 L.Ed. 736 (1953). Nor does our application of that principle in this instance rest upon some mere semantic quibble or strained interpretation of words, since that meaning of respondents' claim which deceives is one which is likely to be understood, and reasonably so, by consumers. A more appropriate statement of the principle in this case might thus be that an otherwise false advertisement is not rendered acceptable merely because one possible interpretation of it is not untrue.

As the Third Circuit observed in *Beneficial Corp. v. FTC*, 542 F.2d 611, 617 (1976), cert. denied, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977), “(w) hether particular advertising has a tendency to deceive or mislead is obviously an impressionistic determination more closely akin to a finding of fact than to a conclusion of law.” Applying the “substantial evidence” rule, and giving due regard to the FTC's expertise, we cannot disturb the finding.

Moreover, our own finding, if it were our province to make one, would be less charitable to petitioners than that of the FTC. The various scientific studies and the expert opinions based on those studies constitute evidence, not merely in the legal sense, but in the commonly understood sense of that word. That a given expert is not persuaded by the studies does not remove them, or another expert's contrary opinion, from the category of evidence. After reviewing the record now before us, we find no reason to alter the conclusion stated in our opinion on the interlocutory appeal:

NCEN has done more than espouse one side of a genuine controversy It has made statements denying the

existence of scientific evidence which the record clearly shows does exist. These statements are, therefore, false and misleading.

517 F.2d at 489.

II. The First Amendment

The argument most strongly pressed is that the FTC's order impinges upon First *162 Amendment guarantees, which, at least since [Bigelow v. Virginia](#), 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975), extend to commercial speech. It is argued that the principles established in [Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.](#), 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976), prohibit the agency from considering the content of the statement without reference to the state of mind with which it was uttered, and require that a commercial misrepresentation on a controversial public issue be treated in the same manner as it would a libel of a public figure, see [New York Times Co. v. Sullivan](#), 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), i. e., as actionable only if it is made deliberately or with reckless disregard for the truth.

In the Virginia Pharmacy opinion, upon which NCEN relies, the Court expressly recognized that the First Amendment did not interfere with a "State's dealing effectively" with the problem of "deceptive or misleading" commercial speech, even when it is "not provably false, or even wholly false." The state is not prohibited "from insuring that the stream of commercial information flow cleanly as well as freely." 425 U.S. at 771-772, 96 S.Ct. at 1831. This position was amplified by the Court in [Bates v. State Bar of Arizona](#), 433 U.S. 350, 381-384, 97 S.Ct. 2691, 2708-2709, 53 L.Ed.2d 810 (1977):

Advertising that is false, deceptive, or misleading of course is subject to restraint. See [Virginia Pharmacy Board v. Virginia Citizens Council](#), 425 U.S. at 771-772 (96 S.Ct. 1817) and n. 24 Since the advertiser knows his product and has a commercial interest in its dissemination, we have little worry that regulation to assure

truthfulness will discourage protected speech. Id., at n. 24 And any concern that strict requirements for truthfulness will undesirably inhibit spontaneity seems inapplicable because commercial speech generally is calculated. Indeed, the public and private benefits from commercial speech derive from confidence in its accuracy and reliability. Thus, the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena.

See also Mr. Justice Stevens' statement in [Young v. American Mini Theatres](#), 427 U.S. 50, 68-69, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976); and see [Linmark Associates, Inc. v. Township of Willingboro](#), 431 U.S. 85, 97 S.Ct. 1614, 1618, 52 L.Ed.2d 155 (1977).

[3] The Court's recognition that the First Amendment does not preclude restraint of false, misleading, or deceptive advertising is consistent with the principle that the protection afforded to speech of any kind is to be determined by "assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." [Bigelow v. Virginia](#), *supra*, 421 U.S. at 826, 95 S.Ct. at 2235. The First Amendment interest is twofold: it embraces the interests of both the speaker and the prospective audience, which, in the case of commercial speech, consists of consumers. The consumers' interest, which is in obtaining information on which to base the decision of whether to buy, see [Linmark Associates, Inc. v. Township of Willingboro](#), *supra*, 97 S.Ct. at 1618, is served by insuring that the information is not false or deceptive, and, in fact, coincides with the public interest served by the regulation. The fact that health is involved enhances the interests of both consumers and the public in being assured "that the stream of commercial information flow cleanly as well as freely." [Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.](#), *supra*, 425 U.S. at 772, 96 S.Ct. at 1831. When these considerations, together with those expressed by the Court in [Bates](#) relating to the hardness of commercial speech, are balanced, the scale is tipped in favor of regulation.

[4] NCEN argues that its advertisements do not fit the paradigm of commercial speech which the Court had in mind in *Virginia Pharmacy*, viz., “speech that does ‘no more than propose a commercial transaction,’ ” 425 U.S. at 771, 96 S.Ct. at 1830, n. 24, quoting from *163 *Pittsburgh Press Co. v. Human Relations Comm’n*, 413 U.S. 376, 385, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973), but rather were expressions of opinion on an important and controversial public issue. Thus, it is said, they are more like the paid political advertisements in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). First, as to the nature and purpose of NCEN’s statements, they were not phrased as statements of opinion but categorically and falsely denied the existence of evidence that in fact exists and were made for the purpose of persuading the people who read them to buy eggs. Second, as to the nature of the issue, the right of government to restrain false advertising can hardly depend upon the view of an agency or court as to the relative importance of the issue to which the false advertising relates. Third, as to the intended scope of the Supreme Court’s expressions on the subject of commercial speech, we believe they were not intended to be narrowly limited to the mere proposal of a particular commercial transaction but extend to false claims as to the harmlessness of the advertiser’s product asserted for the purpose of persuading members of the reading public to buy the product. The nature of the communication is not changed when a group of sellers joins in advertising their common product. See Note, *Protection for Commercial Advertising*, 44 U.Chi.L.Rev. 205, 231 (1976). The considerations the Court has viewed as distinguishing commercial speech from other speech, stated in the passage from *Bates* quoted above, are present here. The order does not offend the First Amendment.

III. Vagueness

[5] NCEN’s argument that the order is unconstitutionally vague is based on the ALJ’s statement of his reasons for not “predicat(ing)” a “finding of violation” on certain of the materials published by NCEN. In the material in question were quotations from an advisory report of a committee of British experts published by the British Government and from an editorial in an American medical journal, and commentary by NCEN critical of governmental action, including that of the FTC in this case. The ALJ said these materials “ may warrant First

Amendment protection,” because they lacked the “strong promotional message” of the condemned material, were “basically true,” contained information which was “a matter of public concern,” and constituted “comment on government action.” The FTC, however, stated,

(W)e must reject the suggestion attributed to the ALJ . . . that (the materials just described) are necessarily not commercial publications, although they do not form the basis for our finding of liability in this matter.

In addition, after defining “advertising” to require a “tendency or capacity to induce the sale of the product,” the FTC said,

Publications designed to convey the point that consumption of a particular product, will not increase the risk of heart disease, are clearly likely to induce the purchase of that product. The fact that the message is conveyed by means of selected quotations from the works of scientists and popular writers does not alter the commercial character of the publication. Nor is it altered by self-serving professions of eleemosynary intent, e. g. “Brought to you in the public interest”. * If anything the misleading effect of respondents’ advertisements is enhanced by casting them in the guise of a “public service message” presented by an unidentified “National Commission”.

* Some of the advertisements carried this legend.

The FTC’s pronouncement eliminates any confusion the ALJ’s statement may have caused. Further clarification is available from the FTC upon request, if the need arises. 16 C.F.R. s 3.61(d). See *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965). Neither the use of the term “advertisement” nor the comments of the ALJ on which NCEN bases its argument render the order unconstitutionally vague.

[6] [7] The FTC’s order also prohibits (in paragraph I, C) advertising which

*164 represents as insignificant the available scientific evidence that the consumption of dietary cholesterol, including that in eggs, may increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition

or which

otherwise misrepresents the amount of scientific evidence that eating eggs does not increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition.

NCEN attacks this language as unconstitutionally vague. The FTC was of course not limited to prohibiting the precise misrepresentations that had occurred in the past. Here, as in [FTC v. Colgate-Palmolive Co.](#), *supra*, 380 U.S. at 393, 85 S.Ct. at 1047, the challenged language is “as specific as the circumstances will permit.” In that case, the Court also stated,

We think it reasonable for the Commission to frame its order broadly enough to prevent respondents from engaging in similarly illegal practices in future advertisements. As we said in [Federal Trade Comm'n v. Ruberoid Co.](#), 343 U.S. 470, 473 (72 S.Ct. 800, 96 L.Ed. 1081): “(T)he Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past.” Having been caught violating the Act, respondents “must expect some fencing in.” [Federal Trade Comm'n v. National Lead Co.](#), 352 U.S. 419, 431 (77 S.Ct. 502, 1 L.Ed.2d 438).

380 U.S. at 395, 85 S.Ct. at 1048. The challenged provision is not unconstitutionally vague.

IV. The Required Additional Statement

The order also directs NCEN to include in any future advertisements or public statement it makes concerning the relationship between eating eggs and heart and circulatory disease, the further statement that many medical experts believe increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease. (Paragraph I, B.) NCEN argues that, even if its advertisements contained misrepresentations, this provision of the order exceeds that which is necessary to prevent repetition of the violation.

[8] [9] The First Amendment does not permit a remedy broader than that which is necessary to prevent deception, [Beneficial Corp. v. FTC](#), *supra*, 542 F.2d at 619-620, or correct the effects of past deception, [Warner-Lambert Co. v. FTC](#), 562 F.2d 749, 760 (D.C.Cir. 1977). In its present form, the challenged condition on the right to make an assertion that is not deceptive does not meet this test. Because the record here, unlike that in [Warner-Lambert Co. v. FTC](#), *supra*, does not show a long history of deception which has so permeated the consumer mind that the “claim was believed by consumers after the false advertising had ceased,” *id.*, at 771, we are concerned primarily with preventing future deception. The condition in its present form would require NCEN to argue the other side of the controversy, thus interfering unnecessarily with the effective presentation of the pro-egg position. The desired preventive effect can be achieved by requiring the disclosure that there is a controversy among the experts and NCEN is presenting its side of that controversy. The additional statement in the form now ordered by the FTC should be required only when NCEN chooses to make a representation as to the state of the available evidence or information concerning the controversy. As thus modified, the challenged condition would not unnecessarily curtail NCEN's right to present its position.

If the provision requiring an additional statement is so modified by the FTC, it will be enforced. The rest of the order will be enforced in its present form.

ENFORCED IN PART.

SUPPLEMENTAL OPINION ON FTC'S MOTION TO AMEND JUDGMENT NUNC PRO TUNC

The FTC has moved that we amend the above opinion “by performing the modification of the portion of

the Commission's order *165 requiring affirmative disclosure of certain facts directed (in Part IV) of that opinion." A proposed form of order is submitted with the motion.⁵ In response, petitioners oppose the motion, and also ask, in effect, that we reconsider other portions of our opinion.

⁵ In a footnote in its supporting memorandum, the FTC states that its motion is not a concession of the correctness of the modification and reserves the right to file a petition for certiorari on this question.

Petitioners having omitted to file a petition for rehearing within the time allowed by Rule 40(a), Fed.R.App.P., we decline to entertain their request for reconsideration. Insofar as their arguments relate to their interpretation of Part IV of the opinion, they are without merit. It is true, as we said there, that this record does not show effects of the deceptive advertising on the consumer mind comparable to those in the Warner-Lambert case, and therefore "we are concerned primarily with preventing future deception" (emphasis supplied). The past cannot be totally ignored, however. Concrete evidence of past effects is likely to be difficult and expensive, if not impossible, to obtain in most deceptive advertising cases.⁶ Even though such evidence is not present, the FTC is entitled to draw reasonable inferences as to the effects deceptive statements are likely to have had upon consumers. Although the weight we can give to these effects in the present case is limited by the absence of any findings by the FTC on the subject, we are at least entitled to assume that many persons interested in the egg-cholesterol question have read NCEN's advertisements, as it was intended they should, and that therefore enough taint remains to justify the limited corrective advertising order we have approved.⁷

⁶ See R. Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv.L.Rev. 661, 698 (1977):

. . . Comparable proof of deception perception memory influence would be virtually impossible in most advertising cases.

If the Commission is to do an effective job in regulating deceptive advertising, corrective advertising must apply to more than the one in a million type of ad campaign present in Warner Lambert.

(Footnote omitted.)

⁷ See Judge J. Skelly Wright's statement in *Warner Lambert Co. v. FTC*, 562 F.2d 749, 770 (D.C.Cir.1977):

. . . (W)hatever incremental chill is caused by a corrective advertising order beyond that which would result from a cease and desist order may well be necessary if the interest of consumers in truthful information is to be served at all. Otherwise, advertisers remain free to misrepresent their products to the public through false and deceptive claims, knowing full well that even if the FTC chooses to prosecute they will be required only to cease an advertising campaign which by that point will, in all likelihood, have served its purpose by deceiving the public and already been replaced.

See also Pitofsky, *supra*, n. 6, at 692 693 and nn. 129 130, and Note, "Corrective Advertising Orders of the Federal Trade Commission," 85 Harv.L.Rev. 477, 482 483 (1973), both of which Judge Wright cites in support of the quoted statement.

The revised order the FTC now asks us to enter, which appears as an appendix hereto, carries out the directions contained in Part IV of our opinion. Inasmuch as that order is presumably the one that would be adopted by the FTC if the case were returned to it, there is no reason to delay the proceeding by a remand. Accordingly, the order entered by the FTC is modified to read as shown in the appendix and, as modified, is ordered enforced.

ENFORCED AS MODIFIED.

APPENDIX

The full text of the order of the Federal Trade Commission as modified, affirmed, and enforced by the Court is:

IT IS ORDERED that respondents National Commission on Egg Nutrition and Richard Weiner, Inc., corporations, their successors and assigns, either jointly or individually, and respondents' officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of eggs for human consumption do forthwith cease and desist from:

A. Disseminating or causing the dissemination of any advertisement by *166 means of the United States mails or by any means in or affecting commerce, as "commerce"

is defined in the Federal Trade Commission Act, which directly or indirectly

1. Represents that there is no scientific evidence that eating eggs increases the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition;

2. Represents that there is scientific evidence that dietary cholesterol, including that in eggs, decreases the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition;

3. Represents that there is scientific evidence that avoiding dietary cholesterol, including that in eggs, increases the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition;

4. Represents that eating eggs does not increase the blood cholesterol level in a normal person;

5. Represents that the blood cholesterol level is prevented from being raised or lowered by dietary cholesterol intake;

6. Represents that the human body increases its manufacture of cholesterol in an amount equal to a decrease in dietary cholesterol intake;

7. Represents that the average human body eliminates the same amount of cholesterol as that eaten;

8. Represents that dietary cholesterol, including that in eggs, is needed by the body for building sex hormones, for transmitting nerve impulses and for maintaining life in cells; or

9. Utilizes the name "National Commission on Egg Nutrition" unless it is clearly and conspicuously disclosed in immediate conjunction with the name that the National Commission on Egg Nutrition is composed of egg producers and other individuals and organizations of, or relating to, the egg industry.

B. Disseminating, or causing the dissemination, of any advertisement by means of the United States mails or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly

1. Represents that eating eggs does not increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition or

2. Makes any representation concerning the relationship of dietary cholesterol, including that in eggs, to heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition

unless it is clearly and conspicuously disclosed in immediate conjunction therewith that there is a controversy among medical experts concerning the relationship of dietary cholesterol, including that in eggs, to heart disease, and that respondents are presenting their side of that controversy.

C. Disseminating, or causing the dissemination of, any advertisement by means of the United States mail or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly

1. Represents that there exists, or describes, scientific evidence which supports the theory that consumption of dietary cholesterol, including that in eggs, does not increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition or

2. Makes any representation concerning the state of the available evidence or information concerning the relationship of dietary cholesterol, including that in eggs, to heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition

unless it is clearly and conspicuously disclosed in immediate conjunction therewith that many medical experts believe that existing evidence indicates that increased consumption of dietary cholesterol, including that in eggs, may increase the risk of heart disease.

*167 D. Disseminating, or causing the dissemination of, any advertisement by means of the United States mails or by any means in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, which directly or indirectly

1. Represents as insignificant the available scientific evidence that the consumption of dietary cholesterol,

including that in eggs, may increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis, or any attendant condition, or represents that there is overwhelming scientific evidence or otherwise misrepresents the amount of scientific evidence that eating eggs does not increase the risk of heart attacks, heart disease, atherosclerosis, arteriosclerosis or any attendant condition.

2. Misrepresents in any manner the physiological effects of consuming dietary cholesterol or eggs.

All Citations

570 F.2d 157, 50 A.L.R. Fed. 1, 1978-1 Trade Cases P 61,877, 1977-2 Trade Cases P 61,751, 3 Media L. Rep. 2196

EXHIBIT 297

683 So.2d 522
 District Court of Appeal of Florida,
 Fourth District.

CIBA-GEIGY LIMITED,
 BASF A.G., et al., Appellants,
 v.

The FISH PEDDLER, INC., et al., Appellees.

No. 96-1536.

|
 July 3, 1996.

Synopsis

On appeal from order of the Seventeenth Judicial Circuit Court, Broward County, Arthur J. Franza, Senior Circuit Judge, motions were filed for leave to file amicus briefs. The District Court of Appeal held that Court would deny motion to file amicus brief which appeared to be nothing more than an attempt to present fact specific argument of the same type contained in appellants' 50-page brief.

Motions granted in part and denied in part.

West Headnotes (7)

[1] Amicus Curiae

➔ Powers, Functions, and Proceedings

Briefs from “amicus curiae,” which means “friend of the court,” are generally for the purpose of assisting the court in cases which are of general public interest, or aiding in the presentation of difficult issues. [West's F.S.A. R.App.P.Rule 9.370](#).

1 Cases that cite this headnote

[2] Amicus Curiae

➔ Powers, Functions, and Proceedings

Although by the nature of things amicus is not normally impartial, amicus briefs should not argue the facts in issue. [West's F.S.A. R.App.P.Rule 9.370](#).

Cases that cite this headnote

[3] Amicus Curiae

➔ Right to Appear and Act in General

Court would deny motion to file amicus brief which appeared to be nothing more than an attempt to present fact specific argument of the same type contained in appellants' 50-page brief. [West's F.S.A. R.App.P.Rule 9.370](#).

Cases that cite this headnote

[4] Amicus Curiae

➔ Powers, Functions, and Proceedings

Since parties are limited as to number and length of briefs, amicus briefs should not be used to simply give one side more exposure than the rules contemplate. [West's F.S.A. R.App.P.Rule 9.370](#).

1 Cases that cite this headnote

[5] Amicus Curiae

➔ Powers, Functions, and Proceedings

It is helpful to the court if amicus join together in one brief and cooperate with the parties so as not to be repetitious of the parties' briefs.

Cases that cite this headnote

[6] Amicus Curiae

➔ Powers, Functions, and Proceedings

In the interest of brevity, amicus briefs should not contain statement of the case or facts, but rather should get right to the additional information which the amicus believes will assist the court.

Cases that cite this headnote

[7] Amicus Curiae

➔ Right to Appear and Act in General

Although Rules of Appellate Procedure do not require motion for leave to file amicus brief to state whether the parties have consented, it would be appropriate for the motion to contain that information. [West's F.S.A. R.App.P.Rules 9.300\(a\), 9.370](#).

Cases that cite this headnote

Attorneys and Law Firms

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ORDER

ON MOTIONS TO FILE AMICUS CURIAE BRIEFS

PER CURIAM.

[1] We have, to date, received motions to file two amicus briefs. Briefs from amicus curiae, which means “friend of the court,” are generally for the purpose of assisting the court in cases which are of general public interest, or aiding in the presentation of difficult issues. *Alexander v. Hall*, 64 F.R.D. 152 (D.C.S.C.1974) and cases cited therein.

[2] [3] [4] Although “by the nature of things an amicus is not normally impartial,” amicus briefs should not argue the facts in issue. *Strasser v. Doorley*, 432 F.2d 567 (1st Cir.1970). In the present case one of the amicus briefs appears to be nothing more than an attempt to present a fact specific argument of the same type as is contained in the appellants' 50 page brief. Since the parties are limited as to the number and length of briefs, amicus briefs should not be used to simply give one side more exposure than the rules contemplate. We therefore deny the motion to file an amicus brief on behalf of the Florida Chamber of Commerce.


[5] [6] [7] Because our time for reading briefs is not unlimited, it would be helpful to the court if amicus would attempt to join together in one brief and cooperate with the parties so as not to be repetitious of the parties' briefs. In the interest of brevity, amicus *524 briefs should not contain a statement of the case or facts, but rather should get right to the *additional* information which the amicus believes will assist the court. And, although [Florida Rule of Appellate Procedure 9.370](#) does not require a motion for leave to file an amicus brief to state whether the parties have consented, it would be appropriate for the motion to contain that information. See [Rule 9.300\(a\)](#).

STONE, WARNER and KLEIN, JJ., concur.

All Citations

683 So.2d 522, 21 Fla. L. Weekly D1562

EXHIBIT 298

 KeyCite: *Ye v. Fag* Negative Treatment
 Caution: Doubt by *Prunckun v. De aware* Department of Health and
 Social Services, De .Supr., January 3, 20 9

90 S.Ct. 1011

Supreme Court of the United States

Jack R. GOLDBERG, Commissioner of Social
 Services of the City of New York, Appellant,

v.

John KELLY et al.

No. 62.

Argued Oct. 13, 1969.

Decided March 23, 1970.

Synopsis

New York City residents receiving financial aid under federally-assisted program of Aid to Families with Dependent Children or under New York State's general Home Relief program brought suit challenging adequacy of procedures for notice and hearing in connection with termination of such aid. The three-judge United States District Court for the Southern District of New York, 294 F.Supp. 893, entered judgment in favor of plaintiffs, and defendant appealed. The Supreme Court, Mr. Justice Brennan, held that procedural due process requires that pretermination evidentiary hearing be held when public assistance payments to welfare recipient are discontinued, and further held that procedures followed by city of New York in terminating public assistance payments to welfare recipients were constitutionally inadequate in failing to permit recipients to appear personally with or without counsel before official who finally determined continued eligibility and failing to permit recipient to present evidence to that official orally or to confront or cross-examine adverse witnesses.

Affirmed.

Mr. Chief Justice Burger and Mr. Justice Black dissented.

For dissenting opinions of Mr. Chief Justice Burger and Mr. Justice Stewart see 397 U.S. 282, 285, 90 S.Ct. 1028, 1029.

West Headnotes (25)

[1] **Constitutional Law**

🔑 Social Security, Welfare, and Other Public Payments

Public Assistance

🔑 In general;right to support

Public Assistance

🔑 Administrative Proceedings

Welfare benefits are a matter of statutory entitlement for persons qualified to receive them and their termination involves state action that adjudicates important rights, and procedural due process is applicable to termination of welfare benefits. U.S.C.A.Const. Amend. 14.

[288 Cases that cite this headnote](#)

[2] **Constitutional Law**

🔑 Public funds and assistance

A constitutional challenge to termination of welfare benefits cannot be answered by argument that public assistance benefits are a "privilege" rather than a "right." U.S.C.A.Const. Amend. 14.

[31 Cases that cite this headnote](#)

[3] **Constitutional Law**

🔑 Social Security, Welfare, and Other Public Payments

Relevant constitutional restraints apply to withdrawal of public assistance benefits. U.S.C.A.Const. Amend. 14.

[15 Cases that cite this headnote](#)

[4] **Constitutional Law**

🔑 Proceedings in general

Extent to which procedural due process must be afforded welfare recipient is influenced by extent to which he may be condemned to suffer grievous loss and depends on whether recipient's interest in avoiding that loss

outweighs governmental interest in summary adjudication. [U.S.C.A.Const. Amend. 14.](#)

[316 Cases that cite this headnote](#)

[5] Constitutional Law

[🔑 Proceedings in general](#)

Some governmental benefits may be administratively terminated without affording recipient a pretermination evidentiary hearing. [U.S.C.A.Const. Amend. 14.](#)

[286 Cases that cite this headnote](#)

[6] Constitutional Law

[🔑 Proceedings in general](#)

Procedural due process requires that pretermination evidentiary hearing be held when public assistance payments to welfare recipient are discontinued. [U.S.C.A.Const. Amend. 14.](#)

[185 Cases that cite this headnote](#)

[7] Public Assistance

[🔑 Notice and hearing](#)

Governmental interests in conserving fiscal and administrative resources by stopping payments promptly on discovery of reason to believe that welfare recipient is no longer eligible and by reducing number of evidentiary hearings actually held would not be sufficient to justify failure to provide pretermination evidentiary hearing and instead delay evidentiary hearing until after discontinuance of grants. [U.S.C.A.Const. Amend. 14.](#)

[48 Cases that cite this headnote](#)

[8] Constitutional Law

[🔑 Proceedings in general](#)

Due process does not require two hearings in connection with termination of public assistance benefits to welfare recipients, and if a state wishes to continue benefits until after a fair hearing there will be no need for a

preliminary hearing. [U.S.C.A.Const. Amend. 14.](#)

[85 Cases that cite this headnote](#)

[9] Public Assistance

[🔑 Notice and hearing](#)

Hearing prior to termination of public assistance benefits to welfare recipients has only function of producing an initial determination of validity of welfare department's grounds for discontinuance of payments in order to protect recipient against an erroneous termination of his benefits. [U.S.C.A.Const. Amend. 14.](#)

[38 Cases that cite this headnote](#)

[10] Public Assistance

[🔑 Notice and hearing](#)

Hearing prior to termination of public assistance benefits to welfare recipients need not provide complete record and comprehensive opinion that would serve primarily to facilitate judicial review and need not take form of judicial or quasi-judicial trial. [U.S.C.A.Const. Amend. 14.](#)

[28 Cases that cite this headnote](#)

[11] Constitutional Law

[🔑 Notice and Hearing](#)

Fundamental requisite of due process of law is opportunity to be heard and hearing must be at meaningful time and in meaningful manner. [U.S.C.A.Const. Amend. 14.](#)

[466 Cases that cite this headnote](#)

[12] Constitutional Law

[🔑 Proceedings in general](#)

Due process would require that welfare recipient on proposed termination of public assistance benefits be given timely and adequate notice detailing reasons for proposed termination and an effective opportunity to defend by confronting any adverse witnesses and by presenting

his own argument and evidence orally.
[U.S.C.A.Const. Amend. 14.](#)

[740 Cases that cite this headnote](#)

[13] Public Assistance

🔑 [Reduction, Termination, or Temporary Termination of Benefits](#)

Public Assistance

🔑 [Notice and hearing](#)

Seven days' notice provided by New York City on proposed termination of public assistance benefits to recipients of financial aid under federally-assisted program of Aid to Families With Dependent Children or under New York State's general Home Relief program was not constitutionally insufficient per se although there might be cases where fairness would require that longer time be given.
[U.S.C.A.Const. Amend. 14](#); [Social Security Act, §§ 401 410 as amended 42 U.S.C.A. §§ 601 610](#); [Social Services Law N.Y. §§ 157 166, 158, 343 362.](#)

[210 Cases that cite this headnote](#)

[14] Public Assistance

🔑 [Notice and hearing](#)

Notice given by city of New York of proposed termination of public assistance payments to welfare recipients by employing both letter and personal conference with caseworker to inform recipient of precise questions raised about his continued eligibility satisfied constitutional requirements as to content or form of notice.
[U.S.C.A.Const. Amend. 14](#); [Social Security Act, §§ 401 410 as amended 42 U.S.C.A. §§ 601 610](#); [Social Services Law N.Y. §§ 157 166, 158, 343 362.](#)

[19 Cases that cite this headnote](#)

[15] Public Assistance

🔑 [Notice and hearing](#)

Procedures followed by city of New York in terminating public assistance payments to welfare recipients were constitutionally inadequate in failing to permit recipients

to appear personally with or without counsel before official who finally determined continued eligibility and failing to permit recipient to present evidence to that official orally or to confront or cross-examine adverse witnesses.
[U.S.C.A.Const Amend. 14](#); [Social Security Act, §§ 401 410 as amended 42 U.S.C.A. §§ 601 610](#); [Social Services Law N.Y. §§ 157 166, 158, 343 362.](#)

[97 Cases that cite this headnote](#)

[16] Constitutional Law

🔑 [Notice and Hearing](#)

Due process requirement of opportunity to be heard must be tailored to capacities and circumstances of those who are to be heard.
[U.S.C.A.Const. Amend. 14.](#)

[288 Cases that cite this headnote](#)

[17] Constitutional Law

🔑 [Proceedings in general](#)

It is not enough to satisfy due process that welfare recipient on proposed termination of public assistance payments be permitted to present his position to decisionmaker in writing or secondhand through caseworker; instead, recipient must be allowed to state his position orally and be given an opportunity to confront and cross-examine witnesses relied on by department.
[U.S.C.A.Const. Amend. 14.](#)

[296 Cases that cite this headnote](#)

[18] Administrative Law and Procedure

🔑 [Decision](#)

Particularly where credibility and veracity are at issue, written submissions of person's position are wholly unsatisfactory basis for decision.

[40 Cases that cite this headnote](#)

[19] Constitutional Law

🔑 [Proceedings in general](#)

Public Assistance

🔑 Evidence

On proposed termination of public assistance payments to welfare recipient, recipient must be allowed to state his position orally but informal procedures will suffice and due process does not require a particular order of proof or mode of offering evidence. [U.S.C.A.Const. Amend. 14.](#)

[257 Cases that cite this headnote](#)

[20] **Constitutional Law**

🔑 Witnesses;confrontation and cross-examination

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. [U.S.C.A.Const. Amend. 14.](#)

[213 Cases that cite this headnote](#)

[21] **Criminal Law**

🔑 Right of Accused to Confront Witnesses
Privileged Communications and Confidentiality

🔑 Public Officers and Records

It has been a relatively immutable principle that where governmental action seriously injures an individual and reasonableness of that action depends on fact-findings, evidence used to prove government's case must be disclosed to individual so that he has opportunity to show that it is untrue.

[44 Cases that cite this headnote](#)

[22] **Administrative Law and Procedure**

🔑 Production and reception of evidence in general

Rights of confrontation and cross-examination apply not only in criminal cases but also in all types of cases where administrative actions are under scrutiny.

[16 Cases that cite this headnote](#)

[23] **Public Assistance**

🔑 Notice and hearing

At hearing to be provided welfare recipient prior to termination of public assistance benefits, recipient must be allowed to retain an attorney if he so desires. [U.S.C.A.Const. Amend. 14.](#)

[55 Cases that cite this headnote](#)

[24] **Public Assistance**

🔑 Notice and hearing

Public Assistance

🔑 Findings and determination

Decision maker's conclusion as to welfare recipient's eligibility to public assistance payments must rest solely on legal rules and evidence adduced at pretermination hearing and, to demonstrate compliance with that requirement, decision maker should state reasons for his determination and indicate evidence he relied on, though his statement need not amount to full opinion or even formal findings of fact and conclusions of law. [U.S.C.A.Const. Amend. 14.](#)

[372 Cases that cite this headnote](#)

[25] **Administrative Law and Procedure**

🔑 Bias, prejudice or other disqualification to exercise powers

Public Assistance

🔑 Notice and hearing

An impartial decision maker is essential in hearing provided welfare recipient prior to termination of public assistance payments and, though prior involvement in some aspects of case will not necessarily bar welfare official from acting as decision maker, decision maker should not have participated in making determination under review. [U.S.C.A.Const. Amend. 14.](#)

[134 Cases that cite this headnote](#)

Attorneys and Law Firms

****1013 *255** John J. Loflin, Jr., New York City, for appellant.

****1014** Lee A. Albert, New York City, for appellees.

Opinion

Mr. Justice BRENNAN delivered the opinion of the Court.

The question for decision is whether a State that terminates public assistance payments to a particular recipient without affording him the opportunity for an evidentiary hearing prior to termination denies the recipient procedural due process in violation of the Due Process Clause of the Fourteenth Amendment.

This action was brought in the District Court for the Southern District of New York by residents of New ***256** York City receiving financial aid under the federally assisted program of Aid to Families with Dependent Children (AFDC) or under New York State's general Home Relief program. Their complaint alleged that the New York State and New York City officials administering these programs terminated, or were about to terminate, such aid without prior notice and hearing, thereby denying them due process of law.² At the time ***257** the suits were filed there was no requirement of prior notice or hearing of any kind before termination of financial aid. However, the State and city adopted procedures for notice and hearing after the suits were brought, and the plaintiffs, appellees here, then challenged the constitutional adequacy of those procedures.

¹ AFDC was established by the Social Security Act of 1935, 49 Stat. 627, as amended, 42 U.S.C. ss 601 610 (1964 ed. and Supp. IV). It is a categorical assistance program supported by federal grants in aid but administered by the States according to regulations of the Secretary of Health, Education, and Welfare. See N.Y. Social Welfare Law ss 343 362 (1966). We considered other aspects of AFDC in *King v. Smith*, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968), and in *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969). Home Relief is a general assistance program financed and administered solely by New York state and local governments. N.Y. Social Welfare Law ss 157 165 (1966), since July 1, 1967, *Social Services Law* ss

157 166. It assists any person unable to support himself or to secure support from other sources. *Id.*, s 158.

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Two suits were brought and consolidated in the District Court. The named plaintiffs were 20 in number, including intervenors. Fourteen had been or were about to be cut off from AFDC, and six from Home Relief. During the course of this litigation most, though not all, of the plaintiffs either received a 'fair hearing' (see *infra*, at 1015 1016) or were restored to the rolls without a hearing. However, even in many of the cases where payments have been resumed, the underlying questions of eligibility that resulted in the bringing of this suit have not been resolved. For example, Mrs. Altagracia Guzman alleged that she was in danger of losing AFDC payments for failure to cooperate with the City Department of Social Services in suing her estranged husband. She contended that the departmental policy requiring such cooperation was inapplicable to the facts of her case. The record shows that payments to Mrs. Guzman have not been terminated, but there is no indication that the basic dispute over her duty to cooperate has been resolved, or that the alleged danger of termination has been removed. Home Relief payments to Juan DeJesus were terminated because he refused to accept counseling and rehabilitation for drug addiction. Mr. DeJesus maintains that he does not use drugs. His payments were restored the day after his complaint was filed. But there is nothing in the record to indicate that the underlying factual dispute in his case has been settled.

The State Commissioner of Social Services amended the State Department of Social Services' Official Regulations to require that local social services officials proposing to discontinue or suspend a recipient's financial aid do so according to a procedure that conforms to either subdivision (a) or subdivision (b) of s 351.26 of the regulations as amended.³ The City of New York ***258** elected to ****1015** promulgate a local procedure according to subdivision (b). That subdivision, so far as here pertinent, provides that the local procedure must include the giving of notice to the recipient of the reasons for a proposed discontinuance or suspension at least seven days prior to its effective date, with notice also that upon request the recipient may have the proposal reviewed by a local welfare official holding a position superior to that of the supervisor who approved the proposed discontinuance or suspension, and, further, that

the recipient may submit, for purposes of the review, a written statement to demonstrate why his grant should not be discontinued or suspended. The decision by the reviewing official whether to discontinue or suspend aid must be made expeditiously, with written notice of the decision to the recipient. The section further expressly provides that '(a)ssistance shall not be discontinued or suspended prior to the date such notice of decision is sent to the recipient and his representative, if any, or prior to the proposed effective date of discontinuance or suspension, whichever occurs later.'

³ The adoption in February 1968 and the amendment in April of Regulation s 351.26 coincided with or followed several revisions by the Department of Health, Education, and Welfare of its regulations implementing 42 U.S.C. s 602(a)(4), which is the provision of the Social Security Act that requires a State to afford a 'fair hearing to any recipient of aid under a federally assisted program before termination of his aid becomes final. This requirement is satisfied by a post termination 'fair hearing under regulations presently in effect. See *HEW Handbook of Public Assistance Administration* (hereafter *HEW Handbook*), pt. IV, ss 6200 6400. A new HEW regulation, 34 Fed.Reg. 1144 (1969), now scheduled to take effect in July 1970, 34 Fed.Reg. 13595 (1969), would require continuation of AFDC payments until the final decision after a 'fair hearing and would give recipients a right to appointed counsel at 'fair hearings. 45 CFR s 205.10, 34 Fed.Reg. 1144 (1969); 45 CFR s 220.25, 34 Fed.Reg. 1356 (1969). For the safeguards specified at such 'fair hearings' see *HEW Handbook*, pt. IV, ss 6200 6400. Another recent regulation now in effect requires a local agency administering AFDC to give 'advance notice of questions it has about an individual's eligibility so that a recipient has an opportunity to discuss his situation before receiving formal written notice of reduction in payment or termination of assistance. *Id.*, pt. IV, s 2300(d)(5). This case presents no issue of the validity or construction of the federal regulations. It is only subdivision (b) of s 351.26 of the New York State regulations and implementing procedure 68 18 of New York City that pose the constitutional question before us. Cf. *Shapiro v. Thompson*, 394 U.S. 618, 641, 89 S.Ct. 1322, 1335, 22 L.Ed.2d 600 (1969). Even assuming that the constitutional question might be avoided in the context of AFDC by construction of the Social Security Act or of the present federal regulations thereunder, or by waiting for the new regulations to become effective, the question must be

faced and decided in the context of New York's Home Relief program, to which the procedures also apply.

Pursuant to subdivision (b), the New York City Department of Social Services promulgated Procedure No. 68 18. A caseworker who has doubts about the recipient's continued eligibility must first discuss them with the recipient. If the caseworker concludes that the recipient is no longer eligible, he recommends termination *259 of aid to a unit supervisor. If the latter concurs, he sends the recipient a letter stating the reasons for proposing to terminate aid and notifying him that within seven days he may request that a higher official review the record, and may support the request with a written statement prepared personally or with the aid of an attorney or other person. If the reviewing official affirms the determination of ineligibility, aid is stopped immediately and the recipient is informed by letter of the reasons for the action. Appellees' challenge to this procedure emphasizes the absence of any provisions for the personal appearance of the recipient before the reviewing official, **1016 for oral presentation of evidence, and for confrontation and cross-examination of adverse witnesses.⁴ However, the letter does inform the recipient that he may request a post-termination 'fair hearing.'⁵ This is a proceeding before an independent *260 state hearing officer at which the recipient may appear personally, offer oral evidence, confront and cross-examine the witnesses against him, and have a record made of the hearing. If the recipient prevails at the 'fair hearing' he is paid all funds erroneously withheld.⁶ *HEW Handbook*, pt. IV, ss 6200 6500; 18 NYCRR ss 84.2 84.23. A recipient whose aid is not restored by a 'fair hearing' decision may have judicial review. *N.Y.Civil Practice Law and Rules*, Art. 78 (1963). The recipient is so notified, 18 NYCRR s 84.16.

⁴ These omissions contrast with the provisions of subdivision (a) of s 351.26, the validity of which is not at issue in this Court. That subdivision also requires written notification to the recipient at least seven days prior to the proposed effective date of the reasons for the proposed discontinuance or suspension. However, the notification must further advise the recipient that if he makes a request therefor he will be afforded an opportunity to appear at a time and place indicated before the official identified in the notice, who will review his case with him and allow him to present such written and oral evidence as the recipient may have to demonstrate why aid should

not be discontinued or suspended. The District Court assumed that subdivision (a) would be construed to afford rights of confrontation and cross examination and a decision based solely on the record. *Kelly v. Wyman*, 294 F.Supp. 893, 906-907 (1968).

5 N.Y. Social Welfare Law s 353(2) (1966) provides for a post termination 'fair hearing pursuant to 42 U.S.C. s 602(a)(4). See n. 3, supra. Although the District Court noted that HEW had raised some objections to the New York 'fair hearing procedures, 294 F.Supp., at 898 n. 9, these objections are not at issue in this Court. Shortly before this suit was filed, New York State adopted a similar provision for a 'fair hearing in terminations of Home Relief. 18 NYCRR ss 84.2-84.23. In both AFDC and Home Relief the 'fair hearing must be held within 10 working days of the request, s 84.6, with decision within 12 working days thereafter, s 84.15. It was conceded in oral argument that these time limits are not in fact observed.

6 Current HEW regulations require the States to make full retroactive payments (with federal matching funds) whenever a 'fair hearing results in a reversal of a termination of assistance. HEW Handbook, pt. IV, ss 6200(k), 6300(g), 6500(a); see 18 NYCRR s 358.8. Under New York State regulations retroactive payments can also be made, with certain limitations, to correct an erroneous termination discovered before a 'fair hearing has been held. 18 NYCRR s 351.27. HEW regulations also authorize, but do not require, the State to continue AFDC payments without loss of federal matching funds pending completion of a 'fair hearing. HEW Handbook, pt. IV, s 6500(b). The new HEW regulations presently scheduled to become effective July 1, 1970, will supersede all of these provisions. See n. 3, supra.

I

The constitutional issue to be decided, therefore, is the narrow one whether the Due Process Clause requires that the recipient be afforded an evidentiary hearing before the termination of benefits.⁷ The District Court held *261 that only a pretermination evidentiary hearing would satisfy the constitutional command, and rejected the argument of the state and city officials that the combination of the post-termination 'fair hearing' with the informal pre-termination review disposed of all due process claims. The court said: 'While post-termination review is **1017 relevant, there is one overpowering fact

which controls here. By hypothesis, a welfare recipient is destitute, without funds or assets. * * * Suffice it to say that to cut off a welfare recipient in the face of * * * 'brutal need' without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it.' *Kelly v. Wyman*, 294 F.Supp. 893, 899, 900 (1968). The court rejected the argument that the need to protect the public's tax revenues supplied the requisite 'overwhelming consideration.' 'Against the justified desire to protect public funds must be weighed the individual's overpowering need in this unique situation not to be wrongfully deprived of assistance. * * * While the problem of additional expense must be kept in mind, it does not justify denying a hearing meeting the ordinary standards of due process. Under all the circumstances, we hold that due process requires an adequate hearing before termination of welfare benefits, and the fact that there is a later constitutionally fair proceeding does not alter the result.' *Id.*, at 901. Although state officials were party defendants in the action, only the Commissioner of Social Services of the City of New York appealed. We noted probable jurisdiction, 394 U.S. 971, 89 S.Ct. 1469, 22 L.Ed.2d 751 (1969), to decide important issues that have been the subject of disagreement in principle between the three-judge court in the present case and that convened in *Wheeler v. Montgomery*, 397 U.S. 280, 90 S.Ct. 1026, 25 L.Ed.2d 307. We affirm.

7 Appellant does not question the recipient's due process right to evidentiary review after termination. For a general discussion of the provision of an evidentiary hearing prior to termination, see Comment, The Constitutional Minimum for the Termination of Welfare Benefits: The Need for and Requirements of a Prior Hearing, 68 Mich.L.Rev. 112 (1969).

[1] [2] [3] [4] Appellant does not contend that procedural due process is not applicable to the termination of welfare benefits. *262 Such benefits are a matter of statutory entitlement for persons qualified to receive them.⁸ Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are "a 'privilege' and not a 'right.'" *Shapiro v. Thompson*, 394 U.S. 618, 627 n. 6, 89 S.Ct. 1322, 1327 (1969). Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation, *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963); or to denial of a tax exemption,

Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958); or to discharge from public employment, Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956).⁹ The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168, 71 S.Ct. 624, 647, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring), and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. Accordingly, as we said in Cafeteria & Restaurant Workers Union, etc. v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748 1749, 6 L.Ed.2d 1230 (1961), 'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action.' See also Hannah v. Larche, 363 U.S. 420, 440, 442, 80 S.Ct. 1502, 1513, 1514, 4 L.Ed.2d 1307 (1960).

⁸ It may be realistic today to regard welfare entitlements as more like 'property than a 'gratuity. Much of the existing wealth in this country takes the form of rights that do not fall within traditional common law concepts of property. It has been aptly noted that '(s)ociety today is built around entitlement. The automobile dealer has his franchise, the doctor and lawyer their professional licenses, the worker his union membership, contract, and pension rights, the executive his contract and stock options; all are devices to aid security and independence. Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen, routes for airlines and channels for television stations; long term contracts for defense, space, and education; social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced. Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 Yale L.J. 1245, 1255 (1965). See also Reich, The New Property, 73 Yale L.J. 733 (1964).

⁹ See also Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117, 46 S.Ct. 215, 70 L.Ed. 494 (1926) (right of a certified public accountant to practice before the Board of Tax Appeals); Hornsby v. Allen, 326 F.2d 605 (C.A.5th Cir. 1964) (right to obtain a retail liquor store license); Dixon v. Alabama State Board of Education, 294 F.2d 150 (C.A.5th Cir.), cert. denied, 368 U.S. 930, 82 S.Ct. 368, 7 L.Ed.2d 193 (1961) (right to attend a public college).

[5] [6] It is true, of course, that some governmental benefits may be administratively terminated without affording the recipient a pre-termination evidentiary hearing.⁰ *264 But we agree with the District Court that when welfare is discontinued, only a pre-termination evidentiary hearing provides the recipient with procedural due process. Cf. Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969). For qualified recipients, welfare provides the means to obtain essential food, clothing, housing, and medical care. Cf. Nash v. Florida Industrial Commission, 389 U.S. 235, 239, 88 S.Ct. 362, 366, 19 L.Ed.2d 438 (1967). Thus the crucial factor in this context a factor not present in the case of the blacklisted government contractor, the discharged government employee, the taxpayer denied a tax exemption, or virtually anyone else whose governmental entitlements are ended is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely **1019 affects his ability to seek redress from the welfare bureaucracy.²

¹⁰ One Court of Appeals has stated: 'In a wide variety of situations, it has long been recognized that where harm to the public is threatened, and the private interest infringed is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing. R. A. Holman & Co. v. SEC, 112 U.S.App.D.C. 43, 47, 299 F.2d 127, 131, cert. denied, 370 U.S. 911, 82 S.Ct. 1257, 8 L.Ed.2d 404 (1962) (suspension of exemption from stock registration requirement). See also, for example, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088 (1950) (seizure of mislabeled vitamin product); North American Cold Storage Co. v. Chicago, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195 (1908) (seizure of food

not fit for human use); *Yakus v. United States*, 321 U.S. 414, 64 S.Ct. 660, 88 L.Ed. 834 (1944) (adoption of wartime price regulations); *Gonzalez v. Freeman*, 118 U.S.App.D.C. 180, 334 F.2d 570 (1964) (disqualification of a contractor to do business with the Government). In *Cafeteria & Restaurant Workers Union, etc. v. McElroy*, supra, 367 U.S. at 896, 81 S.Ct. at 1749, summary dismissal of a public employee was upheld because '(i)n (its) proprietary military capacity, the Federal Government, * * * has traditionally exercised unfettered control, and because the case involved the Government's 'dispatch of its own internal affairs. Cf. *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 60 S.Ct. 869, 84 L.Ed. 1108 (1940).

11 Administrative determination that a person is ineligible for welfare may also render him ineligible for participation in state financed medical programs. See N.Y. Social Welfare Law s 366 (1966).

12 His impaired adversary position is particularly telling in light of the welfare bureaucracy's difficulties in reaching correct decisions on eligibility. See Comment, Due Process and the Right to a Prior Hearing in Welfare Cases, 37 Ford.L.Rev. 604, 610 611 (1969).

Moreover, important governmental interests are promoted by affording recipients a pre-termination evidentiary hearing. From its founding the Nation's basic *265 commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty.³ This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.' The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.

13 See, e.g., Reich, supra, n. 8, 74 Yale L.J., at 1255.

Appellant does not challenge the force of these considerations but argues that they are outweighed by countervailing governmental interests in conserving fiscal and administrative resources. These interests, the argument goes, justify the delay of any evidentiary hearing until after discontinuance of the grants. Summary adjudication protects the public fisc by stopping payments promptly upon discovery of reason to believe that a recipient is no longer eligible. Since most terminations are accepted without challenge, summary adjudication also conserves both the fisc and administrative time and energy by reducing the number of evidentiary hearings actually held.

*266 [7] We agree with the District Court, however, that these governmental interests are not overriding in the welfare context. The requirement of a prior hearing doubtless involves some greater expense, and the benefits paid to ineligible recipients pending decision at the hearing probably cannot be recouped, since these recipients are likely to be judgment-proof. But the State is not without weapons to minimize these increased costs. Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities. Indeed, the very provision for a post-termination evidentiary hearing in New York's Home Relief program is itself cogent evidence that the State recognizes the primacy of the public interest in correct eligibility determinations and therefore in the provision of procedural safeguards. Thus, the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burdens. As the District Court correctly concluded, '(t)he stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance, if he so desires, to be fully informed **1020 of the case against him so that he may contest its basis and produce evidence in rebuttal.' 294 F.Supp., at 904 905.

II

[8] [9] [10] We also agree with the District Court, however, that the pre-termination hearing need not

take the form of a judicial or quasi-judicial trial. We bear in mind that the statutory 'fair hearing' will provide the recipient *267 with a full administrative review.⁴ Accordingly, the pre-termination hearing has one function only: to produce an initial determination of the validity of the welfare department's grounds for discontinuance of payments in order to protect a recipient against an erroneous termination of his benefits. Cf. *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 343, 89 S.Ct. 1820, 1823, 23 L.Ed.2d 349 (1969) (Harlan, J., concurring). Thus, a complete record and a comprehensive opinion, which would serve primarily to facilitate judicial review and to guide future decisions, need not be provided at the pre-termination stage. We recognize, too, that both welfare authorities and recipients have an interest in relatively speedy resolution of questions of eligibility, that they are used to dealing with one another informally, and that some welfare departments have very burdensome caseloads. These considerations justify the limitation of the pre-termination hearing to minimum procedural safeguards, adapted to the particular characteristics of welfare recipients, and to the limited nature of the controversies to be resolved. We wish to add that we, no less than the dissenters, recognize the importance of not imposing upon the States or the Federal Government in this developing field of law any procedural requirements beyond those demanded by rudimentary due process.

14 Due process does not, of course, require two hearings. If, for example, a State simply wishes to continue benefits until after a 'fair hearing there will be no need for a preliminary hearing.

[11] [12] 'The fundamental requisite of due process of law is the opportunity to be heard.' *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). The hearing must be 'at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965). In the present context these principles require that a recipient have timely and adequate notice detailing the reasons for a *268 proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally. These rights are important in cases such as those before us, where recipients have challenged proposed terminations as resting on incorrect or misleading factual premises or on

misapplication of rules or policies to the facts of particular cases.⁵

15 This case presents no question requiring our determination whether due process requires only an opportunity for written submission, or an opportunity both for written submission and oral argument, where there are no factual issues in dispute or where the application of the rule of law is not intertwined with factual issues. See *FCC v. WJR*, 337 U.S. 265, 275 277, 69 S.Ct. 1097, 1103 1104, 93 L.ed. 1353 (1949).

[13] [14] We are not prepared to say that the seven-day notice currently provided by New York City is constitutionally insufficient per se, although there may be cases where fairness would require that a longer time be given. Nor do we see any constitutional deficiency in the content or form of the notice. New York employs both a letter and a personal conference with a caseworker to inform a recipient of the precise questions raised about his continued eligibility. Evidently the recipient is told the legal and factual bases for the Department's doubts. This combination is probably **1021 the most effective method of communicating with recipients.

[15] The city's procedures presently do not permit recipients to appear personally with or without counsel before the official who finally determines continued eligibility. Thus a recipient is not permitted to present evidence to that official orally, or to confront or cross-examine adverse witnesses. These omissions are fatal to the constitutional adequacy of the procedures.

[16] [17] [18] [19] The opportunity to be heard must be tailored to the *269 capacities and circumstances of those who are to be heard.⁶ It is not enough that a welfare recipient may present his position to the decision maker in writing or second-hand through his caseworker. Written submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance. Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important. Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision. The second-hand presentation to the decisionmaker by the caseworker has

its own deficiencies; since the caseworker usually gathers the facts upon which the charge of ineligibility rests, the presentation of the recipient's side of the controversy cannot safely be left to him. Therefore a recipient must be allowed to state his position orally. Informal procedures will suffice; in this context due process does not require a particular order of proof or mode of offering evidence. Cf. HEW Handbook, pt. IV, s 6400(a).

16 (T)he prosecution of an appeal demands a degree of security, awareness, tenacity, and ability which few dependent people have. Wedemeyer & Moore, *The American Welfare System*, 54 Calif.L.Rev. 326, 342 (1966).

[20] [21] [22] In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. E.g., *ICC v. Louisville & N.R. Co.*, 227 U.S. 88, 93 94, 33 S.Ct. 185, 187 188, 57 L.Ed. 431 (1913); *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 103 104, 83 S.Ct. 1175, 1180 1181, 10 L.Ed.2d 224 (1963). What we said in **270 Greene v. McElroy*, 360 U.S. 474, 496 497, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959), is particularly pertinent here:

‘Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment * * *. This Court has been

zealous to protect these rights from erosion. It has spoken out not only in criminal cases, * * * but also in all types of cases where administrative * * * actions were under scrutiny.’

Welfare recipients must therefore be given an opportunity to confront and cross-examine the witnesses relied on by the department.

****1022 [23]** ‘The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.’ *Powell v. Alabama*, 287 U.S. 45, 68 69, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932). We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the ***271** interests of the recipient. We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing. Evidently HEW has reached the same conclusion. See 45 CFR s 205.10, 34 Fed.Reg. 1144 (1969); 45 CFR s 220.25, 34 Fed.Reg. 13595 (1969).

[24] [25] Finally, the decisionmaker's conclusion as to a recipient's eligibility must rest solely on the legal rules and evidence adduced at the hearing. *Ohio Bell Tel. Co. v. PUC*, 301 U.S. 292, 57 S.Ct. 724, 81 L.Ed. 1093 (1937); *United States v. Abilene & S.R. Co.*, 265 U.S. 274, 288 289, 44 S.Ct. 565, 569 570, 68 L.Ed. 1016 (1924). To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on, cf. *Wichita R. & Light Co. v. PUC*, 260 U.S. 48, 57 59, 43 S.Ct. 51, 54 55, 67 L.Ed. 124 (1922), though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law. And, of course, an impartial decision maker is essential. Cf. *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955); *Wong Yang Sung v. McGrath*, 339 U.S. 33, 45 46, 70 S.Ct. 445, 451 452, 94 L.Ed. 616 (1950). We agree with the District Court that prior involvement in some aspects of a case will not necessarily bar a welfare official from acting as a decision maker. He should not,

however, have participated in making the determination under review.

Affirmed.

Mr. Justice BLACK, dissenting.

In the last half century the United States, along with many, perhaps most, other nations of the world, has moved far toward becoming a welfare state, that is, a nation that for one reason or another taxes its most *272 affluent people to help support, feed, clothe, and shelter its less fortunate citizens. The result is that today more than nine million men, women, and children in the United States receive some kind of state or federally financed public assistance in the form of allowances or gratuities, generally paid them periodically, usually by the week, month, or quarter. Since these gratuities are paid on the basis of need, the list of recipients is not static, and some people go off the lists and others are added from time to time. These ever-changing lists put a constant administrative burden on government and it certainly could not have reasonably anticipated that this burden would include the additional procedural expense imposed by the Court today.

¹ This figure includes all recipients of Oldage Assistance, Aid to Families with Dependent Children, Aid to the Blind, Aid to the Permanently and Totally Disabled, and general assistance. In this case appellants are AFDC and general assistance recipients. In New York State alone there are 951,000 AFDC recipients and 108,000 on general assistance. In the Nation as a whole the comparable figures are 6,080,000 and 391,000. U.S. Bureau of the Census, Statistical Abstract of the United States: 1969 (90th ed.), Table 435, p. 297.

The dilemma of the ever-increasing poor in the midst of constantly growing affluence presses upon us and must inevitably be met within the framework of our democratic constitutional government, if our system is to survive as such. It was largely to escape just such pressing economic problems and attendant government repression that people from **1023 Europe, Asia, and other areas settled this country and formed our Nation. Many of those settlers had personally suffered from persecutions of various kinds and wanted to get away from governments that had unrestrained powers to make life miserable for their citizens. It was for this reason, or so I

believe, that on reaching these new lands the early settlers undertook to curb their governments by confining their powers *273 within written boundaries, which eventually became written constitutions.² They wrote their basic charters as nearly as men's collective wisdom could do so as to proclaim to their people and their officials an emphatic command that: 'Thus far and no farther shall you go; and where we neither delegate powers to you, nor prohibit your exercise of them, we the people are left free.'³

² The goal of a written constitution with fixed limits on governmental power had long been desired. Prior to our colonial constitutions, the closest man had come to realizing this goal was the political movement of the Levellers in England in the 1640's. J. Frank, *The Levellers* (1955). In 1647 the Levellers proposed the adoption of An Agreement of the People which set forth written limitations on the English Government. This proposal contained many of the ideas which later were incorporated in the constitutions of this Nation. *Id.* at 135-147.

³ This command is expressed in the Tenth Amendment: 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'

Representatives of the people of the Thirteen Original Colonies spent long, hot months in the summer of 1787 in Philadelphia, Pennsylvania, creating a government of limited powers. They divided it into three departments—Legislative, Judicial, and Executive. The Judicial Department was to have no part whatever in making any laws. In fact proposals looking to vesting some power in the Judiciary to take part in the legislative process and veto laws were offered, considered, and rejected by the Constitutional Convention.⁴ In my *274 judgment there is not one word, phrase, or sentence from the beginning to the end of the Constitution from which it can be inferred that judges were granted any such legislative power. True, *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), held, and properly, I think, that courts must be the final interpreters of the Constitution, and I recognize that the holding can provide an opportunity to slide imperceptibly into constitutional amendment and law making. But when federal judges use this judicial power for legislative purposes, I think they wander out of their field of vested powers and transgress into the area constitutionally assigned to the Congress and the people.

That is precisely what I believe the Court is doing in this case. Hence my dissent.

⁴ It was proposed that members of the judicial branch would sit on a Council of Revision which would consider legislation and have the power to veto it. This proposal was rejected. J. Elliot, 1 Elliot's Debates 160, 164, 214 (Journal of the Federal Convention); 395, 398 (Yates' Minutes); vol. 5, pp. 151, 161 166, 344 349 (Madison's Notes) (Lippincott ed. 1876). It was also suggested that The Chief Justice would serve as a member of the President's executive council, but this proposal was similarly rejected. *Id.*, vol. 5, pp. 442, 445, 446, 462.

The more than a million names on the relief rolls in New York,⁵ and the more than nine million names on the rolls of all the 50 States were not put there at random. The names are there because state welfare officials believed that those people were eligible for assistance. Probably in the officials' haste to make out the lists many names were put there erroneously in order to alleviate immediate suffering, and undoubtedly some people are drawing relief who are not entitled ****1024** under the law to do so. Doubtless some draw relief checks from time to time who know they are not eligible, either because they are not actually in need or for some other reason. Many of those who thus draw undeserved gratuities are without sufficient property to enable the government to collect back from them any money they wrongfully receive. But the Court today holds that it would violate the Due Process Clause of the Fourteenth Amendment to stop paying those people weekly or monthly allowances unless the government first affords them a full 'evidentiary hearing' even ***275** though welfare officials are persuaded that the recipients are not rightfully entitled to receive a penny under the law. In other words, although some recipients might be on the lists for payment wholly because of deliberate fraud on their part, the Court holds that the government is helpless and must continue, until after an evidentiary hearing, to pay money that it does not owe, never has owed, and never could owe. I do not believe there is any provision in our Constitution that should thus paralyze the government's efforts to protect itself against making payments to people who are not entitled to them.

⁵ See n. 1, *supra*.

Particularly do I not think that the Fourteenth Amendment should be given such an unnecessarily broad construction. That Amendment came into being primarily

to protect Negroes from discrimination, and while some of its language can and does protect others, all know that the chief purpose behind it was to protect ex-slaves. Cf. *Adamson v. California*, 332 U.S. 46, 71 72, and n. 5, 67 S.Ct. 1672, 1686, 91 L.Ed. 1903 (1947) (dissenting opinion). The Court, however, relies upon the Fourteenth Amendment and in effect says that failure of the government to pay a promised charitable instalment to an individual deprives that individual of his own property, in violation of the Due Process Clause of the Fourteenth Amendment. It somewhat strains credulity to say that the government's promise of charity to an individual is property belonging to that individual when the government denies that the individual is honestly entitled to receive such a payment.

I would have little, if any, objection to the majority's decision in this case if it were written as the report of the House Committee on Education and Labor, but as an opinion ostensibly resting on the language of the Constitution I find it woefully deficient. Once the verbiage is pared away it is obvious that this Court today adopts the views of the District Court 'that to cut off a welfare recipient in the face of * * * 'brutal need' without a prior ***276** hearing of some sort is unconscionable,' and therefore, says the Court, unconstitutional. The majority reaches this result by a process of weighing 'the recipient's interest in avoiding' the termination of welfare benefits against 'the governmental interest in summary adjudication.' Ante, at 1018. Today's balancing act requires a 'pre-termination evidentiary hearing,' yet there is nothing that indicates what tomorrow's balance will be. Although the majority attempts to bolster its decision with limited quotations from prior cases, it is obvious that today's result doesn't depend on the language of the Constitution itself or the principles of other decisions, but solely on the collective judgment of the majority as to what would be a fair and humane procedure in this case.

This decision is thus only another variant of the view often expressed by some members of this Court that the Due Process Clause forbids any conduct that a majority of the Court believes 'unfair,' 'indecent,' or 'shocking to their consciences.' See, e.g., *Rochin v. California*, 342 U.S. 165, 172, 72 S.Ct. 205, 209, 96 L.Ed. 183 (1952). Neither these words nor any like them appear anywhere in the Due Process Clause. If they did, they would leave the majority of Justices free to hold any conduct unconstitutional that they should conclude ****1025** on their own to be unfair or

shocking to them.⁶ Had the drafters of the Due Process Clause meant to leave judges such ambulatory power to declare *277 laws unconstitutional, the chief value of a written constitution, as the Founders saw it, would have been lost. In fact, if that view of due process is correct, the Due Process Clause could easily swallow up all other parts of the Constitution. And truly the Constitution would always be 'what the judges say it is' at a given moment, not what the Founders wrote into the document.⁷ A written constitution, designed to guarantee protection against governmental abuses, including those of judges, must have written standards that mean something definite and have an explicit content. I regret very much to be compelled to say that the Court today makes a drastic and dangerous departure from a Constitution written to control and limit the government and the judges and moves toward a constitution designed to be no more and no less than what the judges of a particular social and economic philosophy declare on the one hand to be fair or on the other hand to be shocking and unconscionable.

⁶ I am aware that some feel that the process employed in reaching today's decision is not dependent on the individual views of the Justices involved, but is a mere objective search for the 'collective conscience of mankind, but in my view that description is only a euphemism for an individual's judgment. Judges are as human as anyone and as likely as others to see the world through their own eyes and find the 'collective conscience' remarkably similar to their own. Cf. *Griswold v. Connecticut*, 381 U.S. 479, 518 519, 85 S.Ct. 1678, 1700 1701, 14 L.Ed.2d 510 (1965) (Black, J., dissenting); *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 350 351, 89 S.Ct. 1820, 1827, 23 L.Ed.2d 349 (1969) (Black, J., dissenting).

⁷ To realize how uncertain a standard of 'fundamental fairness' would be, one has only to reflect for a moment on the possible disagreement if the 'fairness' of the procedure in this case were propounded to the head of the National Welfare Rights Organization, the president of the national Chamber of Commerce, and the chairman of the John Birch Society.

The procedure required today as a matter of constitutional law finds no precedent in our legal system. Reduced to its simplest terms, the problem in this case is similar to that frequently encountered when two parties have an ongoing legal relationship that requires one party to make periodic payments to the other. Often the situation arises where the party 'owing' the money stops paying it and

justifies his conduct by arguing that the recipient is not legally entitled to payment. The recipient can, of course, disagree and go to court to compel payment. But I know of no situation in our legal system in which the person alleged to owe money to *278 another is required by law to continue making payments to a judgment-proof claimant without the benefit of any security or bond to insure that these payments can be recovered if he wins his legal argument. Yet today's decision in no way obligates the welfare recipient to pay back any benefits wrongfully received during the pretermination evidentiary hearings or post any bond, and in all 'fairness' it could not do so. These recipients are by definition too poor to post a bond or to repay the benefits that, as the majority assumes, must be spent as received to insure survival.

The Court apparently feels that this decision will benefit the poor and needy. In my judgment the eventual result will be just the opposite. While today's decision requires only an administrative, evidentiary hearing, the inevitable logic of the approach taken will lead to constitutionally imposed, time-consuming delays of a full adversary process of administrative and judicial review. In the next case the welfare recipients are bound to argue that cutting off benefits before judicial review of the agency's decision is also a denial of due process. Since, by hypothesis, **1026 termination of aid at that point may still 'deprive an eligible recipient of the very means by which to live while he waits,' ante, at 1018, I would be surprised if the weighing process did not compel the conclusion that termination without full judicial review would be unconscionable. After all, at each step, as the majority seems to feel, the issue is only one of weighing the government's pocketbook against the actual survival of the recipient, and surely that balance must always tip in favor of the individual. Similarly today's decision requires only the opportunity to have the benefit of counsel at the administrative hearing, but it is difficult to believe that the same reasoning process would not require the appointment of counsel, for otherwise the right to counsel is a meaningless one since these *279 people are too poor to hire their own advocates. Cf. *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792, 796, 9 L.Ed.2d 799 (1963). Thus the end result of today's decision may well be that the government, once it decides to give welfare benefits, cannot reverse that decision until the recipient has had the benefits of full administrative and judicial review, including, of course, the opportunity to present his case to this Court. Since this process will usually entail a delay of several years, the inevitable result of

such a constitutionally imposed burden will be that the government will not put a claimant on the rolls initially until it has made an exhaustive investigation to determine his eligibility. While this Court will perhaps have insured that no needy person will be taken off the rolls without a full 'due process' proceeding, it will also have insured that many will never get on the rolls, or at least that they will remain destitute during the lengthy proceedings followed to determine initial eligibility.


For the foregoing reasons I dissent from the Court's holding. The operation of a welfare state is a new

experiment for our Nation. For this reason, among others, I feel that new experiments in carrying out a welfare program should not be frozen into our constitutional structure. They should be left, as are other legislative determinations, to the Congress and the legislatures that the people elect to make our laws.

All Citations

397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 287

EXHIBIT 299

 KeyC te Ye ow F ag Negat ve Treatment
Not Fo owed on State Law Grounds [Combs v. ICG Hazard, LLC](#),
E.D.Ky., March 2 , 20 3

127 S.Ct. 1955

Supreme Court of the United States

BELL ATLANTIC CORPORATION et al., Petitioners,

v.

[William TWOMBLY](#) et al.

No. 05–1126.

|
Argued Nov. 27, 2006.

|
Decided May 21, 2007.

Synopsis

Background: Consumers brought putative class action against incumbent local exchange carriers (ILECs) alleging antitrust conspiracy, in violation of the Sherman Act, both to prevent competitive entry into local telephone and Internet service markets and to avoid competing with each other in their respective markets. The United States District Court for the Southern District of New York, [Gerard Lynch, J.](#), 313 F.Supp.2d 174, dismissed complaint for failure to state a claim upon which relief could be granted. The United States Court of Appeals for the Second Circuit, 425 F.3d 99, reversed. The Supreme Court granted certiorari.

Holdings: The Supreme Court, Justice [Souter](#), held that:

[1] stating a claim under Sherman Act's restraint of trade provision requires a complaint with enough factual matter, taken as true, to suggest that an agreement was made;

[2] an allegation of parallel business conduct and a bare assertion of conspiracy will not alone suffice to state a claim under the Sherman Act;

[3] dismissal for failure to state a claim upon which relief may be granted does not require appearance, beyond a doubt, that plaintiff can prove no set of facts in support of claim that would entitle him to relief, abrogating [Conley v. Gibson](#), 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80; and


[4] consumers' allegations of parallel conduct were insufficient to state a claim.

Judgment of the Court of Appeals reversed and remanded.

Justice [Stevens](#) filed a dissenting opinion in which Justice [Ginsburg](#) joined in part.

West Headnotes (18)

[1] Antitrust and Trade Regulation

 Cartels, Combinations, Contracts, and Conspiracies in General

Because Sherman Act's restraint of trade provision does not prohibit all unreasonable restraints of trade but only restraints effected by a contract, combination, or conspiracy, the crucial question is whether the challenged anticompetitive conduct stems from independent decision or from an agreement, tacit or express. Sherman Act, § 1, 15 U.S.C.A. § 1.

[128 Cases that cite this headnote](#)


[2] Antitrust and Trade Regulation

 Admissibility

While a showing of parallel business behavior is admissible circumstantial evidence from which the fact finder may infer agreement, it falls short of conclusively establishing agreement or itself constituting an offense under the Sherman Act's restraint of trade provision. Sherman Act, § 1, 15 U.S.C.A. § 1.

[31 Cases that cite this headnote](#)

[3] Antitrust and Trade Regulation

 Cartels, Combinations, Contracts, and Conspiracies in General

Conscious parallelism with respect to business behavior, a common reaction of firms in a concentrated market that recognize their shared economic interests and their interdependence with respect to price and

output decisions, is not in itself unlawful under Sherman Act's restraint of trade provision. Sherman Act, § 1, 15 U.S.C.A. § 1.

[38 Cases that cite this headnote](#)

[4] Antitrust and Trade Regulation

🔑 [Cartels, Combinations, Contracts, and Conspiracies in General](#)

An antitrust conspiracy plaintiff with evidence showing nothing beyond parallel conduct on part of defendants is not entitled to a directed verdict. Sherman Act, § 1, 15 U.S.C.A. § 1.

[32 Cases that cite this headnote](#)

[5] Antitrust and Trade Regulation

🔑 [Restraints and misconduct in general](#)

Proof of a conspiracy under Sherman Act's restraint of trade provision must include evidence tending to exclude the possibility of independent action. Sherman Act, § 1, 15 U.S.C.A. § 1.

[24 Cases that cite this headnote](#)

[6] Federal Civil Procedure

🔑 [Antitrust and price discrimination cases](#)

At the summary judgment stage, an offer of conspiracy evidence by a plaintiff alleging violation of Sherman Act's restraint of trade provision must tend to rule out the possibility that the defendants were acting independently. Sherman Act, § 1, 15 U.S.C.A. § 1.

[97 Cases that cite this headnote](#)

[7] Federal Civil Procedure

🔑 [Claim for relief in general](#)

Federal Civil Procedure

🔑 [Insufficiency in general](#)

While a complaint attacked by a motion to dismiss for failure to state a claim upon which relief can be granted does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief

requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[115486 Cases that cite this headnote](#)

[8] Federal Civil Procedure

🔑 [Insufficiency in general](#)

Federal Civil Procedure

🔑 [Matters deemed admitted; acceptance as true of allegations in complaint](#)

To survive a motion to dismiss for failure to state a claim upon which relief can be granted, factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true even if doubtful in fact. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[127398 Cases that cite this headnote](#)

[9] Federal Civil Procedure

🔑 [Claim for relief in general](#)

While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant set out in detail the facts upon which he bases his claim, the general rule governing pleadings still requires a showing, rather than a blanket assertion, of entitlement to relief; without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only fair notice of the nature of the claim, but also grounds on which the claim rests. Fed.Rules Civ.Proc.Rule 8(a)(2), 28 U.S.C.A.

[21814 Cases that cite this headnote](#)

[10] Antitrust and Trade Regulation

🔑 [Conspiracy or combination](#)

Stating a claim under Sherman Act's restraint of trade provision requires a complaint with enough factual matter, taken as true, to suggest that an agreement was made; asking for plausible grounds to infer an agreement

does not impose a probability requirement at the pleading stage, but simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. Sherman Act, § 1, 15 U.S.C.A. § 1.

[16957 Cases that cite this headnote](#)

[11] Federal Civil Procedure

➤ [Clear or certain nature of insufficiency](#)

A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.

[4771 Cases that cite this headnote](#)

[12] Antitrust and Trade Regulation

➤ [Conspiracy or combination](#)

An allegation of parallel business conduct and a bare assertion of conspiracy will not suffice to state a claim under Sherman Act's restraint of trade provision; without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Sherman Act, § 1, 15 U.S.C.A. § 1.

[1082 Cases that cite this headnote](#)

[13] Antitrust and Trade Regulation

➤ [Conspiracy or combination](#)

When allegations of parallel conduct are set out in order to make a claim under the Sherman Act's restraint of trade provision, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action. Sherman Act, § 1, 15 U.S.C.A. § 1.

[440 Cases that cite this headnote](#)

[14] Federal Civil Procedure

➤ [Claim for relief in general](#)

Federal Civil Procedure

➤ [Clear or certain nature of insufficiency](#)

Dismissal for failure to state a claim upon which relief may be granted does not require appearance, beyond a doubt, that plaintiff can prove no set of facts in support of claim that would entitle him to relief, although once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint; abrogating *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[37460 Cases that cite this headnote](#)

[15] Antitrust and Trade Regulation

➤ [Conspiracy or combination](#)

Consumers' allegations that, by virtue of parallel conduct, incumbent local exchange carriers (ILECs) entered into a contract, combination, or conspiracy to prevent competitive entry into their local telephone and Internet service markets, and agreed not to compete with one another, failed to state claim for violation of Sherman Act's restraint of trade provision, as claim essentially rested on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs. Sherman Act, § 1, 15 U.S.C.A. § 1.

[300 Cases that cite this headnote](#)

[16] Evidence

➤ [Historical facts](#)

Where antitrust complaint quoted portion of statement of one defendant's chief executive officer (CEO) to suggest that defendants conspired together, district court was entitled to take notice of the full contents of the published articles referenced in the complaint, from which the truncated quotations were drawn. Fed.Rules Evid.Rule 201, 28 U.S.C.A.

[393 Cases that cite this headnote](#)

[17] Federal Civil Procedure

➤ [Rules of Civil Procedure](#)

Broadening of a Federal Rule of Civil Procedure can only be accomplished by the process of amending the Federal Rules, and not by judicial interpretation.

[78 Cases that cite this headnote](#)

[18] Federal Civil Procedure

🔑 Certainty, Definiteness and Particularity

On certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than that required by general rule governing pleadings. [Fed.Rules Civ.Proc.Rules 8, 9\(b c\)](#), 28 U.S.C.A.

[140 Cases that cite this headnote](#)

****1958 *544 Syllabus ***

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See [United States v. Detroit Timber & Lumber Co.](#), 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

The 1984 divestiture of the American Telephone & Telegraph Company's (AT & T) local telephone business left a system of regional service monopolies, sometimes called Incumbent Local Exchange Carriers (ILECs), and a separate long-distance market from which the ILECs were excluded. The Telecommunications Act of 1996 withdrew approval of the ILECs' monopolies, "fundamentally restructur[ing] local telephone markets" and "subject[ing] [ILECs] to a host of duties intended to facilitate market entry." [AT & T Corp. v. Iowa Utilities Bd.](#), 525 U.S. 366, 371, 119 S.Ct. 721, 142 L.Ed.2d 835. It also authorized them to enter the long-distance market. "Central to the [new] scheme [was each ILEC's] obligation ... to share its network with" competitive local exchange carriers (CLECs). [Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP](#), 540 U.S. 398, 402, 124 S.Ct. 872, 157 L.Ed.2d 823.

Respondents (hereinafter plaintiffs) represent a class of subscribers of local telephone and/or high speed Internet services in this action against petitioner ILECs for claimed

violations of § 1 of the Sherman Act, which prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations." The complaint alleges that the ILECs conspired to restrain trade (1) by engaging in parallel conduct in their respective service areas to inhibit the growth of upstart CLECs; and (2) by agreeing to refrain from competing against one another, as indicated by their common failure to pursue attractive business opportunities in contiguous markets and by a statement by one ILEC's chief executive officer that competing in another ILEC's territory did not seem right. The District Court dismissed the complaint, concluding that parallel business conduct allegations, taken alone, do not state a claim under § 1; plaintiffs must allege additional facts tending to exclude independent self-interested conduct as an explanation for the parallel actions. Reversing, the Second Circuit held that plaintiffs' parallel conduct allegations were sufficient to withstand a motion to dismiss because the ILECs failed to show that there is no set of facts that would permit plaintiffs to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.

***545 Held:**

1. Stating a § 1 claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. An allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Pp. 1963–1970.

(a) Because § 1 prohibits "only restraints effected by a contract, combination, or conspiracy," [Copperweld Corp. v. Independence Tube Corp.](#), 467 U.S. 752, 775, 104 S.Ct. 2731, 81 L.Ed.2d 628, "[t]he crucial question" is whether the challenged anticompetitive conduct "stem[s] from independent decision or from an agreement," [Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.](#), 346 U.S. 537, 540, 74 S.Ct. 257, 98 L.Ed. 273. While a showing of parallel "business behavior is admissible circumstantial evidence from which" agreement may be inferred, it falls short of "conclusively establish[ing] agreement or ... itself constitut[ing] a Sherman Act offense." *Id.*, at 540–541, 74 S.Ct. 257. The inadequacy of showing parallel conduct or interdependence, without more, ****1959** mirrors the behavior's ambiguity: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market. Thus, this Court has

hedged against false inferences from identical behavior at a number of points in the trial sequence, e.g., at the summary judgment stage, see *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538. Pp. 1963–1964.

(b) This case presents the antecedent question of what a plaintiff must plead in order to state a § 1 claim. Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief,” in order to “give the defendant fair notice of what the ... claim is and the grounds upon which it rests,” *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80. While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, *ibid.*, a plaintiff’s obligation to provide the “grounds” of his “entitle[ment] to relief” requires more than labels and conclusions, and a formulaic recitation of a cause of action’s elements will not do. Factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all of the complaint’s allegations are true. Applying these general standards to a § 1 claim, stating a claim requires a complaint with enough factual matter to suggest an agreement. Asking for plausible grounds does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement. The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects Rule 8(a)(2)’s threshold requirement that the “plain statement” possess enough heft to “sho[w] that the pleader is entitled to relief.” A parallel *546 conduct allegation gets the § 1 complaint close to stating a claim, but without further factual enhancement it stops short of the line between possibility and plausibility. The requirement of allegations suggesting an agreement serves the practical purpose of preventing a plaintiff with “ ‘a largely groundless claim’ ” from “ ‘tak[ing] up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.’ ” *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347, 125 S.Ct. 1627, 161 L.Ed.2d 577. It is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive. That potential expense is obvious here, where plaintiffs represent a putative class of at least 90 percent of subscribers to local telephone or high-speed

Internet service in an action against America’s largest telecommunications firms for unspecified instances of antitrust violations that allegedly occurred over a 7 year period. It is no answer to say that a claim just shy of plausible entitlement can be weeded out early in the discovery process, given the common lament that the success of judicial supervision in checking discovery abuse has been modest. Plaintiffs’ main argument against the plausibility standard at the pleading stage is its ostensible conflict with a literal reading of *Conley*’s statement construing Rule 8: “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” 355 U.S., at 45–46, 78 S.Ct. 99. The “no set of facts” language has been questioned, criticized, and explained away long enough by courts and commentators, **1960 and is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. *Conley* described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint’s survival. Pp. 1964–1970.

2. Under the plausibility standard, plaintiffs’ claim of conspiracy in restraint of trade comes up short. First, the complaint leaves no doubt that plaintiffs rest their § 1 claim on descriptions of parallel conduct, not on any independent allegation of actual agreement among the ILECs. The nub of the complaint is the ILECs’ parallel behavior, and its sufficiency turns on the suggestions raised by this conduct when viewed in light of common economic experience. Nothing in the complaint invests either the action or inaction alleged with a plausible conspiracy suggestion. As to the ILECs’ supposed agreement to disobey the 1996 Act and thwart the CLECs’ attempts to compete, the District Court correctly found that nothing in the complaint intimates that resisting the upstarts was anything more than the natural, unilateral reaction of each *547 ILEC intent on preserving its regional dominance. The complaint’s general collusion premise fails to answer the point that there was no need for joint encouragement to resist the 1996 Act, since each ILEC had reason to try to avoid dealing with CLECs and would have tried to keep them out, regardless of the other ILECs’ actions. Plaintiffs’ second conspiracy theory rests on the competitive reticence among the ILECs themselves in the wake of the 1996 Act to enter into

their competitors' territories, leaving the relevant market highly compartmentalized geographically, with minimal competition. This parallel conduct did not suggest conspiracy, not if history teaches anything. Monopoly was the norm in telecommunications, not the exception. Because the ILECs were born in that world, doubtless liked it, and surely knew the adage about him who lives by the sword, a natural explanation for the noncompetition is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same. Antitrust conspiracy was not suggested by the facts adduced under either theory of the complaint, which thus fails to state a valid § 1 claim. This analysis does not run counter to *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, 122 S.Ct. 992, 152 L.Ed.2d 1, which held that “a complaint in an employment discrimination lawsuit [need] not contain specific facts establishing a prima facie case of discrimination.” Here, the Court is not requiring heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed. Pp. 1970–1974.

425 F.3d 99, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, THOMAS, BREYER, and ALITO, JJ., joined. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, except as to Part IV, *post*, p. 1974.

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Opinion

Justice SOUTER delivered the opinion of the Court.

*548 Liability under § 1 of the Sherman Act, 15 U.S.C. § 1, requires a “contract, combination ..., or conspiracy, in restraint of trade or commerce.” The question in this putative class action is whether a § 1 complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to *549 competition, absent some factual context suggesting agreement, as distinct from identical, independent action. We hold that such a complaint should be dismissed.

I

The upshot of the 1984 divestiture of the American Telephone & Telegraph Company's (AT & T) local telephone business was a system of regional service monopolies (variously called “Regional Bell Operating Companies,” “Baby Bells,” or “Incumbent Local Exchange Carriers” (ILECs)), and a separate, competitive market for long-distance service from which the ILECs were excluded. More than a decade later, Congress withdrew approval of the ILECs' monopolies by enacting the Telecommunications Act of 1996 (1996 Act), 110 Stat. 56, which “fundamentally restructure[d] local telephone markets” and “subject[ed] [ILECs] to a host of duties intended to facilitate market entry.” *AT & T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 371, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999). In recompense, the 1996 Act set conditions for authorizing ILECs to enter the long-distance market. See 47 U.S.C. § 271.

“Central to the [new] scheme [was each ILEC's] obligation ... to share its network with competitors,” *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 402, 124 S.Ct. 872, 157 L.Ed.2d 823 (2004), which came to be known as “competitive local exchange carriers” (CLECs), Pet. for Cert. 6, n. 1. A CLEC could make use of an ILEC's network in any of three ways: by (1) “purchas[ing] local telephone services at wholesale rates for resale to end users,” (2) “leas[ing] elements of the [ILEC's] network ‘on an unbundled basis,’ ” or (3) “interconnect[ing] its own facilities with the [ILEC's] network.” *Iowa Utilities Bd., supra*, at 371, 119 S.Ct. 721 (quoting 47 U.S.C. § 251(c)). Owing to the “considerable expense and effort” required to make unbundled network elements available to rivals at wholesale prices, *Trinko, supra*, at 410, 124 S.Ct. 872, the ILECs vigorously litigated the scope of the sharing obligation imposed by the 1996 Act, with the result that the Federal Communications Commission (FCC) three times *550 revised **1962 its regulations to narrow the range of network elements to be shared with the CLECs. See *Covad Communications Co. v. FCC*, 450 F.3d 528, 533 534 (C.A.D.C.2006) (summarizing the 10 year long regulatory struggle between the ILECs and CLECs).

Respondents William Twombly and Lawrence Marcus (hereinafter plaintiffs) represent a putative class consisting of all “subscribers of local telephone and/or high speed internet services ... from February 8, 1996 to present.” Amended Complaint in No. 02 CIV. 10220(GEL) (SDNY) ¶ 53, App. 28 (hereinafter Complaint). In this action against petitioners, a group of ILECs, plaintiffs seek treble damages and declaratory and injunctive relief for claimed violations of § 1 of the Sherman Act, ch. 647, 26 Stat. 209, as amended, 15 U.S.C. § 1, which prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.”

1 The 1984 divestiture of AT & T's local telephone service created seven Regional Bell Operating Companies. Through a series of mergers and acquisitions, those seven companies were consolidated into the four ILECs named in this suit: BellSouth Corporation, Qwest Communications International, Inc., SBC Communications, Inc., and Verizon Communications, Inc. (successor in interest to Bell Atlantic Corporation). Complaint ¶ 21,

App. 16. Together, these ILECs allegedly control 90 percent or more of the market for local telephone service in the 48 contiguous States. *Id.*, ¶ 48, App. 26.

The complaint alleges that the ILECs conspired to restrain trade in two ways, each supposedly inflating charges for local telephone and high-speed Internet services. Plaintiffs say, first, that the ILECs “engaged in parallel conduct” in their respective service areas to inhibit the growth of upstart CLECs. Complaint ¶ 47, App. 23 26. Their actions allegedly included making unfair agreements with the CLECs for access to ILEC networks, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLECs' relations with their own customers. *Ibid.* According to the complaint, the ILECs' *551 “compelling common motivatio[n]” to thwart the CLECs' competitive efforts naturally led them to form a conspiracy; “[h]ad any one [ILEC] not sought to prevent CLECs ... from competing effectively ..., the resulting greater competitive inroads into that [ILEC's] territory would have revealed the degree to which competitive entry by CLECs would have been successful in the other territories in the absence of such conduct.” *Id.*, ¶ 50, App. 26 27.

Second, the complaint charges agreements by the ILECs to refrain from competing against one another. These are to be inferred from the ILECs' common failure “meaningfully [to] pursu[e]” “attractive business opportunit[ies]” in contiguous markets where they possessed “substantial competitive advantages,” *id.*, ¶¶ 40 41, App. 21 22, and from a statement of Richard Notebaert, chief executive officer (CEO) of the ILEC Qwest, that competing in the territory of another ILEC “ ‘might be a good way to turn a quick dollar but that doesn't make it right,’ ” *id.*, ¶ 42, App. 22.

The complaint couches its ultimate allegations this way:

“In the absence of any meaningful competition between the [ILECs] in one another's markets, and in light of the parallel course of conduct that each engaged in to prevent competition from CLECs within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information **1963 and belief that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets

and have agreed not to compete with one another and otherwise allocated customers and markets to one another.” *Id.*, ¶ 51, App. 27.²

² In setting forth the grounds for § 1 relief, the complaint repeats these allegations in substantially similar language:

“Beginning at least as early as February 6, 1996, and continuing to the present, the exact dates being unknown to Plaintiffs, Defendants and their co-conspirators engaged in a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets by, among other things, agreeing not to compete with one another and to stifle attempts by others to compete with them and otherwise allocating customers and markets to one another in violation of Section 1 of the Sherman Act. *Id.*, ¶ 64, App. 30-31.

*552 The United States District Court for the Southern District of New York dismissed the complaint for failure to state a claim upon which relief can be granted. The District Court acknowledged that “plaintiffs may allege a conspiracy by citing instances of parallel business behavior that suggest an agreement,” but emphasized that “while [c]ircumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy[, ...] “conscious parallelism” has not yet read conspiracy out of the Sherman Act entirely.’ ” 313 F.Supp.2d 174, 179 (2003) (quoting *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541, 74 S.Ct. 257, 98 L.Ed. 273 (1954); alterations in original). Thus, the District Court understood that allegations of parallel business conduct, taken alone, do not state a claim under § 1; plaintiffs must allege additional facts that “ten[d] to exclude independent self-interested conduct as an explanation for defendants’ parallel behavior.” 313 F.Supp.2d, at 179. The District Court found plaintiffs’ allegations of parallel ILEC actions to discourage competition inadequate because “the behavior of each ILEC in resisting the incursion of CLECs is fully explained by the ILEC’s own interests in defending its individual territory.” *Id.*, at 183. As to the ILECs’ supposed agreement against competing with each other, the District Court found that the complaint does not “alleg[e] facts ... suggesting that refraining from competing in other territories as CLECs was contrary to [the ILECs’] apparent economic interests, and consequently [does] not

rais[e] an inference that [the ILECs’] actions were the result of a conspiracy.” *Id.*, at 188.

*553 The Court of Appeals for the Second Circuit reversed, holding that the District Court tested the complaint by the wrong standard. It held that “plus factors are not *required* to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal.” 425 F.3d 99, 114 (2005) (emphasis in original). Although the Court of Appeals took the view that plaintiffs must plead facts that “include conspiracy among the realm of ‘plausible’ possibilities in order to survive a motion to dismiss,” it then said that “to rule that allegations of parallel anticompetitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.” *Ibid.*

We granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct, 548 U.S. 903, 126 S.Ct. 2965, 165 L.Ed.2d 949 (2006), and now reverse.

**1964 II

A

[1] [2] [3] Because § 1 of the Sherman Act “does not prohibit [all] unreasonable restraints of trade ... but only restraints effected by a contract, combination, or conspiracy,” *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 775, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), “[t]he crucial question” is whether the challenged anticompetitive conduct “stem[s] from independent decision or from an agreement, tacit or express,” *Theatre Enterprises*, 346 U.S., at 540, 74 S.Ct. 257. While a showing of parallel “business behavior is admissible circumstantial evidence from which the fact finder may infer agreement,” it falls short of “conclusively establish[ing] agreement or ... itself constitut[ing] a Sherman Act offense.” *Id.*, at 540-541, 74 S.Ct. 257. Even “conscious parallelism,” a common reaction of “firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions” *554 is “not in itself unlawful.” *Brooke Group Ltd. v. Brown &*

Williamson Tobacco Corp., 509 U.S. 209, 227, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993); see 6 P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 1433a, p. 236 (2d ed.2003) (hereinafter *Areeda & Hovenkamp*) (“The courts are nearly unanimous in saying that mere interdependent parallelism does not establish the contract, combination, or conspiracy required by Sherman Act § 1”); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 *Harv. L.Rev.* 655, 672 (1962) (“[M]ere interdependence of basic price decisions is not conspiracy”).

[4] [5] [6] The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market. See, e.g., AEI Brookings Joint Center for Regulatory Studies, Epstein, *Motions to Dismiss Antitrust Cases: Separating Fact from Fantasy*, Related Publication 06 08, pp. 3 4 (2006) (discussing problem of “false positives” in § 1 suits). Accordingly, we have previously hedged against false inferences from identical behavior at a number of points in the trial sequence. An antitrust conspiracy plaintiff with evidence showing nothing beyond parallel conduct is not entitled to a directed verdict, see *Theatre Enterprises, supra*; proof of a § 1 conspiracy must include evidence tending to exclude the possibility of independent action, see *Monsanto Co. v. Spray Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984); and at the summary judgment stage a § 1 plaintiff’s offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently, see *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

B

[7] [8] [9] This case presents the antecedent question of what a plaintiff must plead in order to state a claim under § 1 of the *555 Sherman Act. *Federal Rule of Civil Procedure 8(a)(2)* requires only “a short and plain statement of the claim showing that the pleader is entitled to relief,” in order to “give the defendant fair notice of what the ... claim is and the grounds upon which it rests,” *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). While a complaint attacked by a Rule

12(b)(6) motion to dismiss does not need detailed factual allegations, *ibid.*; *Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251 (C.A.7 1994), a plaintiff’s obligation to provide the **1965 “grounds” of his “entitle[ment] to relief” requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, see *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) (on a motion to dismiss, courts “are not bound to accept as true a legal conclusion couched as a factual allegation”). Factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, pp. 235 236 (3d ed.2004) (hereinafter *Wright & Miller*) (“[T]he pleading must contain something more ... than ... a statement of facts that merely creates a suspicion [of] a legally cognizable right of action”),³ on the assumption that all the allegations in the complaint are true (even if doubtful in fact), see, e.g., *Swierkiewicz v. *556 Sorema N. A.*, 534 U.S. 506, 508, n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); *Neitzke v. Williams*, 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989) (“Rule 12(b)(6) does not countenance ... dismissals based on a judge’s disbelief of a complaint’s factual allegations”); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (a well-pleaded complaint may proceed even if it appears “that a recovery is very remote and unlikely”).

3 The dissent greatly oversimplifies matters by suggesting that the Federal Rules somehow dispensed with the pleading of facts altogether. See *post*, at 1979 (opinion of STEVENS, J.) (pleading standard of Federal Rules “does not require, or even invite, the pleading of facts”). While, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant “set out *in detail* the facts upon which he bases his claim, *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) (emphasis added), *Rule 8(a)(2)* still requires a “showing, rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only “fair notice of the nature of the claim, but also “grounds on which the claim rests. See 5 *Wright & Miller* § 1202, at 94, 95 (*Rule 8(a)* “contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented and does not authorize a pleader’s “bare averment that he wants relief and is entitled to it”).

[10] [11] [12] [13] In applying these general standards to a § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.⁴ And, of course, a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and “that a recovery is very remote and unlikely.” *Ibid.* In identifying facts that are suggestive enough to render a § 1 conspiracy plausible, we have the benefit of the prior rulings and considered views of leading commentators, already quoted, that lawful parallel conduct fails to bespeak unlawful agreement. It makes sense to say, therefore, that an allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.

⁴ Commentators have offered several examples of parallel conduct allegations that would state a § 1 claim under this standard. See, e.g., 6 Areeda & Hovenkamp ¶ 1425, at 167 185 (discussing “parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties”); Blechman, *Conscious Parallelism, Signalling and Facilitating Devices: The Problem of Tacit Collusion Under the Antitrust Laws*, 24 N.Y.L. S. L.Rev. 881, 899 (1979) (describing “conduct that] indicates the sort of restricted freedom of action and sense of obligation that one generally associates with agreement”). The parties in this case agree that “complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason, would support a plausible inference of conspiracy. Brief for Respondents 37; see also Reply Brief for Petitioners 12.

The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects

the threshold requirement of Rule 8(a)(2) that the “plain statement” possess enough heft to “sho[w] that the pleader is entitled to relief.” A statement of parallel conduct, even conduct consciously undertaken, needs some setting suggesting the agreement necessary to make out a § 1 claim; without that further circumstance pointing toward a meeting of the minds, an account of a defendant’s commercial efforts stays in neutral territory. An allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of “entitle[ment] to relief.” Cf. *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 56 (C.A.1 1999) (“[T]erms like ‘conspiracy,’ or even ‘agreement,’ are border-line: they might well be sufficient in conjunction with a more specific allegation for example, identifying a written agreement or even a basis for inferring a tacit agreement, ... but a court is not required to accept such terms as a sufficient basis for a complaint”).⁵

⁵ The border in *DM Research* was the line between the conclusory and the factual. Here it lies between the factually neutral and the factually suggestive. Each must be crossed to enter the realm of plausible liability.

We alluded to the practical significance of the Rule 8 entitlement requirement in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005), when we explained that something beyond the mere possibility of loss causation must be alleged, lest a plaintiff with “‘a largely groundless claim’” be allowed to “‘take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value.’” *Id.*, at 347, 125 S.Ct. 1627 (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975)). So, when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, “‘this basic deficiency should ... be exposed at the point of minimum expenditure of time and money by the parties and the court.’” 5 Wright & Miller § 1216, at 233 234 (quoting *Daves v. Hawaiian Dredging Co.*, 114 F.Supp. 643, 645 (D.Hawaii 1953)); see also *Dura*, *supra*, at 346, 125 S.Ct. 1627; *Asahi Glass Co. v. Pentech Pharmaceuticals, Inc.*, 289 F.Supp.2d 986, 995 (N.D.Ill.2003) (*Posner, J., sitting by designation*) (“[S]ome threshold of plausibility must be crossed at the outset before a patent antitrust case should

be permitted to go into its inevitably costly and protracted discovery phase”).

Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, cf. ****1967** *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962), but quite another to forget that proceeding to antitrust discovery can be expensive. As we indicated over 20 years ago in *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 528, n. 17, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), “a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.” See also *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (C.A.7 1984) (“[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint”); Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y. & U. L.Rev. 1887, 1898-1899 (2003) (discussing the unusually high cost of discovery in antitrust cases); ***559** *Manual for Complex Litigation, Fourth*, § 30, p. 519 (2004) (describing extensive scope of discovery in antitrust cases); Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000) (reporting that discovery accounts for as much as 90 percent of litigation costs when discovery is actively employed). That potential expense is obvious enough in the present case: plaintiffs represent a putative class of at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States, in an action against America's largest telecommunications firms (with many thousands of employees generating reams and gigabytes of business records) for unspecified (if any) instances of antitrust violations that allegedly occurred over a period of seven years.

It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through “careful case management,” *post*, at 1975, given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side. See, *e.g.*,

Easterbrook, *Discovery as Abuse*, 69 B.U.L.Rev. 635, 638 (1989) (“Judges can do little about impositional discovery when parties control the legal claims to be presented and conduct the discovery themselves”). And it is self-evident that the problem of discovery abuse cannot be solved by “careful scrutiny of evidence at the summary judgment stage,” much less “lucid instructions to juries,” *post*, at 1975; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no “‘reasonably founded hope that the [discovery] process will reveal relevant evidence’ ” to support a § 1 claim. ***560** *Dura*, 544 U.S., at 347, 125 S.Ct. 1627, 161 L.Ed.2d 577, (quoting *Blue Chip Stamps, supra*, at 741, 95 S.Ct. 1917; alteration in *Dura*).⁶

⁶ The dissent takes heart in the reassurances of plaintiffs' counsel that discovery would be “ ‘phased and “limited to the existence of the alleged conspiracy and class certification. *Post*, at 1987. But determining whether some illegal agreement may have taken place between unspecified persons at different ILECs (each a multibillion dollar corporation with legions of management level employees) at some point over seven years is a sprawling, costly, and hugely time consuming undertaking not easily susceptible to the kind of line drawing and case management that the dissent envisions. Perhaps the best answer to the dissent's optimism that antitrust discovery is open to effective judicial control is a more extensive quotation of the authority just cited, a judge with a background in antitrust law. Given the system that we have, the hope of effective judicial supervision is slim:

“The timing is all wrong. The plaintiff files a sketchy complaint (the Rules of Civil Procedure discourage fulsome documents), and discovery is launched. A judicial officer does not know the details of the case the parties will present and in theory *cannot* know the details. Discovery is used to find the details. The judicial officer always knows less than the parties, and the parties themselves may not know very well where they are going or what they expect to find. A magistrate supervising discovery does not cannot know the expected productivity of a given request, because the nature of the requester's claim and the contents of the files (or head) of the adverse party are unknown.

Judicial officers cannot measure the costs and benefits to the requester and so cannot isolate impositional requests. Requesters have no reason to disclose their own estimates because they gain from imposing costs on rivals (and may lose from an improvement in accuracy). The portions of the Rules of Civil Procedure calling on judges to trim back excessive demands, therefore, have been, and are doomed to be, hollow. We cannot prevent what we cannot detect; we cannot detect what we cannot define; we cannot define 'abusive discovery except in theory, because in practice we lack essential information. Easterbrook, *Discovery as Abuse*, 69 B.U.L.Rev. 635, 638 639 (1989) (footnote omitted).

****1968** [14] Plaintiffs do not, of course, dispute the requirement of plausibility and the need for something more than merely parallel behavior explained in *Theatre Enterprises*, *Monsanto*, and *Matsushita*, and their main argument against the plausibility standard at the pleading stage is its ostensible ***561** conflict with an early statement of ours construing Rule 8. Justice Black's opinion for the Court in *Conley v. Gibson* spoke not only of the need for fair notice of the grounds for entitlement to relief but of "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." 355 U.S., at 45 46, 78 S.Ct. 99. This "no set of facts" language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings; and the Court of Appeals appears to have read *Conley* in some such way when formulating its understanding of the proper pleading standard, see 425 F.3d, at 106, 114 (invoking *Conley's* "no set of facts" language in describing the standard for dismissal).⁷

⁷ The Court of Appeals also relied on Chief Judge Clark's suggestion in *Nagler v. Admiral Corp.*, 248 F.2d 319 (C.A.2 1957), that facts indicating parallel conduct alone suffice to state a claim under § 1. 425 F.3d, at 114 (citing *Nagler*, *supra*, at 325). But *Nagler* gave no explanation for citing *Theatre Enterprises* (which upheld a denial of a directed verdict for plaintiff on the ground that proof of parallelism was not proof of conspiracy) as authority that pleading parallel conduct sufficed to plead a Sherman Act conspiracy. Now that *Monsanto Co. v. Spray Rite Service Corp.*, 465 U.S. 752, 104

S.Ct. 1464, 79 L.Ed.2d 775 (1984), and *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), have made it clear that neither parallel conduct nor conscious parallelism, taken alone, raise the necessary implication of conspiracy, it is time for a fresh look at adequacy of pleading when a claim rests on parallel action.

On such a focused and literal reading of *Conley's* "no set of facts," a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some "set of [undisclosed] facts" to support recovery. So here, the Court of Appeals specifically found the prospect of unearthing direct evidence of conspiracy sufficient to preclude dismissal, even though the complaint ****1969** does not set forth a single ***562** fact in a context that suggests an agreement. 425 F.3d, at 106, 114. It seems fair to say that this approach to pleading would dispense with any showing of a " 'reasonably founded hope' " that a plaintiff would be able to make a case, see *Dura*, 544 U.S., at 347, 125 S.Ct. 1627 (quoting *Blue Chip Stamps*, 421 U.S., at 741, 95 S.Ct. 1917); Mr. Micawber's optimism would be enough.

Seeing this, a good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard. See, e.g., *Car Carriers*, 745 F.2d, at 1106 ("*Conley* has never been interpreted literally" and, "[i]n practice, a complaint ... must contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory" (internal quotation marks omitted; emphasis and omission in original)); *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1155 (C.A.9 1989) (tension between *Conley's* "no set of facts" language and its acknowledgment that a plaintiff must provide the "grounds" on which his claim rests); *O'Brien v. DiGrazia*, 544 F.2d 543, 546, n. 3 (C.A.1 1976) ("[W]hen a plaintiff ... supplies facts to support his claim, we do not think that *Conley* imposes a duty on the courts to conjure up unpleaded facts that might turn a frivolous claim of unconstitutional ... action into a substantial one"); *McGregor v. Industrial Excess Landfill, Inc.*, 856 F.2d 39, 42 43 (C.A.6 1988) (quoting *O'Brien's* analysis); Hazard, *From Whom No Secrets Are Hid*, 76 Tex. L.Rev. 1665, 1685 (1998) (describing *Conley* as having "turned Rule 8 on its head"); Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 Colum. L.Rev. 433, 463 465 (1986) (noting tension

between *Conley* and subsequent understandings of Rule 8).

We could go on, but there is no need to pile up further citations to show that *Conley's* “no set of facts” language has been questioned, criticized, and explained away long enough. To be fair to the *Conley* Court, the passage should be understood in light of the opinion's preceding summary of the complaint's *563 concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief. But the passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. See *Sanjuan*, 40 F.3d, at 251 (once a claim for relief has been stated, a plaintiff “receives the benefit of imagination, so long as the hypotheses are consistent with the complaint”); accord, *Swierkiewicz*, 534 U.S., at 514, 122 S.Ct. 992; *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 256, 114 S.Ct. 798, 127 L.Ed.2d 99 (1994); *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 249–250, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989); *Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). *Conley*, then, described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival.⁸

⁸ Because *Conley's* “no set of facts” language was one of our earliest statements about pleading under the Federal Rules, it is no surprise that it has since been “cited as authority” by this Court and others. *Post*, at 1978. Although we have not previously explained the circumstances and rejected the literal reading of the passage embraced by the Court of Appeals, our analysis comports with this Court's statements in the years since *Conley*. See *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005) (requiring “‘reasonably founded hope that the [discovery] process will reveal relevant evidence to support the claim (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975)); (alteration in *Dura*)); *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 526, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983) (“It is not ... proper to

assume that the plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged”); *Wilson v. Schmettler*, 365 U.S. 381, 383, 81 S.Ct. 632, 5 L.Ed.2d 620 (1961) (“In the absence of ... an allegation that the arrest was made without probable cause] the courts below could not, nor can we, assume that respondents arrested petitioner without probable cause to believe that he had committed ... a narcotics offense”). Nor are we reaching out to decide this issue in a case where the matter was not raised by the parties, see *post*, at 1979, since both the ILECs and the Government highlight the problems stemming from a literal interpretation of *Conley's* “no set of facts” language and seek clarification of the standard. Brief for Petitioners 27–28; Brief for United States as *Amicus Curiae* 22–25; see also Brief for Respondents 17 (describing “petitioners and their amici as mounting an ‘attack on *Conley's* ‘no set of facts’ standard”).

The dissent finds relevance in Court of Appeals precedents from the 1940s, which allegedly gave rise to *Conley's* “no set of facts” language. See *post*, at 1979–1981. Even indulging this line of analysis, these cases do not challenge the understanding that, before proceeding to discovery, a complaint must allege facts suggestive of illegal conduct. See, e.g., *Leimer v. State Mut. Life Assurance Co. of Worcester, Mass.*, 108 F.2d 302, 305 (C.A.8 1940) (“‘[I]f, in view of what is alleged, it can reasonably be conceived that the plaintiffs ... could, upon a trial, establish a case which would entitle them to ... relief, the motion to dismiss should not have been granted”); *Continental Collieries, Inc. v. Shober*, 130 F.2d 631, 635 (C.A.3 1942) (“No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it”). Rather, these cases stand for the unobjectionable proposition that, when a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder. Cf. *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974) (a district court weighing a motion to dismiss asks “not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims”).

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[15] When we look for plausibility in this complaint, we agree with the District Court that plaintiffs' claim of conspiracy in restraint of trade comes up short. To begin with, the complaint leaves no doubt that plaintiffs rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs. *Supra*, at 1962-1963. Although in form a few stray statements speak directly of agreement,⁹ on fair reading these are merely legal conclusions resting on the prior allegations. Thus, the complaint *565 first takes account of the alleged "absence of any meaningful competition between [the ILECs] in one another's markets," "the parallel course of conduct that each [ILEC] engaged in to prevent competition from CLECs," "and the other facts and market circumstances alleged [earlier]"; "in light of" these, the complaint concludes "that [the ILECs] have entered into a contract, combination or conspiracy to prevent competitive entry into their ... markets and have agreed not to compete with one another." Complaint ¶ 51, App. 27.⁰ The nub of the **1971 complaint, then, is the ILECs' parallel behavior, consisting of steps to keep the CLECs out and manifest disinterest in becoming CLECs themselves, and its sufficiency turns on the suggestions raised by this conduct when viewed in light of common economic experience.

⁹ See Complaint ¶¶ 51, 64, App. 27, 30-31 (alleging that ILECs engaged in a "contract, combination or conspiracy and agreed not to compete with one another).

¹⁰ If the complaint had not explained that the claim of agreement rested on the parallel conduct described, we doubt that the complaint's references to an agreement among the ILECs would have given the notice required by Rule 8. Apart from identifying a 7-year span in which the § 1 violations were supposed to have occurred (*i. e.*, "beginning at least as early as February 6, 1996, and continuing to the present," *id.*, ¶ 64, App. 30), the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies. This lack of notice contrasts sharply with the model form for pleading negligence, Form 9, which the dissent says exemplifies the kind of "bare allegation that survives a motion to dismiss." *Post*, at 1977. Whereas the model form alleges that

the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified date and time, the complaint here furnishes no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place. A defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer; a defendant seeking to respond to plaintiffs' conclusory allegations in the § 1 context would have little idea where to begin.

¹¹ The dissent's quotations from the complaint leave the impression that plaintiffs directly allege illegal agreement; in fact, they proceed exclusively via allegations of parallel conduct, as both the District Court and Court of Appeals recognized. See 313 F.Supp.2d 174, 182 (S.D.N.Y.2003); 425 F.3d 99, 102-104 (C.A.2 2005).

*566 We think that nothing contained in the complaint invests either the action or inaction alleged with a plausible suggestion of conspiracy. As to the ILECs' supposed agreement to disobey the 1996 Act and thwart the CLECs' attempts to compete, we agree with the District Court that nothing in the complaint intimates that the resistance to the upstarts was anything more than the natural, unilateral reaction of each ILEC intent on keeping its regional dominance. The 1996 Act did more than just subject the ILECs to competition; it obliged them to subsidize their competitors with their own equipment at wholesale rates. The economic incentive to resist was powerful, but resisting competition is routine market conduct, and even if the ILECs flouted the 1996 Act in all the ways the plaintiffs allege, see *id.*, ¶ 47, App. 23-24, there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway; so natural, in fact, that if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a § 1 violation against almost any group of competing businesses would be a sure thing.

The complaint makes its closest pass at a predicate for conspiracy with the claim that collusion was necessary because success by even one CLEC in an ILEC's territory "would have revealed the degree to which competitive entry by CLECs would have been successful in the other territories." *Id.*, ¶ 50, App. 26-27. But, its logic aside, this general premise still fails to answer the point that there was just no need for joint encouragement to resist the 1996 Act; as the District Court said, "each ILEC has reason to want to avoid dealing with CLECs" and "each

ILEC would attempt to keep CLECs out, regardless of the actions of the other ILECs.” 313 F.Supp.2d, at 184; cf. *Kramer v. Pollock Krasner Foundation*, 890 F.Supp. 250, 256 (S.D.N.Y.1995) (while the plaintiff “may believe the defendants conspired ..., the defendants' allegedly conspiratorial actions *567 could equally have been prompted by lawful, independent goals which do not constitute a conspiracy”).²

12 From the allegation that the ILECs belong to various trade associations, see Complaint ¶ 46, App. 23, the dissent playfully suggests that they conspired to restrain trade, an inference said to be “buttressed by the common sense of Adam Smith. *Post*, at 1985-1986, 1987-1988. If Adam Smith is peering down today, he may be surprised to learn that his tongue-in-cheek remark would be authority to force his famous pinmaker to devote financial and human capital to hire lawyers, prepare for depositions, and otherwise fend off allegations of conspiracy; all this just because he belonged to the same trade guild as one of his competitors when their pins carried the same price tag.

**1972 Plaintiffs' second conspiracy theory rests on the competitive reticence among the ILECs themselves in the wake of the 1996 Act, which was supposedly passed in the “ ‘hop[e] that the large incumbent local monopoly companies ... might attack their neighbors' service areas, as they are the best situated to do so.’ ” Complaint ¶ 38, App. 20 (quoting Consumer Federation of America, *Lessons from 1996 Telecommunications Act: Deregulation Before Meaningful Competition Spells Consumer Disaster*, p. 12 (Feb. 2000)). Contrary to hope, the ILECs declined “ ‘to enter each other's service territories in any significant way,’ ” Complaint ¶ 38, App. 20, and the local telephone and high-speed Internet market remains highly compartmentalized geographically, with minimal competition. Based on this state of affairs, and perceiving the ILECs to be blessed with “especially attractive business opportunities” in surrounding markets dominated by other ILECs, the plaintiffs assert that the ILECs' parallel conduct was “strongly suggestive of conspiracy.” *Id.*, ¶ 40, App. 21.

But it was not suggestive of conspiracy, not if history teaches anything. In a traditionally unregulated industry with low barriers to entry, sparse competition among large firms dominating separate geographical segments of the market could very well signify illegal agreement, but

here we have an obvious alternative explanation. In the decade *568 preceding the 1996 Act and well before that, monopoly was the norm in telecommunications, not the exception. See *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 477-478, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002) (describing telephone service providers as traditional public monopolies). The ILECs were born in that world, doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword. Hence, a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.

[16] [17] [18] In fact, the complaint itself gives reasons to believe that the ILECs would see their best interests in keeping to their old turf. Although the complaint says generally that the ILECs passed up “especially attractive business opportunit[ies]” by declining to compete as CLECs against other ILECs, Complaint ¶ 40, App. 21, it does not allege that competition as CLECs was potentially any more lucrative than other opportunities being pursued by the ILECs during the same period,³ and **1973 the complaint is replete with indications that any CLEC faced nearly insurmountable barriers to profitability owing to the ILECs' flagrant resistance to the network sharing requirements of the 1996 Act, *id.*, ¶ 47, App. *569-23-26. Not only that, but even without a monopolistic tradition and the peculiar difficulty of mandating shared networks, “[f]irms do not expand without limit and none of them enters every market that an outside observer might regard as profitable, or even a small portion of such markets.” Areeda & Hovenkamp ¶ 307d, at 155 (Supp.2006) (commenting on the case at bar). The upshot is that Congress may have expected some ILECs to become CLECs in the legacy territories of other ILECs, but the disappointment does not make conspiracy plausible. We agree with the District Court's assessment that antitrust conspiracy was not suggested by the facts adduced under either theory of the complaint, which thus fails to state a valid § 1 claim.⁴

13 The complaint quoted a reported statement of Qwest's CEO, Richard Notebaert, to suggest that the ILECs declined to compete against each other despite recognizing that it “ ‘might be a good way to turn a quick dollar.’ ” ¶ 42, App. 22 (quoting *Chicago Tribune*, Oct. 31, 2002, Business Section, p. 1). This was only part of what he reportedly said, however,

and the District Court was entitled to take notice of the full contents of the published articles referenced in the complaint, from which the truncated quotations were drawn. See [Fed. Rule Evid. 201](#).

Notebaert was also quoted as saying that entering new markets as a CLEC would not be “a sustainable economic model” because the CLEC pricing model is “just ... nuts. Chicago Tribune, Oct. 31, 2002, Business Section, p. 1 (cited at Complaint ¶ 42, App. 22). Another source cited in the complaint quotes Notebaert as saying he thought it “unwise to “base a business plan on the privileges accorded to CLECs under the 1996 Act because the regulatory environment was too unstable. Chicago Tribune, Dec. 19, 2002, Business Section, p. 2 (cited at Complaint ¶ 45, App. 23).

14

In reaching this conclusion, we do not apply any “heightened pleading standard, nor do we seek to broaden the scope of [Federal Rule of Civil Procedure 9](#), which can only be accomplished “ ‘by the process of amending the Federal Rules, and not by judicial interpretation. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 515, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (quoting *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993)). On certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than [Rule 8](#) requires. [Fed. Rules Civ. Proc. 9\(b\) \(c\)](#). Here, our concern is not that the allegations in the complaint were insufficiently “particular ized], *ibid.*; rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs’ entitlement to relief plausible.

Plaintiffs say that our analysis runs counter to *Swierkiewicz*, 534 U.S., at 508, 122 S.Ct. 992, 152 L.Ed.2d 1, which held that “a complaint in an employment discrimination lawsuit [need] not contain specific facts establishing a prima facie case of discrimination under the framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792[, 93 S.Ct. 1817, 36 L.Ed.2d 668] (1973).” They argue that just as the prima facie case is a “flexible evidentiary standard” that “should not be transposed into a rigid pleading standard for discrimination cases,” *Swierkiewicz*, *supra*, at 512, 122 S.Ct. 992, “transpos[ing] ‘plus factor’ summary judgment analysis woodenly into a rigid [Rule 12\(b\)\(6\)](#) pleading standard ... would be unwise,” Brief for Respondents 39. As the District Court *570 correctly understood, however, “*Swierkiewicz* did not change the law of pleading, but simply re-emphasized ... that the [Second Circuit's use of a heightened pleading](#)

standard for Title VII cases was contrary to the Federal Rules’ structure of liberal pleading requirements.” 313 F.Supp.2d, at 181 (citation and footnote omitted). Even though *Swierkiewicz's* pleadings “detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination,” the Court of Appeals dismissed his complaint for failing to allege certain additional facts that *Swierkiewicz* would need at the trial stage to support his claim in the absence of direct evidence of discrimination. *Swierkiewicz*, 534 U.S., at 514, 122 S.Ct. 992. We reversed on the ground that the Court of Appeals had impermissibly applied what amounted to a heightened pleading requirement by insisting that *Swierkiewicz* allege “specific facts” beyond those necessary to state his **1974 claim and the grounds showing entitlement to relief. *Id.*, at 508, 122 S.Ct. 992.

Here, in contrast, we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.

* * *

The judgment of the Court of Appeals for the Second Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice [STEVENS](#), with whom Justice [GINSBURG](#) joins except as to Part IV, dissenting.

In the first paragraph of its 23 page opinion the Court states that the question to be decided is whether allegations that “major telecommunications providers engaged in certain *571 parallel conduct unfavorable to competition” suffice to state a violation of § 1 of the Sherman Act. *Ante*, at 1961. The answer to that question has been settled for more than 50 years. If that were indeed the issue, a summary reversal citing *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 74 S.Ct. 257, 98 L.Ed. 273 (1954), would adequately resolve this case. As *Theatre Enterprises* held, parallel conduct is circumstantial evidence admissible on the issue

of conspiracy, but it is not itself illegal. *Id.*, at 540-542, 74 S.Ct. 257.

Thus, this is a case in which there is no dispute about the substantive law. If the defendants acted independently, their conduct was perfectly lawful. If, however, that conduct is the product of a horizontal agreement among potential competitors, it was unlawful. The plaintiffs have alleged such an agreement and, because the complaint was dismissed in advance of answer, the allegation has not even been denied. Why, then, does the case not proceed? Does a judicial opinion that the charge is not “plausible” provide a legally acceptable reason for dismissing the complaint? I think not.

Respondents' amended complaint describes a variety of circumstantial evidence and makes the straightforward allegation that petitioners

“entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.” Amended Complaint in No. 02 CIV. 10220(GEL) (SDNY) ¶ 51, App. 27 (hereinafter Complaint).

The complaint explains that, contrary to Congress' expectation when it enacted the 1996 Telecommunications Act, and consistent with their own economic self-interests, petitioner Incumbent Local Exchange Carriers (ILECs) have assiduously avoided infringing upon each other's markets and have *572 refused to permit nonincumbent competitors to access their networks. The complaint quotes Richard Notebaert, the former chief executive officer of one such ILEC, as saying that competing in a neighboring ILEC's territory “ ‘might be a good way to turn a quick dollar but that doesn't make it right.’ ” *Id.*, ¶ 42, App. 22. Moreover, respondents allege that petitioners “communicate amongst themselves” through numerous industry associations. *Id.*, ¶ 46, App. 23. In sum, respondents allege that petitioners entered into an agreement that has long been recognized as a classic *per se* **1975 violation of the Sherman Act. See Report of the Attorney General's National Committee to Study the Antitrust Laws 26 (1955).

Under rules of procedure that have been well settled since well before our decision in *Theatre Enterprises*, a judge

ruling on a defendant's motion to dismiss a complaint “must accept as true all of the factual allegations contained in the complaint.” *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002); see *Overstreet v. North Shore Corp.*, 318 U.S. 125, 127, 63 S.Ct. 494, 87 L.Ed. 656 (1943). But instead of requiring knowledgeable executives such as Notebaert to respond to these allegations by way of sworn depositions or other limited discovery and indeed without so much as requiring petitioners to file an answer denying that they entered into any agreement the majority permits immediate dismissal based on the assurances of company lawyers that nothing untoward was afoot. The Court embraces the argument of those lawyers that “there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway,” *ante*, at 1971; that “there was just no need for joint encouragement to resist the 1996 Act,” *ibid.*; and that the “natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing,” *ante*, at 1972.

The Court and petitioners' legal team are no doubt correct that the parallel conduct alleged is consistent with the absence *573 of any contract, combination, or conspiracy. But that conduct is also entirely consistent with the *presence* of the illegal agreement alleged in the complaint. And the charge that petitioners “agreed not to compete with one another” is not just one of “a few stray statements,” *ante*, at 1970; it is an allegation describing unlawful conduct. As such, the Federal Rules of Civil Procedure, our longstanding precedent, and sound practice mandate that the District Court at least require some sort of response from petitioners before dismissing the case.

Two practical concerns presumably explain the Court's dramatic departure from settled procedural law. Private antitrust litigation can be enormously expensive, and there is a risk that jurors may mistakenly conclude that evidence of parallel conduct has proved that the parties acted pursuant to an agreement when they in fact merely made similar independent decisions. Those concerns merit careful case management, including strict control of discovery, careful scrutiny of evidence at the summary judgment stage, and lucid instructions to juries; they do not, however, justify the dismissal of an adequately pleaded complaint without even requiring

the defendants to file answers denying a charge that they in fact engaged in collective decisionmaking. More importantly, they do not justify an interpretation of [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) that seems to be driven by the majority's appraisal of the plausibility of the ultimate factual allegation rather than its legal sufficiency.

I

[Rule 8\(a\)\(2\) of the Federal Rules](#) requires that a complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” The Rule did not come about by happenstance, and its language is not inadvertent. The English experience with Byzantine special pleading rules illustrated by the hypertechnical Hilary rules of [*574](#) 1834 made [**1976](#) obvious the appeal of a pleading standard that was easy for the common litigant to understand and sufficed to put the defendant on notice as to the nature of the claim against him and the relief sought. Stateside, David Dudley Field developed the highly influential New York Code of 1848, which required “[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.” An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of this State, ch. 379, § 120(2), 1848 N.Y. Laws pp. 497, 521. Substantially similar language appeared in the Federal Equity Rules adopted in 1912. See Fed. Equity Rule 25 (requiring “a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence”).

¹ See 9 W. Holdsworth, *History of English Law* 324 (1926).

A difficulty arose, however, in that the Field Code and its progeny required a plaintiff to plead “facts” rather than “conclusions,” a distinction that proved far easier to say than to apply. As commentators have noted,

“it is virtually impossible logically to distinguish among ‘ultimate facts,’ ‘evidence,’ and ‘conclusions.’ Essentially any allegation in a pleading must be an assertion that certain occurrences took place. The pleading spectrum, passing from evidence through ultimate facts to conclusions, is largely a continuum varying only in the degree of particularity with which

the occurrences are described.” Weinstein & Distler, [Comments on Procedural Reform: Drafting Pleading Rules](#), 57 *Colum. L.Rev.* 518, 520–521 (1957).

See also Cook, *Statements of Fact in Pleading Under the Codes*, 21 *Colum. L.Rev.* 416, 417 (1921) (hereinafter Cook) (“[T]here is no logical distinction between statements which are grouped by the courts under the phrases ‘statements of [*575](#) fact’ and ‘conclusions of law’”). [Rule 8](#) was directly responsive to this difficulty. Its drafters intentionally avoided any reference to “facts” or “evidence” or “conclusions.” See 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1216, p. 207 (3d ed.2004) (hereinafter Wright & Miller) (“The substitution of ‘claim showing that the pleader is entitled to relief’ for the code formulation of the ‘facts’ constituting a ‘cause of action’ was intended to avoid the distinctions drawn under the codes among ‘evidentiary facts,’ ‘ultimate facts,’ and ‘conclusions’ ...”).

Under the relaxed pleading standards of the Federal Rules, the idea was not to keep litigants out of court but rather to keep them in. The merits of a claim would be sorted out during a flexible pretrial process and, as appropriate, through the crucible of trial. See [Swierkiewicz](#), 534 U.S., at 514, 122 S.Ct. 992 (“The liberal notice pleading of [Rule 8\(a\)](#) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim”). Charles E. Clark, the “principal draftsman” of the Federal Rules,² put it thus:

² [Gulfstream Aerospace Corp. v. Mayacamas Corp.](#), 485 U.S. 271, 283, 108 S.Ct. 1133, 99 L.Ed.2d 296 (1988).

“Experience has shown ... that we cannot expect the proof of the case to be made through the pleadings, and that such proof is really not their function. We can expect a general statement distinguishing the case from all others, so that the manner and form of trial and remedy expected are clear, and so that a permanent judgment will result.” [**1977](#) *The New Federal Rules of Civil Procedure: The Last Phase Underlying Philosophy Embodied in Some of the Basic Provisions of the New Procedure*, 23 *A.B.A.J.* 976, 977 (1937) (hereinafter Clark, *New Federal Rules*).

The pleading paradigm under the new Federal Rules was well illustrated by the inclusion in the appendix of Form 9, [*576](#) a complaint for negligence. As relevant, the Form 9 complaint states only: “On June 1, 1936,

in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.” Form 9, Complaint for Negligence, Forms App., *Fed. Rules Civ. Proc.*, 28 U.S.C.App., p. 829 (hereinafter Form 9). The complaint then describes the plaintiff’s injuries and demands judgment. The asserted ground for relief namely, the defendant’s negligent driving would have been called a “ ‘conclusion of law’ ” under the code pleading of old. See, e.g., *Cook* 419. But that bare allegation suffices under a system that “restrict[s] the pleadings to the task of general notice-giving and invest[s] the deposition-discovery process with a vital role in the preparation for trial.”³ *Hickman v. Taylor*, 329 U.S. 495, 501, 67 S.Ct. 385, 91 L.Ed. 451 (1947); see also *Swierkiewicz*, 534 U.S., at 513, n. 4, 122 S.Ct. 992 (citing Form 9 as an example of “ ‘the simplicity and brevity of statement which the rules contemplate’ ”); *Thomson v. Washington*, 362 F.3d 969, 970 (C.A.7 2004) (Posner, J.) (“The federal rules replaced fact pleading with notice pleading”).

³ The Federal Rules do impose a “particularity requirement on “all averments of fraud or mistake, *Fed. Rule Civ. Proc.* 9(b), neither of which has been alleged in this case. We have recognized that the canon of *expressio unius est exclusio alterius* applies to Rule 9(b). See *Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993).

II

It is in the context of this history that *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), must be understood. The *Conley* plaintiffs were black railroad workers who alleged that their union local had refused to protect them against discriminatory discharges, in violation of the National Railway Labor Act. The union sought to dismiss the complaint on the ground that its general allegations of discriminatory treatment by the defendants lacked sufficient specificity. Writing *577 for a unanimous Court, Justice Black rejected the union’s claim as foreclosed by the language of Rule 8. *Id.*, at 47-48, 78 S.Ct. 99. In the course of doing so, he articulated the formulation the Court rejects today: “In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his

claim which would entitle him to relief.” *Id.*, at 45-46, 78 S.Ct. 99.

Consistent with the design of the Federal Rules, *Conley*’s “no set of facts” formulation permits outright dismissal only when proceeding to discovery or beyond would be futile. Once it is clear that a plaintiff has stated a claim that, if true, would entitle him to relief, matters of proof are appropriately relegated to other stages of the trial process. Today, however, in its explanation of a decision to dismiss a complaint that it regards as a fishing expedition, the Court scraps *Conley*’s “no set of facts” language. Concluding that the phrase has been “questioned, criticized, and explained away long enough,” *ante*, at 1969, the Court dismisses it as careless composition.

****1978** If *Conley*’s “no set of facts” language is to be interred, let it not be without a eulogy. That exact language, which the majority says has “puzzl[ed] the profession for 50 years,” *ante*, at 1969, 355 U.S. 41, 2 L.Ed.2d 80, has been cited as authority in a dozen opinions of this Court and four separate writings.⁴ In not one of *578 those 16 opinions was the language “questioned,” “criticized,” or “explained away.” Indeed, today’s opinion is the first by any Member of this Court to express *any* doubt as to the adequacy of the *Conley* formulation. Taking their cues from the federal courts, 26 States and the District of Columbia utilize as their standard for dismissal of a complaint the very language the majority repudiates: whether it appears “beyond doubt” that “no set of facts” in support of the claim would entitle the plaintiff to relief.⁵

⁴ *SEC v. Zandford*, 535 U.S. 813, 818, 122 S.Ct. 1899, 153 L.Ed.2d 1 (2002); *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629, 654, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 811, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993); *Brower v. County of Inyo*, 489 U.S. 593, 598, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989); *Hughes v. Rowe*, 449 U.S. 5, 10, 101 S.Ct. 173, 66 L.Ed.2d 163 (1980) (*per curiam*); *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246, 100 S.Ct. 502, 62 L.Ed.2d 441 (1980); *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976); *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Cruz v. Beto*, 405 U.S. 319, 322, 92 S.Ct.

1079, 31 L.Ed.2d 263 (1972) (*per curiam*); *Haines v. Kerner*, 404 U.S. 519, 521, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) (*per curiam*); *Jenkins v. McKeithen*, 395 U.S. 411, 422, 89 S.Ct. 1843, 23 L.Ed.2d 404 (1969) (plurality opinion); see also *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532, 554, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) (Brennan, J., concurring in part and dissenting in part); *Hoover v. Ronwin*, 466 U.S. 558, 587, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984) (STEVENS, J., dissenting); *United Air Lines, Inc. v. Evans*, 431 U.S. 553, 561, n. 1, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977) (Marshall, J., dissenting); *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 55, n. 6, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976) (Brennan, J., concurring in judgment).

5 See, e.g., *EB Invs., LLC v. Atlantis Development, Inc.*, 930 So.2d 502, 507 (Ala.2005); *Department of Health & Social Servs. v. Native Village of Curyung*, 151 P.3d 388, 396 (Alaska 2006); *Newman v. Maricopa Cty.*, 167 Ariz. 501, 503, 808 P.2d 1253, 1255 (App.1991); *Public Serv. Co. of Colo. v. Van Wyk*, 27 P.3d 377, 385 386 (Colo.2001) (en banc); *Clawson v. St. Louis Post Dispatch, LLC*, 906 A.2d 308, 312 (D.C.2006); *Hillman Constr. Corp. v. Wainer*, 636 So.2d 576, 578 (Fla.App.1994); *Kaplan v. Kaplan*, 266 Ga. 612, 613, 469 S.E.2d 198, 199 (1996); *Wright v. Home Depot U.S.A., Inc.*, 111 Hawai'i 401, 406, 142 P.3d 265, 270 (2006); *Taylor v. Maile*, 142 Idaho 253, 257, 127 P.3d 156, 160 (2005); *Fink v. Bryant*, 2001 CC 0987, p. 4 (La.11/28/01), 801 So.2d 346, 349; *Gagne v. Cianbro Corp.*, 431 A.2d 1313, 1318 1319 (Me.1981); *Gasior v. Massachusetts Gen. Hospital*, 446 Mass. 645, 647, 846 N.E.2d 1133, 1135 (2006); *Ralph Walker, Inc. v. Gallagher*, 926 So.2d 890, 893 (Miss.2006); *Jones v. Montana Univ. System*, 337 Mont. 1, 7, 155 P.3d 1247, 1252 (2007); *Johnston v. Nebraska Dept. of Correctional Servs.*, 270 Neb. 987, 989, 709 N.W.2d 321, 324 (2006); *Blackjack Bonding v. Las Vegas Munic. Ct.*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000); *Shepard v. Owen Fed. Bank*, 361 N.C. 137, 139, 638 S.E.2d 197, 199 (2006); *Rose v. United Equitable Ins. Co.*, 2001 ND 154, ¶ 10, 632 N.W.2d 429, 434; *State ex rel. Turner v. Houk*, 112 Ohio St.3d 561, 562, 2007 Ohio 814, ¶ 5, 862 N.E.2d 104, 105 (*per curiam*); *Moneypenney v. Dawson*, 2006 OK 53, ¶ 2, 141 P.3d 549, 551; *Gagnon v. State*, 570 A.2d 656, 659 (R.I.1990); *Osloond v. Farrier*, 2003 SD 28, ¶ 4, 659 N.W.2d 20, 22 (*per curiam*); *Smith v. Lincoln Brass Works, Inc.*, 712 S.W.2d 470, 471 (Tenn.1986); *Association of Haystack Property Owners, Inc. v. Sprague*, 145 Vt. 443, 446, 494 A.2d 122, 124 (1985); *In re Coday*, 156 Wash.2d 485, 497, 130 P.3d 809, 815

(2006) (en banc); *Haines v. Hampshire Cty. Commn*, 216 W.Va. 499, 502, 607 S.E.2d 828, 831 (2004); *Warren v. Hart*, 747 P.2d 511, 512 (Wyo.1987); see also *Malpiede v. Townson*, 780 A.2d 1075, 1082 1083 (Del.2001) (permitting dismissal only “where the court determines with reasonable certainty that the plaintiff could prevail on no set of facts that may be inferred from the well pleaded allegations in the complaint (internal quotation marks omitted)); *Canel v. Topinka*, 212 Ill.2d 311, 318, 288 Ill.Dec. 623, 818 N.E.2d 311, 317 (2004) (replacing “appears beyond doubt in the *Conley* formulation with “is clearly apparent); *In re Young*, 522 N.E.2d 386, 388 (Ind.1988) (*per curiam*) (replacing “appears beyond doubt with “appears to a certainty); *Barkema v. Williams Pipeline Co.*, 666 N.W.2d 612, 614 (Iowa 2003) (holding that a motion to dismiss should be sustained “only when there exists no conceivable set of facts entitling the non moving party to relief); *Pioneer Village v. Bullitt Cty.*, 104 S.W.3d 757, 759 (Ky.2003) (holding that judgment on the pleadings should be granted “if it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him/her to relief); *Corley v. Detroit Bd. of Ed.*, 470 Mich. 274, 277, 681 N.W.2d 342, 345 (2004) (*per curiam*) (holding that a motion for judgment on the pleadings should be granted only “ ‘if no factual development could possibly justify recovery); *Oberkramer v. Ellisville*, 706 S.W.2d 440, 441 (Mo.1986) (en banc) (omitting the words “beyond doubt from the *Conley* formulation); *Colman v. Utah State Land Bd.*, 795 P.2d 622, 624 (Utah 1990) (holding that a motion to dismiss is appropriate “only if it clearly appears that the plaintiff] can prove no set of facts in support of his claim); *NRC Management Servs. Corp. v. First Va. Bank Southwest*, 63 Va. Cir. 68, 70, 2003 WL 23540085 (2003) (“The Virginia standard is identical to the *Conley* formulation], though the Supreme Court of Virginia may not have used the same words to describe it).

****1979 *579** Petitioners have not requested that the *Conley* formulation be retired, nor have any of the six amici who filed briefs in support of petitioners. I would not rewrite the Nation's civil procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so. Congress has established a process a rulemaking process for revisions of that order. See 28 U.S.C. §§ 2072 2074 (2000 ed. and Supp. IV).

Today's majority calls *Conley's* “ ‘no set of facts’ ” language “an incomplete, negative gloss on an accepted

pleading standard: once a claim has been stated adequately, it may be *580 supported by showing any set of facts consistent with the allegations in the complaint.” *Ante*, at 1969. This is not and cannot be what the *Conley* Court meant. First, as I have explained, and as the *Conley* Court well knew, the pleading standard the Federal Rules meant to codify does not require, or even invite, the pleading of facts.⁶ The “pleading standard” label the majority gives to what it reads into the *Conley* opinion a statement of the permissible factual support for an adequately pleaded complaint would not, therefore, have impressed the *Conley* Court itself. Rather, that Court would have understood the majority’s remodeling of its language to express an *evidentiary* standard, which the *Conley* Court had neither need nor want to explicate. Second, it is pellucidly clear that the *Conley* Court was interested in what a complaint *must* contain, not what it *may* contain. In fact, the Court said without qualification that it was “appraising the *sufficiency* of **1980 the complaint.” 355 U.S., at 45, 78 S.Ct. 99 (emphasis added). It was, to paraphrase today’s majority, describing “the minimum standard of adequate pleading to govern a complaint’s survival,” *ante*, at 1969.

⁶ The majority is correct to say that what the Federal Rules require is a “‘showing of entitlement to relief. *Ante*, at 1965, n. 3. Whether and to what extent that “showing requires allegations of fact will depend on the particulars of the claim. For example, had the amended complaint in this case alleged *only* parallel conduct, it would not have made the required “showing. See *supra*, at 1974. Similarly, had the pleadings contained *only* an allegation of agreement, without specifying the nature or object of that agreement, they would have been susceptible to the charge that they did not provide sufficient notice that the defendants may answer intelligently. Omissions of that sort instance the type of “bareness with which the Federal Rules are concerned. A plaintiff’s inability to persuade a district court that the allegations actually included in her complaint are “plausible is an altogether different kind of failing, and one that should not be fatal at the pleading stage.

We can be triply sure as to *Conley*’s meaning by examining the three Court of Appeals cases the *Conley* Court cited as support for the “accepted rule” that “a complaint should not *581 be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” 355 U.S., at 45 46, 78 S.Ct. 99. In the first case,

Leimer v. State Mut. Life Assurance Co. of Worcester, Mass., 108 F.2d 302 (C.A.8 1940), the plaintiff alleged that she was the beneficiary of a life insurance plan and that the insurance company was wrongfully withholding proceeds from her. In reversing the District Court’s grant of the defendant’s motion to dismiss, the Eighth Circuit noted that court’s own longstanding rule that, to warrant dismissal, “‘it should appear from the allegations that a cause of action does not exist, rather than that a cause of action has been defectively stated.’” *Id.*, at 305 (quoting *Winget v. Rockwood*, 69 F.2d 326, 329 (C.A.8 1934)).

The *Leimer* court viewed the Federal Rules specifically Rules 8(a)(2), 12(b)(6), 12(e) (motion for a more definite statement), and 56 (motion for summary judgment) as reinforcing the notion that “there is no justification for dismissing a complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim.” 108 F.2d, at 306. The court refuted in the strongest terms any suggestion that the unlikelihood of recovery should determine the fate of a complaint: “No matter how improbable it may be that she can prove her claim, she is entitled to an opportunity to make the attempt, and is not required to accept as final a determination of her rights based upon inferences drawn in favor of the defendant from her amended complaint.” *Ibid.*

The Third Circuit relied on *Leimer*’s admonition in *Continental Collieries, Inc. v. Shober*, 130 F.2d 631 (1942), which the *Conley* Court also cited in support of its “no set of facts” formulation. In a diversity action the plaintiff alleged breach of contract, but the District Court dismissed the complaint on the ground that the contract appeared to be unenforceable under state law. The Court of Appeals reversed, *582 concluding that there were facts in dispute that went to the enforceability of the contract, and that the rule at the pleading stage was as in *Leimer*: “No matter how likely it may seem that the pleader will be unable to prove his case, he is entitled, upon averring a claim, to an opportunity to try to prove it.” 130 F.3d, at 635.

The third case the *Conley* Court cited approvingly was written by Judge Clark himself. In *Dioguardi v. Durning*, 139 F.2d 774 (C.A.2 1944), the *pro se* plaintiff, an importer of “tonics,” charged the customs inspector with auctioning off the plaintiff’s former merchandise for less

than was bid for it and indeed for an amount equal to the plaintiff's own bid and complained that two cases of tonics went missing three weeks before the sale. The inference, hinted at by the averments but never stated in so many words, was that the defendant fraudulently denied the plaintiff his rightful claim to the tonics, which, if true, would have violated federal law. Writing six years after the adoption of the Federal Rules he held the lead rein in drafting, Judge Clark said that the defendant

“could have disclosed the facts from his point of view, in advance of a trial if he ****1981** chose, by asking for a pre-trial hearing or by moving for a summary judgment with supporting affidavits. But, as it stands, we do not see how the plaintiff may properly be deprived of his day in court to show what he obviously so firmly believes and what for present purposes defendant must be taken as admitting.” *Id.*, at 775.

As any civil procedure student knows, Judge Clark's opinion disquieted the defense bar and gave rise to a movement to revise [Rule 8](#) to require a plaintiff to plead a “ ‘cause of action.’ ” See [5 Wright & Miller § 1201, at 86-87](#). The movement failed, see *ibid.*; *Dioguardi* was explicitly approved in *Conley*; and “[i]n retrospect the case itself seems to be a ***583** routine application of principles that are universally accepted,” [5 Wright & Miller § 1220, at 284-285](#).

In light of *Leimer*, *Continental Collieries*, and *Dioguardi*, *Conley*'s statement that a complaint is not to be dismissed unless “no set of facts” in support thereof would entitle the plaintiff to relief is hardly “puzzling,” *ante*, at 1969. It reflects a philosophy that, unlike in the days of code pleading, separating the wheat from the chaff is a task assigned to the pretrial and trial process. *Conley*'s language, in short, captures the policy choice embodied in the Federal Rules and binding on the federal courts.

We have consistently reaffirmed that basic understanding of the Federal Rules in the half century since *Conley*. For example, in *Scheuer v. Rhodes*, [416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 \(1974\)](#), we reversed the Court of Appeals' dismissal on the pleadings when the respondents, the Governor and other officials of the State of Ohio, argued that the petitioners' claims were barred by sovereign immunity. In a unanimous opinion by then-Justice Rehnquist, we emphasized:

“When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. *Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.*” *Id.*, at 236, [94 S.Ct. 1683](#) (emphasis added).

The *Rhodes* plaintiffs had “alleged generally and in conclusory terms” that the defendants, by calling out the National Guard to suppress the Kent State University student protests, “were guilty of wanton, wilful and negligent conduct.” *Krause v. Rhodes*, [471 F.2d 430, 433 \(C.A.6 1972\)](#). We reversed the Court of Appeals on the ground that “[w]hatever ***584** the plaintiffs may or may not be able to establish as to the merits of their allegations, their claims, as stated in the complaints, given the favorable reading required by the Federal Rules of Civil Procedure,” were not barred by the Eleventh Amendment because they were styled as suits against the defendants in their individual capacities. [416 U.S., at 238, 94 S.Ct. 1683](#).

We again spoke with one voice against efforts to expand pleading requirements beyond their appointed limits in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, [507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 \(1993\)](#). Writing for the unanimous Court, Chief Justice Rehnquist rebuffed the Fifth Circuit's effort to craft a standard for pleading municipal liability that accounted for “the enormous expense involved today in litigation,” *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, [954 F.2d 1054, 1057 \(1992\)](#) (internal quotation marks omitted), by requiring a plaintiff to “state with factual ****1982** detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity,” [507 U.S., at 167, 113 S.Ct. 1160, 122 L.Ed.2d 517](#), (internal quotation marks omitted). We found this language inconsistent with [Rules 8\(a\)\(2\) and 9\(b\)](#) and emphasized that motions to dismiss were not the place to combat discovery abuse: “In the absence of [an amendment to [Rule 9\(b\)](#)], federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.” *Id.*, at 168-169, [113 S.Ct. 1160](#).

Most recently, in *Swierkiewicz*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1, we were faced with a case more similar to the present one than the majority will allow. In discrimination cases, our precedents require a plaintiff at the summary judgment stage to produce either direct evidence of discrimination or, if the claim is based primarily on circumstantial evidence, to meet the shifting evidentiary burdens imposed under the framework articulated in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). See, e.g., *585 *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985). *Swierkiewicz* alleged that he had been terminated on account of national origin in violation of Title VII of the Civil Rights Act of 1964. The Second Circuit dismissed the suit on the pleadings because he had not pleaded a prima facie case of discrimination under the *McDonnell Douglas* standard.

We reversed in another unanimous opinion, holding that “under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case.” *Swierkiewicz*, 534 U.S., at 511, 122 S.Ct. 992. We also observed that Rule 8(a)(2) does not contemplate a court’s passing on the merits of a litigant’s claim at the pleading stage. Rather, the “simplified notice pleading standard” of the Federal Rules “relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.” *Id.*, at 512, 122 S.Ct. 992; see Brief for United States et al. as *Amici Curiae* in *Swierkiewicz v. Sorema N. A.*, O.T.2001, No. 00 1853, p. 10 (stating that a Rule 12(b)(6) motion is not “an appropriate device for testing the truth of what is asserted or for determining whether a plaintiff has any evidence to back up what is in the complaint” (internal quotation marks omitted)).⁷

⁷ See also 5 *Wright & Miller* § 1202, at 89 90 (“Pleadings under the rules simply may be a general summary of the party’s position that is sufficient to advise the other party of the event being sued upon, to provide some guidance in a subsequent proceeding as to what was decided for purposes of res judicata and collateral estoppel, and to indicate whether the case should be tried to the court or to a jury. No more is demanded of the pleadings than this; indeed, history

shows that no more can be performed successfully by the pleadings (footnotes omitted)).

As in the discrimination context, we have developed an evidentiary framework for evaluating claims under § 1 of the Sherman Act when those claims rest on entirely circumstantial evidence of conspiracy. See *Matsushita Elec. Industrial *586 Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). Under *Matsushita*, a plaintiff’s allegations of an illegal conspiracy may not, at the summary judgment stage, rest solely on the inferences that may be drawn from the parallel conduct of the defendants. In order to survive a Rule 56 motion, a § 1 plaintiff “must present evidence ‘that tends **1983 to exclude the possibility’ that the alleged conspirators acted independently.” *Id.*, at 588, 106 S.Ct. 1348 (quoting *Monsanto Co. v. Spray Rite Service Corp.*, 465 U.S. 752, 764, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984)). That is, the plaintiff “must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action.” 475 U.S., at 588, 106 S.Ct. 1348.

Everything today’s majority says would therefore make perfect sense if it were ruling on a Rule 56 motion for summary judgment and the evidence included nothing more than the Court has described. But it should go without saying in the wake of *Swierkiewicz* that a heightened production burden at the summary judgment stage does not translate into a heightened pleading burden at the complaint stage. The majority rejects the complaint in this case because in light of the fact that the parallel conduct alleged is consistent with ordinary market behavior the claimed conspiracy is “conceivable” but not “plausible,” *ante*, at 1974. I have my doubts about the majority’s assessment of the plausibility of this alleged conspiracy. See Part III, *infra*. But even if the majority’s speculation is correct, its “plausibility” standard is irreconcilable with Rule 8 and with our governing precedents. As we made clear in *Swierkiewicz* and *Leatherman*, fear of the burdens of litigation does not justify factual conclusions supported only by lawyers’ arguments rather than sworn denials or admissible evidence.

This case is a poor vehicle for the Court’s new pleading rule, for we have observed that “in antitrust cases, where ‘the proof is largely in the hands of the alleged conspirators,’ ... dismissals prior to giving the plaintiff ample *587 opportunity for discovery should be granted

very sparingly.” *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 746, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976) (quoting *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962)); see also *Knuth v. Erie Crawford Dairy Cooperative Assn.*, 395 F.2d 420, 423 (C.A.3 1968) (“The ‘liberal’ approach to the consideration of antitrust complaints is important because inherent in such an action is the fact that all the details and specific facts relied upon cannot properly be set forth as part of the pleadings”). Moreover, the fact that the Sherman Act authorizes the recovery of treble damages and attorney’s fees for successful plaintiffs indicates that Congress intended to encourage, rather than discourage, private enforcement of the law. See *Radovich v. National Football League*, 352 U.S. 445, 454, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957) (“Congress itself has placed the private antitrust litigant in a most favorable position In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws”). It is therefore more, not less, important in antitrust cases to resist the urge to engage in armchair economics at the pleading stage.

The same year we decided *Conley*, Judge Clark wrote, presciently,

“I fear that every age must learn its lesson that special pleading cannot be made to do the service of trial and that live issues between active litigants are not to be disposed of or evaded on the paper pleadings, i.e., the formalistic claims of the parties. Experience has found no quick and easy short cut for trials in cases generally *and antitrust cases in particular.*” Special Pleading in the “Big Case”? in Procedure The Handmaid of Justice 147, 148 (C. Wright & H. Reasoner eds.1965) (hereinafter **1984 Clark, Special Pleading in the Big Case) (emphasis added).

*588 In this “Big Case,” the Court succumbs to the temptation that previous Courts have steadfastly resisted.⁸ While the majority assures us that it is not applying any “‘heightened’” pleading standard, see *ante*, at 1973, n. 14, I shall now explain why I have a difficult time understanding its opinion any other way.

⁸ Our decision in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005), is not to the contrary. There, the plaintiffs failed adequately to allege loss causation, a required element

in a private securities fraud action. Because it alleged nothing more than that the prices of the securities the plaintiffs purchased were artificially inflated, the *Dura* complaint failed to “provid[e] the defendants with notice of what the relevant economic loss might be or of what the causal connection might be between that loss and the alleged misrepresentation. *Id.*, at 347, 125 S.Ct. 1627. Here, the failure the majority identifies is not a failure of notice which “notice pleading rightly condemns but rather a failure to satisfy the Court that the agreement alleged might plausibly have occurred. That being a question not of *notice* but of *proof*, it should not be answered without first hearing from the defendants (as apart from their lawyers).

Similarly, in *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983), in which we also found an antitrust complaint wanting, the problem was not that the injuries the plaintiffs alleged failed to satisfy some threshold of plausibility, but rather that the injuries *as alleged* were not “the type that the antitrust statute was intended to forestall. *Id.*, at 540, 103 S.Ct. 897; see *id.*, at 526, 103 S.Ct. 897 (“As the case comes to us, we must assume that the Union can prove the facts alleged in its amended complaint. It is not, however, proper to assume that the Union can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged).

III

The Court does not suggest that an agreement to do what the plaintiffs allege would be permissible under the antitrust laws, see, e.g., *Associated Gen. Contractors of Cal., Inc. v. Carpenters*, 459 U.S. 519, 526–527, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983). Nor does the Court hold that these plaintiffs have failed to allege an injury entitling them to sue for damages under those laws, see *Brunswick Corp. v. Pueblo Bowl O Mat, Inc.*, 429 U.S. 477, 489–490, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977). Rather, the theory on which the Court permits *589 dismissal is that, so far as the Federal Rules are concerned, no agreement has been alleged at all. This is a mind-boggling conclusion.

As the Court explains, prior to the enactment of the Telecommunications Act of 1996 the law prohibited the defendants from competing with each other. The new statute was enacted to replace a monopolistic market with a competitive one. The Act did not merely require the

regional monopolists to take affirmative steps to facilitate entry to new competitors, see *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 402, 124 S.Ct. 872, 157 L.Ed.2d 823 (2004); it also permitted the existing firms to compete with each other and to expand their operations into previously forbidden territory. See 47 U.S.C. § 271. Each of the defendants decided not to take the latter step. That was obviously an extremely important business decision, and I am willing to presume that each company acted entirely independently in reaching that decision. I am even willing to entertain the majority's belief that any agreement among the companies was unlikely. But the plaintiffs allege in three places in their complaint, ¶¶ 4, 51, 64, App. 11, 27, 30, that the ILECs did in fact agree both to prevent competitors from entering into their local markets and to forgo competition with each other. And as the Court ****1985** recognizes, at the motion to dismiss stage, a judge assumes "that all the allegations in the complaint are true (even if doubtful in fact)." *Ante*, at 1965.

The majority circumvents this obvious obstacle to dismissal by pretending that it does not exist. The Court admits that "in form a few stray statements in the complaint speak directly of agreement," but disregards those allegations by saying that "on fair reading these are merely legal conclusions resting on the prior allegations" of parallel conduct. *Ante*, at 1970. The Court's dichotomy between factual allegations and "legal conclusions" is the stuff of a bygone era, *supra*, at 1976–1977. That distinction was a defining feature of code pleading, see generally Clark, ***590** *The Complaint in Code Pleading*, 35 *Yale L.J.* 259 (1925–1926), but was conspicuously abolished when the Federal Rules were enacted in 1938. See *United States v. Employing Plasterers Assn. of Chicago*, 347 U.S. 186, 188, 74 S.Ct. 452, 98 L.Ed. 618 (1954) (holding, in an antitrust case, that the Government's allegations of effects on interstate commerce must be taken into account in deciding whether to dismiss the complaint "[w]hether these charges be called 'allegations of fact' or 'mere conclusions of the pleader'"); *Brownlee v. Conine*, 957 F.2d 353, 354 (C.A.7 1992) ("The Federal Rules of Civil Procedure establish a system of notice pleading rather than of fact pleading, ... so the happenstance that a complaint is 'conclusory,' whatever exactly that overused lawyers' cliché means, does not automatically condemn it"); *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1, 3–4 (C.A.9 1963) ("[O]ne purpose of Rule 8 was to get away from the

highly technical distinction between statements of fact and conclusions of law ..."); *Oil, Chemical & Atomic Workers Int'l Union v. Delta*, 277 F.2d 694, 697 (C.A.6 1960) ("Under the notice system of pleading established by the Rules of Civil Procedure, ... the ancient distinction between pleading 'facts' and 'conclusions' is no longer significant"); 5 *Wright & Miller* § 1218, at 267 ("[T]he federal rules do not prohibit the pleading of facts or legal conclusions as long as fair notice is given to the parties"). "Defendants entered into a contract" is no more a legal conclusion than "defendant negligently drove," see Form 9; *supra*, at 1977. Indeed it is less of one.⁹

9 The Court suggests that the allegation of an agreement, even if credited, might not give the notice required by Rule 8 because it lacks specificity. *Ante*, at 1970–1971, n. 10. The remedy for an allegation lacking sufficient specificity to provide adequate notice is, of course, a Rule 12(e) motion for a more definite statement. See *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002). Petitioners made no such motion and indeed have conceded that "our problem with the current complaint is not a lack of specificity, it's quite specific. Tr. of Oral Arg. 14. Thus, the fact that "the pleadings mentioned no specific time, place, or persons involved in the alleged conspiracies, *ante*, at 1971, n. 10, is, for our purposes, academic.

591** Even if I were inclined to accept the Court's anachronistic dichotomy and ignore the complaint's actual allegations, I would dispute the Court's suggestion that any inference of agreement from petitioners' parallel conduct is "implausible." Many years ago a truly great economist perceptively observed that "[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." A. Smith, *An Inquiry Into the Nature and Causes of the Wealth of Nations*, in 39 *Great Books of the Western World* 55 (R. Hutchins & M. Adler eds. 1952). I am not so cynical as to accept that sentiment at face value, but I need not do so here. Respondents' complaint *1986** points not only to petitioners' numerous opportunities to meet with each other, Complaint ¶ 46, App. 23,⁰ but also to Notebaert's curious statement that encroaching on a fellow incumbent's territory "might be a good way to turn a quick dollar but that doesn't make it right," *id.*, ¶ 42, App. 22. What did he mean by that? One possible (indeed plausible) inference is that he meant that while it would

be in his company's economic self-interest to compete with its brethren, he had agreed with his competitors not to do so. According to the complaint, that is how the Illinois Coalition for Competitive Telecom construed Notebaert's statement, *id.*, ¶ 44, App. 22 (calling the statement "evidence of potential collusion among regional Bell phone monopolies to not compete *592 against one another and kill off potential competitors in local phone service"), and that is how Members of Congress construed his company's behavior, *id.*, ¶ 45, App. 23 (describing a letter to the Justice Department requesting an investigation into the possibility that the ILECs' "very apparent non-competition policy" was coordinated).

10 The Court describes my reference to the allegation that the defendants belong to various trade associations as "playfully suggesting that the defendants conspired to restrain trade. *Ante*, at 1971 1972, n. 12. Quite the contrary: An allegation that competitors meet on a regular basis, like the allegations of parallel conduct, is consistent with though not sufficient to prove the plaintiffs' entirely serious and unequivocal allegation that the defendants entered into an unlawful agreement. Indeed, if it were true that the plaintiffs "rest their § 1 claim on descriptions of parallel conduct and not on any independent allegation of actual agreement among the ILECs, *ante*, at 1970, there would have been no purpose in including a reference to the trade association meetings in the amended complaint.

Perhaps Notebaert meant instead that competition would be sensible in the short term but not in the long run. That's what his lawyers tell us anyway. See Brief for Petitioners 36. But I would think that no one would know better what Notebaert meant than Notebaert himself. Instead of permitting respondents to ask Notebaert, however, the Court looks to other quotes from that and other articles and decides that what he meant was that entering new markets as a competitive local exchange carrier would not be a "sustainable economic model." *Ante*, at 1972 1973, n. 13. Never mind that as anyone ever interviewed knows a newspaper article is hardly a verbatim transcript; the writer selects quotes to package his story, not to record a subject's views for posterity. But more importantly the District Court was required at this stage of the proceedings to construe Notebaert's ambiguous statement in the plaintiffs' favor. See *Allen v. Wright*, 468 U.S. 737, 767 768, n. 1, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (Brennan, J., dissenting). The inference the statement supports that simultaneous

decisions by ILECs not even to attempt to poach customers from one another once the law authorized them to *593 do so were the product of an agreement sits comfortably within the realm of possibility. That is all the Rules require.

11 It is ironic that the Court seeks to justify its decision to draw factual inferences in the defendants' favor at the pleading stage by citing to a rule of evidence, *ante*, at 1972 1973, n. 13. Under [Federal Rule of Evidence 201\(b\)](#), a judicially noticed fact "must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Whether Notebaert's statements constitute evidence of a conspiracy is hardly beyond reasonable dispute.

To be clear, if I had been the trial judge in this case, I would not have permitted the plaintiffs to engage in massive discovery based solely on the allegations in this complaint. On the other hand, I surely would not have dismissed the complaint **1987 without requiring the defendants to answer the charge that they "have agreed not to compete with one another and otherwise allocated customers and markets to one another." ² Complaint, ¶ 51, App. 27. Even a sworn denial of that charge would not justify a summary dismissal without giving the plaintiffs the opportunity to take depositions from Notebaert and at least one responsible executive representing each of the other defendants.

12 The Court worries that a defendant seeking to respond to this "conclusory allegation "would have little idea where to begin. *Ante*, at 1971, n. 10. A defendant could, of course, begin by either denying or admitting the charge.

Respondents in this case proposed a plan of "phased discovery" limited to the existence of the alleged conspiracy and class certification. Brief for Respondents 25 26. Two petitioners rejected the plan. *Ibid*. Whether or not respondents' proposed plan was sensible, it was an appropriate subject for negotiation. ³ Given the charge in the complaint *594 buttressed by the common sense of Adam Smith I cannot say that the possibility that joint discussions **1988 and perhaps some agreements played a role in petitioners' decisionmaking process is so implausible that dismissing the complaint before any defendant has denied the charge is preferable to

granting respondents even a minimal opportunity *595 to prove their claims. See Clark, *New Federal Rules* 977 (“[T]hrough the weapons of discovery and summary judgment we have developed new devices, with more appropriate penalties to aid in matters of *proof*, and do not need to force the pleadings to their less appropriate function”).

13 The potential for “sprawling, costly, and hugely time consuming discovery, *ante*, at 1967, n. 6, is no reason to throw the baby out with the bathwater. The Court vastly underestimates a district court’s case management arsenal. Before discovery even begins, the court may grant a defendant’s Rule 12(e) motion; Rule 7(a) permits a trial court to order a plaintiff to reply to a defendant’s answer, see *Crawford El v. Britton*, 523 U.S. 574, 598, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998); and Rule 23 requires “rigorous analysis to ensure that class certification is appropriate, *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982); see *In re Initial Public Offering Securities Litigation*, 471 F.3d 24 (C.A.2 2006) (holding that a district court may not certify a class without ruling that each Rule 23 requirement is met, even if a requirement overlaps with a merits issue). Rule 16 invests a trial judge with the power, backed by sanctions, to regulate pretrial proceedings via conferences and scheduling orders, at which the parties may discuss, *inter alia*, “the elimination of frivolous claims or defenses, Rule 16(c)(1); “the necessity or desirability of amendments to the pleadings, Rule 16(c)(2); “the control and scheduling of discovery, Rule 16(c)(6); and “the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems, Rule 16(c)(12). Subsequently, Rule 26 confers broad discretion to control the combination of interrogatories, requests for admissions, production requests, and depositions permitted in a given case; the sequence in which such discovery devices may be deployed; and the limitations imposed upon them. See 523 U.S., at 598–599, 118 S.Ct. 1584. Indeed, Rule 26(c) specifically permits a court to take actions “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense by, for example, disallowing a particular discovery request, setting appropriate terms and conditions, or limiting its scope.

In short, the Federal Rules contemplate that pretrial matters will be settled through a flexible process of give and take, of proffers, stipulations, and stonewalls, not by having trial judges screen allegations for their plausibility *vel non* without requiring an answer from the defendant. See *Societe Internationale Pour Participations Industrielles Et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 206, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958) (“Rule 34 is sufficiently flexible to be adapted to the exigencies of particular litigation”). And should it become apparent over the course of litigation that a plaintiff’s filings bespeak an *in terrorem* suit, the district court has at its call its own *in terrorem* device, in the form of a wide array of Rule 11 sanctions. See Rules 11(b), (c) (authorizing sanctions if a suit is presented “for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation”); see *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, 498 U.S. 533, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991) (holding that Rule 11 applies to a represented party who signs a pleading, motion, or other papers, as well as to attorneys); *Atkins v. Fischer*, 232 F.R.D. 116, 126 (D.D.C.2005) (“As possible sanctions pursuant to Rule 11, the court has an arsenal of options at its disposal”).

I fear that the unfortunate result of the majority’s new pleading rule will be to invite lawyers’ debates over economic theory to conclusively resolve antitrust suits in the absence of any evidence. It is no surprise that the antitrust defense bar among whom “lament” as to inadequate judicial supervision of discovery is most “common,” see *ante*, at 1967 should lobby for this state of affairs. But “we must recall that their primary responsibility is to win cases for their clients, not to improve law administration for the public.” Clark, *Special Pleading in the Big Case* 152. As we did in our prior decisions, we should have instructed them that their remedy was to seek to amend the Federal Rules not our interpretation of them.⁴ See *Swierkiewicz*, 534 U.S., at 515, 122 S.Ct. 992; *Crawford El v. Britton*, 523 U.S. 574, 595, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998); *Leatherman*, 507 U.S., at 168, 113 S.Ct. 1160.

14 Given his “background in antitrust law, *ante*, at 1968, n. 6, Judge Easterbrook has recognized that the most effective solution to discovery abuse lies in the legislative and rulemaking arenas. He has suggested

that the remedy for the ills he complains of requires a revolution in the rules of civil procedure:

“Perhaps a system in which judges pare away issues and focus on] investigation is too radical to contemplate in this country although it prevailed here before 1938, when the Federal Rules of Civil Procedure were adopted. The change could not be accomplished without abandoning notice pleading, increasing the number of judicial officers, and giving them more authority If we are to rule out judge directed discovery, however, we must be prepared to pay the piper. Part of the price is the high cost of unnecessary discovery impositional and otherwise. *Discovery as Abuse*, 69 B.U.L.Rev. 635, 645 (1989).

IV

Just a few weeks ago some of my colleagues explained that a strict interpretation of the literal text of statutory language *596 is essential to avoid judicial decisions that are not faithful to the intent of Congress. *Zuni Public School Dist. No. 89 v. Department of Education*, ante, p. 108, 127 S.Ct. 1534, 167 L.Ed.2d 449, (2007) (SCALIA, J., dissenting). I happen to believe that there are cases in which other tools of construction are more reliable than text, but I agree of course that congressional intent should guide us in matters of statutory interpretation. *Ante*, at 106, 127 S.Ct. 1534, 167 L.Ed.2d 449, (STEVENS, J., concurring). This is a case in which the intentions of the drafters of three important sources of law the Sherman Act, the Telecommunications Act of 1996, and the Federal Rules of Civil Procedure all point unmistakably in the same direction, yet the Court marches resolutely the other way. Whether the Court's actions will benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer. But that the Court has announced a significant new rule that does not even purport to respond to any **1989 congressional command is glaringly obvious.

The transparent policy concern that drives the decision is the interest in protecting antitrust defendants who in this case are some of the wealthiest corporations in our economy from the burdens of pretrial discovery. *Ante*, at 1966–1967. Even if it were not apparent that the legal fees petitioners have incurred in arguing the merits of their Rule 12(b) motion have far exceeded the cost of limited discovery, or that those discovery costs would burden respondents as well as petitioners,⁵ that concern would not provide an adequate justification for this law-changing decision. For in the final analysis it is only a lack of confidence in the ability of trial judges to control discovery, buttressed by appellate judges' independent appraisal of the plausibility of profoundly *597 serious factual allegations, that could account for this stark break from precedent.

15 It would be quite wrong, of course, to assume that dismissal of an antitrust case after discovery is costless to plaintiffs. See *Fed. Rule Civ. Proc. 54(d)(1)* (“ [C]osts other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs).

If the allegation of conspiracy happens to be true, today's decision obstructs the congressional policy favoring competition that undergirds both the Telecommunications Act of 1996 and the Sherman Act itself. More importantly, even if there is abundant evidence that the allegation is untrue, directing that the case be dismissed without even looking at any of that evidence marks a fundamental and unjustified change in the character of pretrial practice.

Accordingly, I respectfully dissent.

All Citations

550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929, 75 USLW 4337, 2007-1 Trade Cases P 75,709, 68 Fed.R.Serv.3d 661, 07 Cal. Daily Op. Serv. 5550, 2007 Daily Journal D.A.R. 7097, 41 Communications Reg. (P&F) 567, 20 Fla. L. Weekly Fed. S 267

EXHIBIT 300

 KeyCite Yellow Flag Negative Treatment
 Distinguished by [United States v. Fattah](#), 3rd Cir.(Pa.), August 9, 2018

618 F.3d 300

United States Court of Appeals,
Third Circuit.

In re INSURANCE BROKERAGE
ANTITRUST LITIGATION

OptiCare Health Systems, Inc., Comcar Industries, Inc., Sunburst Hospitality Corporation, Robert Mulcahy, Golden Gate Bridge, Highway and Transportation District, Glenn Singer, Redwood Oil Company, Omni Group of Companies, Bayou Steel Corporation, Clear Lam Packaging, Inc., Collect, LLC, Enclave, LLC, Gateway Club Apartments, Ltd., Michigan Multi-King, Inc., City of Stamford, Belmont Holdings Corporation, Tri-State Container Corporation, Appellants
 In re Employee Benefit Insurance Brokerage Antitrust Litigation
 Maryann Waxman, on behalf of herself and all others similarly situated, Golden Gate Bridge, Highway and Transportation District, Christopher Bare, David Boros, Cynthia Brandes, Hans Fuson, Sharon Gehringer, Larry Hayes, Brannen Henn, Robert H. Kimball, Wayne Moran, Alicia A. Pombo, Clear Lam Packaging Inc., Connecticut Spring & Stamp Company, City of Danbury, Connecticut, Fire District of Sun City West, Hollander Home Fashions Corporation, Appellants.

Nos. 07-4046, 08-1455, 08-1777.

MDL No. 1663.

Argued April 21, 2009.

Filed Aug. 16, 2010.

Synopsis

Background: Purchasers of commercial and employee benefit insurance brought action against insurers and insurance brokers, alleging unlawful schemes to allocate purchasers among particular groups of insurers. The United States District Court for the District of New

Jersey, [Garrett E. Brown, J.](#), 2007 WL 2892700, dismissed action. Purchasers appealed.

Holdings: The Court of Appeals, [Scirica](#), Circuit Judge, held that:

[1] purchasers failed to allege horizontal broker-centered conspiracies as to claims not involving bid-rigging;

[2] purchasers alleged horizontal conspiracies as to claims involving bid-rigging;

[3] purchasers failed to allege horizontal global conspiracy;

[4] defendants' alleged conduct was not exempt from antitrust regulation under McCarran-Ferguson Act;

[5] purchasers failed to allege actionable Racketeer Influenced and Corrupt Organizations Act (RICO) enterprise as to broker-centered activities;

[6] purchasers alleged actionable enterprise as to bid-rigging; and

[7] purchasers alleged actionable conduct as to bid-rigging.

Affirmed in part, vacated in part, and remanded.

West Headnotes (34)

[1] **Antitrust and Trade Regulation**

 Injury to Business or Property

Plaintiffs in antitrust case must prove "antitrust injury," which is: (1) injury of type that antitrust laws were intended to prevent, and (2) which flows from that which makes defendants' acts unlawful.

9 Cases that cite this headnote

[2] **Antitrust and Trade Regulation**

🔑 **Cartels, Combinations, Contracts, and Conspiracies in General**

Existence of agreement to violate antitrust law is hallmark of Sherman Act claim. Sherman Act, § 1, 15 U.S.C.A. § 1.

6 Cases that cite this headnote

[3] Antitrust and Trade Regulation

🔑 **Cartels, Combinations, Contracts, and Conspiracies in General**

In addition to demonstrating existence of conspiracy or agreement, Sherman Act plaintiff must show that conspiracy to which defendant was party imposed unreasonable restraint on trade. Sherman Act, § 1, 15 U.S.C.A. § 1.

34 Cases that cite this headnote

[4] Antitrust and Trade Regulation

🔑 **Rule of reason**

Under “rule of reason” standard for determining whether challenged practice unreasonably restrains trade under Sherman Act, fact-finder weighs all circumstances of case in deciding whether restrictive practice should be prohibited. Sherman Act, § 1, 15 U.S.C.A. § 1.

13 Cases that cite this headnote

[5] Antitrust and Trade Regulation

🔑 **Presumptions and burden of proof**

Under rule of reason analysis, Sherman Act plaintiff bears initial burden of showing that alleged agreement produced adverse, anti-competitive effect within relevant geographic market. Sherman Act, § 1, 15 U.S.C.A. § 1.

17 Cases that cite this headnote

[6] Antitrust and Trade Regulation

🔑 **Per se**

Under per se rules of illegality, Sherman Act plaintiffs are relieved of obligation to define

market and prove market power. Sherman Act, § 1, 15 U.S.C.A. § 1.

5 Cases that cite this headnote

[7] Antitrust and Trade Regulation

🔑 **Complaint**

Antitrust and Trade Regulation

🔑 **Issues, proof, and variance**

While pleading exclusively per se violations can lighten a plaintiff's litigation burdens, it is not a riskless strategy; if court determines that restraint at issue is sufficiently different from per se archetypes to require application of rule of reason, Sherman Act plaintiff's claim alleging per se violation will be dismissed. Sherman Act, § 1, 15 U.S.C.A. § 1.

47 Cases that cite this headnote

[8] Antitrust and Trade Regulation

🔑 **“Quick look” and other tests**

Under “quick look analysis,” competitive harm is presumed, and Sherman Act defendant must set forth some competitive justification for restraints. Sherman Act, § 1, 15 U.S.C.A. § 1.

1 Cases that cite this headnote

[9] Antitrust and Trade Regulation

🔑 **“Quick look” and other tests**

If Sherman Act defendant offers sound pro-competitive justifications for restraint under quick look analysis, court must proceed to weigh overall reasonableness of restraint using full-scale rule of reason analysis. Sherman Act, § 1, 15 U.S.C.A. § 1.

3 Cases that cite this headnote

[10] Antitrust and Trade Regulation

🔑 **Cartels, Combinations, Contracts, and Conspiracies in General**

Conscious parallelism, as common reaction of firms in concentrated market that recognize their shared economic interests and their

interdependence with respect to price and output decisions, is not in itself unlawful under Sherman Act. Sherman Act, § 1, 15 U.S.C.A. § 1.

[8 Cases that cite this headnote](#)

[11] Antitrust and Trade Regulation

Weight and Sufficiency

Evidence implying traditional conspiracy, as “plus factor” indicating existence of actionable agreement under Sherman Act, consists of non-economic evidence that there was actual, manifest agreement not to compete, which may include proof that defendants got together and exchanged assurances of common action or otherwise adopted common plan, even though no meetings, conversations, or exchanged documents are shown. Sherman Act, § 1, 15 U.S.C.A. § 1.

[27 Cases that cite this headnote](#)

[12] Antitrust and Trade Regulation

Conspiracy or combination

When allegations of parallel conduct are set out in order to make Sherman Act claim, they must be placed in context that raises suggestion of preceding agreement, not merely parallel conduct that could just as well be independent action. Sherman Act, § 1, 15 U.S.C.A. § 1.

[22 Cases that cite this headnote](#)

[13] Antitrust and Trade Regulation

Conspiracy or combination

Allegations of conspiracy are deficient under Sherman Act if there are obvious alternative explanations for facts alleged. Sherman Act, § 1, 15 U.S.C.A. § 1.

[8 Cases that cite this headnote](#)

[14] Antitrust and Trade Regulation

Conspiracy or combination

Allegations of direct evidence of agreement, if sufficiently detailed, are independently adequate to state Sherman Act claim. Sherman Act, § 1, 15 U.S.C.A. § 1.

[13 Cases that cite this headnote](#)

[15] Antitrust and Trade Regulation

Conspiracy or combination

If Sherman Act plaintiff expects to rest on circumstantial evidence of parallel behavior, complaint's statement of facts must place alleged behavior in context that raises suggestion of preceding agreement, not merely parallel conduct that could just as well be independent action. Sherman Act, § 1, 15 U.S.C.A. § 1.

[27 Cases that cite this headnote](#)

[16] Antitrust and Trade Regulation

Conspiracy or combination

Regardless of whether Sherman Act plaintiff expects to prove existence of conspiracy directly or circumstantially, he must plead enough facts to raise reasonable expectation that discovery will reveal evidence of illegal agreement. Sherman Act, § 1, 15 U.S.C.A. § 1.

[37 Cases that cite this headnote](#)

[17] Antitrust and Trade Regulation

Cartels, Combinations, Contracts, and Conspiracies in General

Sherman Act claim of conspiracy predicated on parallel conduct should be dismissed if common economic experience, or facts alleged in complaint itself, show that independent self-interest is obvious alternative explanation for defendants' common behavior. Sherman Act, § 1, 15 U.S.C.A. § 1.

[28 Cases that cite this headnote](#)

[18] Antitrust and Trade Regulation

Per se

Antitrust and Trade Regulation

🔑 [Forms of Combinations](#)

Critical issue in establishing per se Sherman Act violation via “hub and spoke” conspiracy is how spokes are connected to each other. Sherman Act, § 1, 15 U.S.C.A. § 1.

[12 Cases that cite this headnote](#)

[19] [Antitrust and Trade Regulation](#)

🔑 [Insurance](#)

Insurance purchasers who sued insurers and brokers in connection with purported scheme to allocate purchasers among particular groups of insurers failed to allege facts supporting plausible inference of horizontal broker-centered conspiracies, as required to state Sherman Act claim, to extent that conspiracies did not involve bid-rigging; mere showing that brokers deceptively steered their clients to preferred insurer-partners in order to obtain contingent commission payments did not plausibly imply horizontal conspiracy. Sherman Act, § 1, 15 U.S.C.A. § 1.

[5 Cases that cite this headnote](#)

[20] [Antitrust and Trade Regulation](#)

🔑 [Insurance](#)

Insurance purchasers who sued insurers and brokers in connection with purported scheme to allocate purchasers among particular groups of insurers alleged facts supporting plausible inference of horizontal broker-centered conspiracies based upon bid-rigging, as required to state Sherman Act claim; complaint averred that insurers furnished purposefully uncompetitive sham bids on policies in order to facilitate steering of business to other insurer-partners, on understanding that other insurers would later reciprocate. Sherman Act, § 1, 15 U.S.C.A. § 1.

[4 Cases that cite this headnote](#)

[21] [Antitrust and Trade Regulation](#)

🔑 [Rule of reason](#)

Restraint is not automatically deemed ancillary for Sherman Act purposes

simply because it facilitates pro-competitive arrangement. Sherman Act, § 1, 15 U.S.C.A. § 1.

[1 Cases that cite this headnote](#)

[22] [Antitrust and Trade Regulation](#)

🔑 [Insurance](#)

Insurance purchasers who sued insurers and brokers in connection with purported scheme to allocate purchasers among particular groups of insurers failed to allege facts supporting plausible inference of horizontal global conspiracy, as required to state Sherman Act claim; complaint's averment as to pervasive use of contingent commissions to exploit brokers' power over clients may have evidenced common industry practice, but did not support industry-wide conspiracy. Sherman Act, § 1, 15 U.S.C.A. § 1.

[2 Cases that cite this headnote](#)

[23] [Antitrust and Trade Regulation](#)

🔑 [Insurance](#)

[Insurance](#)

🔑 [Anti-Trust](#)

[States](#)

🔑 [Insurance](#)

McCarran-Ferguson Act provides statutory antitrust exemption for activities that: (1) constitute business of insurance; (2) are regulated pursuant to state law; and (3) do not constitute acts of boycott, coercion, or intimidation. McCarran Ferguson Act, § 3(b), 15 U.S.C.A. § 1013(b).

[4 Cases that cite this headnote](#)

[24] [Antitrust and Trade Regulation](#)

🔑 [Insurance](#)

Alleged conduct of insurers and brokers in connection with purported scheme to allocate purchasers among particular groups of insurers was not exempt from antitrust regulation under McCarran-Ferguson Act, since conduct did not constitute “business of insurance”; purported agreement not

to compete for incumbent business was unrelated to reliability, and did not involve restrictions on type of coverage offered or risk profiles of insurable entities. McCarran Ferguson Act, § 2(b), 15 U.S.C.A. § 1012(b).

3 Cases that cite this headnote

[25] Racketeer Influenced and Corrupt Organizations

🔑 Elements of violation in general

To plead claim under Racketeer Influenced and Corrupt Organizations Act (RICO), plaintiff must allege conduct of enterprise through pattern of racketeering activity. 18 U.S.C.A. § 1962(c).

135 Cases that cite this headnote

[26] Racketeer Influenced and Corrupt Organizations

🔑 Informal entities;associations-in-fact

Although Racketeer Influenced and Corrupt Organizations Act (RICO) structure requirement demands that parts of association in fact must be arranged or put together to form whole, statute does not prescribe any particular arrangement, as long as it is sufficient to permit associates to pursue enterprise's purpose. 18 U.S.C.A. § 1962(c).

45 Cases that cite this headnote

[27] Racketeer Influenced and Corrupt Organizations

🔑 Informal entities;associations-in-fact

Proof of pattern of racketeering activity may be sufficient in particular case to permit jury to infer existence of association-in-fact enterprise under Racketeer Influenced and Corrupt Organizations Act (RICO). 18 U.S.C.A. § 1962(c).

69 Cases that cite this headnote

[28] Racketeer Influenced and Corrupt Organizations

🔑 Association with or participation in enterprise;control or intent

One is not liable under Racketeer Influenced and Corrupt Organizations Act (RICO) unless one has participated in operation or management of RICO enterprise itself. 18 U.S.C.A. § 1962(c).

8 Cases that cite this headnote

[29] Racketeer Influenced and Corrupt Organizations

🔑 Association with or participation in enterprise;control or intent

Racketeer Influenced and Corrupt Organizations Act (RICO) enterprise is “operated” not just by upper management, but also by lower-rung participants in enterprise who are under direction of upper management. 18 U.S.C.A. § 1962(c).

2 Cases that cite this headnote

[30] Racketeer Influenced and Corrupt Organizations

🔑 Association with or participation in enterprise;control or intent

Outsiders may meet Racketeer Influenced and Corrupt Organizations Act (RICO) “conduct” requirement if they exert control over enterprise, but such outsider defendants must have conducted or participated in conduct of RICO enterprise's affairs, not just their own affairs. 18 U.S.C.A. § 1962(c).

39 Cases that cite this headnote

[31] Racketeer Influenced and Corrupt Organizations

🔑 Association with or participation in enterprise;control or intent

For defendant to have participated in operation or management of Racketeer Influenced and Corrupt Organizations Act (RICO) enterprise, there must be not only nexus between defendant and conduct of affairs of enterprise, but also between conduct

of those affairs and pattern of racketeering activity. 18 U.S.C.A. § 1962(c).

[92 Cases that cite this headnote](#)

[32] Racketeer Influenced and Corrupt Organizations

🔑 Enterprise

Insurance purchasers who sued insurers and brokers in connection with purported scheme to allocate purchasers among particular groups of insurers failed to allege actionable “enterprise” as to broker-centered activities, as required to state claim under Racketeer Influenced and Corrupt Organizations Act (RICO); allegations as to steering of potential clients to preferred insurer-partners did not plausibly imply concerted “hub and spoke” activity by defendants, as opposed to merely parallel conduct. 18 U.S.C.A. § 1962(c).

[5 Cases that cite this headnote](#)

[33] Racketeer Influenced and Corrupt Organizations

🔑 Enterprise

Insurance purchasers who sued insurers and brokers in connection with purported scheme to allocate purchasers among particular groups of insurers alleged actionable “enterprise” as to bid-rigging activities, as required to state claim under Racketeer Influenced and Corrupt Organizations Act (RICO); complaint averred defendants' preparation of brokering plans governing placement of insurance contracts that came up for renewal, assigning business to specific insurers at target prices, and outlining coverage. 18 U.S.C.A. § 1962(c).

[2 Cases that cite this headnote](#)

[34] Racketeer Influenced and Corrupt Organizations

🔑 Association or participation

Insurance purchasers who sued insurers and brokers in connection with purported scheme to allocate purchasers among particular

groups of insurers alleged actionable “conduct” as to bid-rigging activities, as required to state claim under Racketeer Influenced and Corrupt Organizations Act (RICO); complaint averred that broker directed placement of insurance contracts and solicited rigged bids from insurers, which plausibly implied that broker participated in the operation or management of the enterprise itself, and complaint alleged that insurers supplied sham bids, which adequately alleged that the insurers operated the enterprise. 18 U.S.C.A. § 1962(c).

[7 Cases that cite this headnote](#)

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Before [SCIRICA](#), [FISHER](#) and [GREENBERG](#), Circuit Judges.

OPINION OF THE COURT

[SCIRICA](#), Circuit Judge.

This appeal from orders of dismissal under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) involves multiple putative class actions alleging massive conspiracies throughout the insurance industry. Plaintiffs are purchasers of commercial and employee benefit insurance, and defendants are insurers and insurance brokers that deal in those lines of insurance. According to plaintiffs, defendants entered into unlawful, deceptive schemes to allocate purchasers among particular groups of defendant insurers. The complaints assert that conspiring brokers funneled unwitting clients to their co-conspirator insurers, which were insulated from competition; in return, the insurers awarded the brokers contingent commission payments concealed from the insurance purchasers and surreptitiously priced into insurance premiums based on the volume of premium dollars steered their way. As a result of this scheme, plaintiffs allege they paid inflated prices for their insurance coverage and were generally denied the benefits of a competitive market. The question

on appeal is whether plaintiffs have adequately pled either a per se violation of § 1 of the Sherman Act (plaintiffs have foresworn a full-scale rule-of-reason analysis) or a violation of the Racketeer Influenced and Corrupt Organizations (RICO) Act. Concluding they had not, the District Court dismissed the complaints. We will affirm in large part, vacate in part, and remand for further proceedings.

I. Procedural History and Plaintiffs' Allegations

This litigation followed on the heels of a public investigation and enforcement action. *309 In October 2004, the New York State Attorney General filed a civil complaint in state court against insurance broker Marsh & McLennan (“Marsh”), alleging “that Marsh had solicited rigged bids for insurance contracts, and had received improper contingent commission payments in exchange for steering its clients to a select group of insurers.” *In re Ins. Brokerage Antitrust Litig.*, Nos. 04 5184, 05 1079, 2006 WL 2850607, at *1 (D.N.J. Oct.3, 2006) (citing *People v. Marsh & McLennan Cos.*, No. 04/403342 (N.Y.Sup.Ct. Oct. 14, 2004)). The next month, a group of attorneys general and state insurance departments began a broader investigation of insurance-industry practices. Private parties also filed numerous federal actions, which are the subject of this appeal.

The private actions were transferred by the Judicial Panel on Multidistrict Litigation to the United States District Court for the District of New Jersey for consolidated pretrial proceedings. *In re Ins. Brokerage Antitrust Litig.*, 360 F.Supp.2d 1371 (J.P.M.L.2005); see 28 U.S.C. § 1407. The District Court severed and realigned the actions into two consolidated dockets the first pertaining to claims regarding property and casualty insurance (the “Commercial Case”), and the second pertaining to claims regarding employee benefits insurance (the “Employee Benefits Case”).

The plaintiffs in the Commercial Case are a proposed class of businesses, individuals, and public entities who, between August 26, 1994 and September 1, 2005, engaged the services of the Broker Defendants to obtain advice with

respect to the procurement or renewal of commercial property and casualty insurance and entered into or renewed an insurance policy with the Insurer Defendants. The plaintiffs in the Employee Benefits Case are both employers who utilized the services of the Broker Defendants to obtain group insurance coverage from the Insurer Defendants for their employees as part of their employee benefits plans and employees who obtained insurance from the Insurer Defendants through the employers' benefits plans.

In re Ins. Brokerage Antitrust Litig., 579 F.3d 241, 249 (3d Cir.2009) (affirming, inter alia, the District Court's approval of plaintiffs' settlement agreements with two defendants in this litigation).

¹ This statement paraphrases the description of the proposed plaintiff classes given by the District Court. See *In re Ins. Brokerage Antitrust Litig.*, 2007 WL 2892700, at *2 (D.N.J. Sept.28, 2007). The complaints, however, arguably define the proposed classes to include not only those persons or entities who bought insurance from a defendant insurer through a defendant broker, but also those persons or entities who bought insurance from *any* insurer through a defendant broker. See Commercial Case Second Amended Complaint (Comm.SAC) ¶ 555; Employee Benefits Case Second Amended Complaint (EB SAC) ¶ 585. This discrepancy is not relevant to our disposition of this appeal.

In accordance with the District Court's restructuring, plaintiffs filed a separate consolidated amended complaint in each of the Commercial and Employee Benefits cases. Each complaint alleged violations of the Sherman Act, 15 U.S.C. § 1, and the RICO Act, 18 U.S.C. § 1962(c), (d), as well as violations of various state-law antitrust statutes and common-law duties. Shortly thereafter, defendants moved to dismiss the Sherman Act and RICO claims in both cases under Federal Rule of Civil Procedure 12(b)(6).²

2 In the Employee Benefits Case only, plaintiffs also brought claims under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132(a)(2), alleging defendants had breached fiduciary duties imposed by the statute. These claims are not before us. See *infra* note 3.

*310 On October 3, 2006, the District Court granted the motions and dismissed the claims without prejudice. *Ins. Brokerage*, 2006 WL 2850607. Defendants had asserted in their moving papers that they were immune from Sherman Act liability under the McCarran Ferguson Act, 15 U.S.C. §§ 1011 1015, which “provides a statutory antitrust exemption for activities that (1) constitute the ‘business of insurance,’ (2) are regulated pursuant to state law, and (3) do not constitute acts of ‘boycott, coercion or intimidation.’” *Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129, 1133 (3d Cir.1993) (quoting *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 219 20, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979)); see 15 U.S.C. §§ 1012(b), 1013(b). The District Court rejected this argument on the ground that defendants’ alleged conduct was not part of the “business of insurance” within the meaning of the Act. 2006 WL 2850607, at *7 10. But the court nonetheless dismissed both the Sherman Act and RICO claims because it found the complaints lacked the requisite factual specificity.

In granting leave to amend, the District Court instructed plaintiffs to file in each case a supplemental statement of particularity for their federal antitrust claims and an amended RICO case statement for their RICO claims. Plaintiffs did so, and defendants again moved to dismiss. On April 5, 2007, the District Court again granted the motions, but it once again allowed plaintiffs an opportunity to amend their pleadings. *In re Ins. Brokerage Antitrust Litig.*, 2007 WL 1100449 (D.N.J. Apr.5, 2007) (antitrust claims); *In re Ins. Brokerage Antitrust Litig.*, 2007 WL 1062980 (D.N.J. Apr.5, 2007) (RICO claims). In response, plaintiffs filed a Second Amended Complaint (“SAC”) in each of the Commercial and Employee Benefits cases, as well as a Revised Particularized Statement (“RPS”) and Amended RICO Case Statement (“ARCS”) augmenting the Second Amended Complaint’s allegations. For a third time, defendants moved to dismiss under Rule 12(b)(6). In orders dated August 31 and September 28, 2007, the District Court again dismissed the antitrust and RICO claims this time with prejudice. Applying the pleading standard set forth by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544,

127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), which had been decided on May 21, 2007, the District Court concluded that plaintiffs’ allegations in both the Commercial and the Employee Benefits cases were insufficient with respect to both the Sherman Act and RICO claims. *In re Ins. Brokerage Antitrust Litig.*, 2007 WL 2533989 (D.N.J. Aug.31, 2007) (antitrust claims); *In re Ins. Brokerage Antitrust Litig.*, 2007 WL 2892700 (D.N.J. Sept.28, 2007) (RICO claims). Plaintiffs filed a timely notice of appeal in each case.³

3 The District Court exercised jurisdiction under 28 U.S.C. §§ 1331, 1367. We have jurisdiction under 28 U.S.C. § 1291. The Sherman Act and RICO claims were the only federal causes of action asserted in the Commercial complaint. Having dismissed both claims in its August 31 and September 28 opinions, the District Court declined to exercise supplemental jurisdiction over the remaining state law claims and dismissed the Commercial complaint in its entirety. 2007 WL 2892700, at *34; see 28 U.S.C. § 1367(c). The Employee Benefits complaint also included claims that the insurer defendants had breached their fiduciary duties under ERISA. The District Court subsequently disposed of these ERISA claims when it granted defendants’ motion for summary judgment, *In re Ins. Brokerage Antitrust Litig.*, 2008 WL 141498 (D.N.J. Jan.14, 2008), after which it declined to exercise supplemental jurisdiction over the state law claims and dismissed the Employee Benefits complaint in its entirety, *In re Ins. Brokerage Antitrust Litig.*, No. 05 1079 (D.N.J. Feb. 13, 2008).

Although plaintiffs originally appealed the District Court’s summary judgment order regarding the ERISA claims, they expressly waived that issue in their opening brief. Plaintiffs’ Employee Benefits (EB) Br. 10.

*311 Plaintiffs’ pleadings are of a substantial volume. The complaint in each case is more than 200 pages (including attached exhibits), and to this total must be added the pages in the Revised Particularized Statements and Amended RICO Case Statements. Significantly, the District Court allowed discovery to proceed while the motions to dismiss were pending. Plaintiffs’ amended pleadings were thus able to draw on documents produced and depositions taken pursuant to these discovery orders, as well as material unearthed in the course of the public investigations.

As reflected by the length of this opinion and of the caption this is extraordinarily complex litigation involving a large swath of the insurance provider and brokerage industries, elaborate allegations of misconduct, and challenging legal issues. The District Court skillfully managed the consolidated proceedings. We take particular note of the court's thorough treatment of defendants' motions to dismiss, which comprised five separate opinions examining three successive rounds of pleadings. The court's patient and meticulous analysis has greatly aided our review.

A. Antitrust Claims

1. Broker-Centered Conspiracies

In each complaint, plaintiffs allege the existence of a number of broker-centered antitrust conspiracies. As the name suggests, at the center of each alleged conspiracy was a defendant broker, who colluded with its defendant insurer-partners to steer its clients, purchasers of insurance, to particular insurers in exchange for the payment of contingent commissions. In the Commercial Case, plaintiffs allege six such conspiracies, centered on defendant brokers Marsh,⁴ Aon Corporation, Wells Fargo & Company, HRH, Willis Group, and Gallagher, respectively. In the Employee Benefits Case, plaintiffs allege five broker-centered conspiracies, led respectively by Marsh,⁵ Aon, Universal Life Resources, Gallagher, and Willis Group.⁶

⁴ While this appeal was pending, the District Court approved a settlement agreement between the plaintiffs and the Marsh Defendants. (In the Commercial Case, the Marsh Defendants comprise Marsh & McLennan Companies, Inc.; Marsh Inc.; Marsh USA, Inc.; Marsh USA Inc. (Connecticut); and Seabury & Smith, Inc. In the Employee Benefits Case, the Marsh Defendants comprise Marsh & McLennan Companies, Inc.; Marsh Inc.; Marsh USA, Inc.; Marsh USA Inc. (Connecticut); Mercer, Inc.; Mercer Human Resource Consulting LLC; Mercer Human Resource Consulting of Texas, Inc.; and Seabury & Smith, Inc.) *See In re Ins. Brokerage Antitrust Litig.*, No. 04 5184, 2009 WL 411877 (D.N.J. Feb.17, 2009), *appeal docketed*, No. 09 1821 (3d Cir. Mar. 30, 2009). Per the settling parties' joint motions, we dismissed the instant appeal as to the

Marsh Defendants without prejudice. *See In re Ins. Brokerage Antitrust Litig.*, Nos. 07 4046, 08 1455, 08 1777 (3d Cir. June 30, 2008).

⁵ *See supra* note 4.

⁶ The defendant broker names given here encompass related and/or subsidiary companies, as detailed in Comm. SAC ¶¶ 24 36 and EB SAC ¶¶ 34 45. The names of the defendant insurers allegedly conspiring with each broker can also be found in the complaints; in the interest of brevity, we will not reproduce them here. *See* Comm. SAC ¶¶ 95, 157, 201, 236, 262, 326; EB SAC ¶¶ 106, 139, 175, 239, 271. The number of insurers in each alleged broker centered conspiracy ranges from three to thirteen. (These numbers refer to parent entities and do not include the subsidiary/related companies also named as defendants. *See* Comm. SAC ¶¶ 37 63 (listing subsidiary/related insurers in the Commercial Case); EB SAC ¶¶ 46 57 (listing subsidiary/related insurers in the Employee Benefits Case).)

*312 According to the complaints, the broker-centered conspiracies proceeded in two stages. First, “[b]eginning in the mid-to-late 1990s, each of the Broker Defendants,” in “a dramatic change” from prior practice, “began to form so-called ‘strategic partnerships’ with certain insurance companies, to which it would then allocate the bulk of its business.” Comm. SAC ¶ 83. The broker and each of its co-conspiring insurers agreed, “and each of the conspiring insurers horizontally agreed,” that the broker “would ‘consolidate’ its business by directing the bulk of its premium volume to its ‘strategic partner’ co-conspirators, thereby eliminating hundreds of other insurers from competing equally with the conspiring insurers for the majority” of the broker's business. *Id.* ¶ 158. In the second stage, the insurer-members of each conspiracy each agreed with the broker, “and agreed horizontally among themselves, to reduce or eliminate competition for that secured business among the conspiring [‘strategic partner’] insurers.” *Id.*⁷

⁷ The quoted language is drawn from the description of the Aon centered conspiracy in the Commercial complaint but is generally applicable to all of the alleged broker centered conspiracies. *See* Comm. SAC ¶¶ 66 67; EB SAC ¶¶ 76 77.

As alleged by plaintiffs, a major focus of the second stage of the conspiracies was protecting the incumbent business of each insurer. To maximize insurers' retention of existing customers, the conspiracies allegedly employed

a variety of “incumbent protection devices.” Specifically, plaintiffs aver that brokers facilitated the non-competitive allocation of customers to insurers by giving insurers “last looks” and “first looks” on bids.⁸ The complaints also assert that each insurer in each broker-centered conspiracy knew the identity of the broker's other “strategic partners.” The brokers also revealed to each insurer detailed information about the arrangements between the broker and its other insurer-partners, including information about the size of the contingent commissions those partners were paying to the broker, and even the amount of premium volume steered by the broker to the other insurers. These facts, plaintiffs contend, evince the existence of an agreement between the insurers and the broker and among the insurers themselves to reap inflated profits by stifling competitive bidding and protecting incumbent business, in violation of § 1 of the Sherman Act.

⁸ Plaintiffs do not specifically define these terms, but from context we infer that a “last look” affords a bidder the ability to make the final bid with knowledge of all previous bids, and a “first look” allows a bidder the opportunity to bid without competition (for example, guaranteeing a sale to the bidder if it can match a certain price).

These incumbent protection devices, plaintiffs claim, were common to all of the broker-centered conspiracies. In the Commercial Case only, plaintiffs also allege that insurers in the Marsh-centered conspiracy acceded to broker requests to provide “false” bids that were intentionally higher than the bids of the insurer to which the broker wished to award the business. For example, the complaint relates a statement by a former employee of a defendant insurer that his employer had agreed to “provide[] losing quotes” to its broker-partner in exchange for, among other things, the broker's “getting ‘quotes from other [insurance] carriers that would support the [employer, at least when it was the incumbent carrier] as being the best price.’” *Id.* ¶ 109. The employee of another insurer allegedly stated that “she provided protective quotes when the broking plan called for it [t]o show, to pretend to show competition where there is none.” *313 *Id.* ¶ 119. This employee was allegedly told by the broker that the insurer “should provide protective quotes so that [it] would not face competition on its own renewals.” *Id.* This bid-rigging behavior facilitated the customer allocation scheme by deceiving insurance customers into believing they were receiving the best possible price in a competitive market.

According to plaintiffs, insurers were willing to assist co-conspiring insurers in this way because they expected to be the beneficiary of such bid rigging where their own incumbent business was concerned.

2. Global Conspiracy

In addition to the broker-centered conspiracies, each complaint alleges a “global conspiracy” among all of the defendants: “[W]hile engaging in their separate ‘hub and spoke’ schemes [i.e., the broker-centered conspiracies] to create supra-competitive premiums and contingent commissions, each of the Broker ‘hubs’ simultaneously agreed horizontally not to compete with each other by disclosing any competing broker's contingent commission arrangements, or the consequent premium price impact of those arrangements, in an effort to win those brokers' customers' business.” *Id.* ¶ 354. Although each broker, plaintiffs claim, knew that the other brokers were using contingent commission arrangements to obtain outsized profits, each “also knew that exposing another broker's contingent commission arrangements to the other broker's customers would lead to retaliation, thereby threatening the first broker's own contingent commission scheme and supra-competitive profits.” *Id.* ¶ 355. “Therefore,” plaintiffs allege, the brokers “agreed horizontally” to maintain a mutually beneficial silence. *Id.* ¶ 362. Plaintiffs further allege that the defendant insurers were “complicit[]” in this horizontal agreement among the brokers, *id.* ¶ 353, and that they also agreed “horizontally with each other [] not to disclose the Broker Centered Conspiracies and resulting supra-competitive premiums to the brokers' customers,” *id.* ¶ 359.

As evidence of this asserted “global” agreement in the Commercial Case, plaintiffs point to allegations that each broker-centered conspiracy operated in a similar way and that the brokers incorporated similar standardized confidentiality provisions into their respective contingent commission agreements with insurers, which prohibited disclosing the terms of the contingent commission agreements to insurance customers. Furthermore, plaintiffs allege that the brokers' membership in the Council of Insurance Agents & Brokers (CIAB), a trade association, “afforded them many opportunities to exchange information and allowed Defendants to adopt collective policies towards nondisclosure of rival brokers' contingent commissions.” *Id.* ¶ 364.

Plaintiffs in the Employee Benefits Case also rely on these types of allegations to support their claim of a global conspiracy. They find additional support, however, in the similar way in which insurers, at the alleged behest of the brokers, accounted for the expense of contingent commissions on Schedule A of Form 5500, a document that must, under ERISA, be filed with the Internal Revenue Service and the Department of Labor. According to plaintiffs, instead of reporting the commissions as “a variable, case-specific cost,” insurers treated them “improperly as a non-reportable fixed cost (overhead).” EB SAC ¶ 305. This reporting technique allegedly yielded two advantages to defendants. First, they “were enabled to evade their disclosure requirements under ERISA and mislead their clients.” *Id.* Second, by classifying contingent *314 commissions as a fixed cost spread across all lines of an insurer's business, “the Insurer Defendants artificially raised the price of all lines of insurance, rather than substantially raising the cost of insurance” obtained through the co-conspiring brokers, which would have rendered that insurance blatantly uncompetitive with insurance obtained through other, non-conspiring brokers. *Id.* ¶ 306. Not only, plaintiffs allege, did defendants adopt a similar approach to accounting for the contingent commission agreements, but employees of the defendants also sometimes exchanged information about how they completed Form 5500. Plaintiffs claim these allegations support an inference of an agreement not to disclose contingent commissions properly in order to conceal the existence of defendants' anticompetitive practices.

B. RICO Claims

Plaintiffs contend that defendants' alleged customer allocation schemes also violated the RICO statute. In the Commercial Case, plaintiffs assert the existence of six RICO enterprises, which correspond to the six broker-centered conspiracies identified in the antitrust claims. “Alternatively, Plaintiffs allege that CIAB is a legal entity which constitutes a RICO enterprise....” Comm. SAC ¶ 512. According to the complaint, the defendants utilized these enterprises to engage in a pattern of racketeering activity consisting of numerous acts of mail and wire fraud that served to conceal and misrepresent defendants' customer allocation schemes.

The Employee Benefit complaint alleges similar predicate acts of racketeering and adds allegations that defendants misrepresented information reported on Form 5500 and otherwise violated ERISA through their use of contingent commissions. Here, plaintiffs allege the existence of five RICO enterprises congruent with the five alleged broker-centered antitrust conspiracies.

II. Discussion

We exercise plenary review of the District Court's orders granting defendants' motions to dismiss under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). See [Gelman v. State Farm Mut. Auto. Ins. Co.](#), 583 F.3d 187, 190 (3d Cir.2009). This Rule authorizes dismissal of a complaint for “failure to state a claim upon which relief can be granted.” [Fed.R.Civ.P. 12\(b\)\(6\)](#). Under Rule 8(a)(2), a complaint need present “only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to ‘give the defendant fair notice of what the ... claim is and the grounds upon which it rests.’” [Twombly](#), 550 U.S. at 555, 127 S.Ct. 1955 (quoting [Conley v. Gibson](#), 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)) (omission in [Twombly](#)); see [Fed.R.Civ.P. 8\(a\)\(2\)](#). To comply with this general pleading standard, the complaint, “construe[d] ... in the light most favorable to the plaintiff,” [Gelman](#), 583 F.3d at 190 (quoting [Phillips v. County of Allegheny](#), 515 F.3d 224, 233 (3d Cir.2008)), must contain “ ‘enough factual matter (taken as true) to suggest’ the required element[s]” of the claims asserted, [Phillips](#), 515 F.3d at 234 (quoting [Twombly](#), 550 U.S. at 556, 127 S.Ct. 1955).

A. Antitrust Claims

1. Plausibility Under *Twombly*

a. Legal Standards

[1] [2] [Section 1](#) of the Sherman Act provides: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.” 15 U.S.C. § 1. As we have explained, this *315 statutory language imposes two essential requirements on an antitrust plaintiff.⁹ “First, the plaintiff must show that the defendant was a party to a ‘contract, combination ...

or conspiracy.’” *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 218 (3d Cir.2008). Instead of assigning each of these last three terms a distinct meaning, courts have interpreted them collectively to require “some form of concerted action,” *In re Baby Food Antitrust Litig.*, 166 F.3d 112, 117 (3d Cir.1999) (internal quotation marks omitted), in other words, a “‘unity of purpose or a common design and understanding or a meeting of minds’ or ‘a conscious commitment to a common scheme.’” *In re Flat Glass Antitrust Litig.*, 385 F.3d 350, 357 (3d Cir.2004) (quoting *Monsanto Co. v. Spray Rite Serv. Corp.*, 465 U.S. 752, 764, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984)). Put more succinctly, “[t]he existence of an agreement is the hallmark of a Section 1 claim.” *Baby Food*, 166 F.3d at 117; see *InterVest, Inc. v. Bloomberg, L.P.*, 340 F.3d 144, 159 (3d Cir.2003) (“Unilateral activity by a defendant, no matter the motivation, cannot give rise to a section 1 violation.”).⁰

9 In addition to the following two requirements, the plaintiffs in any antitrust case “must prove antitrust injury, which is to say (1) injury of the type the antitrust laws were intended to prevent and (2) that flows from that which makes defendants’ acts unlawful. *A.D. Bedell Wholesale Co. v. Philip Morris Inc.*, 263 F.3d 239, 247 (3d Cir.2001) (quoting *Brunswick Corp. v. Pueblo Bowl O Mat*, 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977) (emphasis omitted)).

10 “Congress used the distinction between concerted and independent action to deter anticompetitive conduct and compensate its victims, without chilling vigorous competition through ordinary business operations.... Unlike independent action, ‘concerted activity inherently is fraught with anticompetitive risk insofar as it ‘deprives the marketplace of independent centers of decisionmaking that competition assumes and demands. *Am. Needle, Inc. v. NFL*, U.S. , 130 S.Ct. 2201, 2209, 176 L.Ed.2d 947 (2010) (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 69, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984)).

[3] [4] [5] In addition to demonstrating the existence of a “conspiracy,” or agreement, “the plaintiff must show that the conspiracy to which the defendant was a party imposed an unreasonable restraint on trade.” *Mack Trucks*, 530 F.3d at 218; see *Flat Glass*, 385 F.3d at 356 (“Despite its broad language, Section 1 only prohibits

contracts, combinations or conspiracies that *unreasonably* restrain trade.”). “[T]he usual standard” applied to determine whether a challenged practice unreasonably restrains trade is the so-called “rule of reason.” *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 882, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007). Under this standard, “the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited.” *Mack Trucks*, 530 F.3d at 225 (internal quotation marks omitted). Significantly, under a rule-of-reason analysis, the plaintiff “bears the initial burden of showing that the alleged [agreement] produced an adverse, anticompetitive effect within the relevant geographic market.” *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 210 (3d Cir.2005). Because of “the difficulty of isolating the [actual] market effects of challenged conduct,” *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir.1993), successful attempts to meet this burden typically include a demonstration of defendants’ market power, as “a judgment *316 about market power is [a] means by which the effects of the [challenged] conduct on the market place can be assessed,” *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 110 n. 42, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984) (quoting the Solicitor General’s “correct[.]” observation). Cf. *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 460 61, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986) (“Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects, such as a reduction of output, can obviate the need for an inquiry into market power, which is but a surrogate for detrimental effects.” (internal quotation marks omitted)). If the plaintiff carries this burden, the court will need to decide whether the anticompetitive effects of the practice are justified by any countervailing pro-competitive benefits.² See *Eichorn v. AT & T Corp.*, 248 F.3d 131, 143 (3d Cir.2001) (describing an analysis in which courts “balance the effect of the alleged anti-competitive activity against its competitive purposes within the relevant product and geographic markets”); see also *Leegin*, 551 US. at 886, 127 S.Ct. 2705 (“In its design and function the rule [of reason] distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer’s best interest.”).

11 “The question whether an arrangement is a contract, combination, or conspiracy is different from and

antecedent to the question whether it unreasonably restrains trade. *Am. Needle*, 130 S.Ct. at 2206.

12

In the event a genuinely disputed issue of fact exists regarding the reasonableness of the restraint, the determination is for the jury. See *Arizona v. Maricopa County Med. Socy.*, 457 U.S. 332, 343, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982) (“[T]he rule of reason requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition. ”); 11 Herbert Hovenkamp, *Antitrust Law* ¶ 1909b (2d ed. 2005) (“[O]nce the court decide[s] that the rule of reason should apply, disputed factual questions about reasonableness should be left to the jury. ”).

[6] Judicial experience has shown that some classes of restraints have redeeming competitive benefits so rarely that their condemnation does not require application of the full-fledged rule of reason. Paradigmatic examples are “horizontal agreements among competitors to fix prices or to divide markets.” *Leegin*, 551 U.S. at 886, 127 S.Ct. 2705 (citations omitted). Once a practice has been found to fall into one of these classes, it is subject to a “per se” standard. As the Supreme Court has explained, these practices

are ordinarily condemned as a matter of law under an “illegal *per se*” approach because the probability that these practices are anticompetitive is so high; a *per se* rule is applied when “the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.” In such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in which it is found.

NCAA, 468 U.S. at 100, 104 S.Ct. 2948 (quoting *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19 20, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979)); see *Brown Univ.*, 5 F.3d at 670 (“*Per se* rules of illegality are judicial constructs, and are based in large part on economic predictions that certain types of activity will more often than not unreasonably restrain competition.” (internal citation omitted)). Under the *per se* standard, plaintiffs are relieved of the obligation to define a market and prove market power. See *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984) (citing *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958)); *317 *Rossi v. Standard Roofing, Inc.*, 156 F.3d 452, 464 65 (3d Cir.1998); 11 Herbert Hovenkamp, *Antitrust Law* ¶ 1910a (2d ed. 2005); see also 7 Phillip E. Areeda &

Herbert Hovenkamp, *Antitrust Law* ¶ 1509c, at 403 04 (2d ed. 2003) (“Little is lost when the court condemns a restraint that was harmless because the defendants lacked power but that was socially useless in any event.”). Once a defendant's practice has been found to fall into one of the recognized classes, it is “conclusively presumed to unreasonably restrain competition.” *Flat Glass*, 385 F.3d at 356 (internal quotation marks omitted).³

13

When evaluating tying arrangements, in which a firm “sell[s] one good (the tying product) on the condition that the buyer also purchase another, separate good (the tied product), *Town Sound & Custom Tops, Inc. v. Chrysler Motors Corp.*, 959 F.2d 468, 475 (3d Cir.1992) (en banc), courts have applied a modified version of the *per se* standard. Unlike the “truly *per se* rules” explicated above, in which no inquiry is made into market structure, actual anticompetitive effects, or possible justifications, “the ‘*per se*’ rule against tying goes only halfway ...: the inquiry into tying product market structure ... is still required, but if the defendant is found to have market power there, the plaintiff is, in theory, relieved of proving actual harm to competition and of rebutting justifications for the tie in. *Id.* at 477; see *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 593 n. 2 (1st Cir.1993) (stating that tying might better be described as a “quasi *per se* offense, “since some element of market] power must be shown and defenses are effectively available) (citing *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992)). See generally 7 Areeda & Hovenkamp, *supra*, ¶ 1510a (explicating various different meanings of “*per se*” language in antitrust jurisprudence).

[7] While pleading exclusively *per se* violations can lighten a plaintiff's litigation burdens, it is not a riskless strategy. If the court determines that the restraint at issue is sufficiently different from the *per se* archetypes to require application of the rule of reason, the plaintiff's claims will be dismissed. *E.g.*, *AT & T Corp. v. JMC Telecom, LLC*, 470 F.3d 525, 531 (3d Cir.2006); see also *Texaco Inc. v. Dagher*, 547 U.S. 1, 7 n. 2, 126 S.Ct. 1276, 164 L.Ed.2d 1 (2006) (declining to conduct a rule of reason analysis where plaintiffs “ha[d] not put forth a rule of reason claim”). See generally 11 Hovenkamp, *supra*, ¶ 1910b (discussing the cost-benefit analysis involved in deciding whether to pursue an exclusively *per se* theory of liability).

[8] [9] Some restraints of trade are “highly suspicious” yet “sufficiently idiosyncratic that judicial experience with them is limited.” 11 Hovenkamp, *supra*, ¶ 1911a. Per se condemnation is inappropriate, but at the same time, the “inherently suspect” nature of the restraint obviates the sort of “elaborate industry analysis” required by the traditional rule-of-reason standard. *Gordon*, 423 F.3d at 210. Courts have devised a “quick look” approach for these cases. See *Dagher*, 547 U.S. at 7 n. 3, 126 S.Ct. 1276; *Cal. Dental Ass'n. v. FTC*, 526 U.S. 756, 770, 119 S.Ct. 1604, 143 L.Ed.2d 935 (1999) (stating that a “ ‘quick-look’ analysis” is appropriate where “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets”); see also 11 Hovenkamp, *supra*, ¶ 1911a (“What [the ‘quick-look’] term is intended to connote is that a certain class of restraints, while not unambiguously in the per se category, may require no more than cursory examination to establish that their principal or only effect is anticompetitive.”). Under a quick look analysis, which is essentially an abbreviated form of the rule of reason, *Cal. Dental*, 526 U.S. at 770, 119 S.Ct. 1604, “competitive harm is presumed and the defendant must set forth some competitive *318 justification for the restraints,” *Gordon*, 423 F.3d at 210. If no plausible justification is forthcoming, the restraint will be condemned. *Brown Univ.*, 5 F.3d at 669. “If the defendant offers sound procompetitive justifications, however, the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis.” *Id.* ⁴

14 As the above discussion ought to make clear, the respective analyses conducted under the rule of reason, per se, and quick look standards are not categorically different. In every case, “the essential inquiry is “whether or not the challenged restraint enhances competition. *Cal. Dental*, 526 U.S. at 780, 119 S.Ct. 1604 (internal quotation marks omitted). Under a traditional rule of reason analysis, a court requires “actual market analysis, *id.* at 779 80, 119 S.Ct. 1604, and carefully balances all of the factors bearing on that ultimate question. In applying per se or quick look analysis, courts make judgments based on judicial experience with certain types of restraints and market contexts, without demanding such extensive inquiry into the market in which the specific restraint at issue operates. But “there is often no bright line separating the three standards. *Id.*

at 779, 119 S.Ct. 1604 (quoting *NCAA*, 468 U.S. at 104 n. 26, 104 S.Ct. 2948). “What is required ... is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one. *Id.* at 781, 119 S.Ct. 1604.

Here, plaintiffs abjure “a full-scale rule of reason analysis.” They claim instead that defendants’ behavior was per se unlawful, or that, at the very least, it is susceptible to condemnation under a “quick look” analysis. Plaintiffs do not dispute that in order to succeed under either of these approaches, they need to show the existence of a horizontal agreement, that is, an agreement between “competitors at the same market level.” *In re Pharmacy Benefit Managers Antitrust Litig.*, 582 F.3d 432, 436 n. 5 (3d Cir.2009); see also *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 730, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988) (“Restraints imposed by agreement between competitors have traditionally been denominated as horizontal restraints, and those imposed by agreement between firms at different levels of distribution as vertical restraints.”). Under the Supreme Court’s jurisprudence, virtually all vertical agreements now receive a traditional rule-of-reason analysis. See *Leegin*, 551 U.S. 877, 127 S.Ct. 2705; see also *Gordon*, 423 F.3d at 210 (rejecting quick look analysis and applying rule of reason where restraint was vertical). ⁵ In the factual context of this case, a horizontal agreement means an agreement among the insurers in the broker-centered conspiracies, and an agreement among either the brokers or the insurers in the global conspiracy. Agreements between brokers and insurers, on the other hand, are vertical and would have to be analyzed under the traditional rule of reason, which plaintiffs *319 have disclaimed. ⁶

15 In *Leegin*, the Supreme Court overruled its earlier holding that vertical price fixing agreements were subject to per se condemnation. 551 U.S. at 881 82, 127 S.Ct. 2705 (overruling *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911)). Earlier, in *Continental T.V., Inc. v. GTE Sylvania Inc.*, the Court had ruled that non price vertical restraints must be analyzed under the traditional rule of reason rather than a per se standard. 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977); see *Leegin*, 551 U.S. at 901, 127

S.Ct. 2705. Tying arrangements, however, appear to remain an exception to the general rule that vertical restraints are reviewed under the full scale rule of reason. See *supra* note 13; *Sheridan v. Marathon Petroleum Co.*, 530 F.3d 590, 593-94 (7th Cir.2008) (explaining that despite a series of Supreme Court decisions subjecting various vertical restraints to the rule of reason, including *Leegin*, tying is still reviewed under a modified per se standard).

16

Although plaintiffs' First Amended Complaints (FAC) expressly pled a rule of reason claim in the alternative, see, e.g., Comm. FAC ¶ 530; EB FAC ¶ 454, their Second Amended Complaints omit any reference to the rule of reason, and their moving papers and appellate arguments make clear they are alleging exclusively per se violations. In their initial motions to dismiss, defendants contended that the First Amended Complaints had not adequately defined a market or pled anti competitive effects and had thus failed to state a claim under the rule of reason. In response, plaintiffs did not assert that they had, in fact, met these requirements; they argued only that "where plaintiffs allege per se claims, these requirements do not apply. Plaintiffs' Memorandum of Law in Opposition to Defendants Motions to Dismiss 43 n. 26, filed in the District Court as No. 04-5184, Dkt. Entry # 344. In a subsequent submission, plaintiffs explicitly stated that the allegations in their complaints were "subject to per se antitrust analysis, not evaluation under the rule of reason. Plaintiffs' Reply Brief in Support of Motion for Class Certification I, filed in the District Court as No. 04-5184, Dkt. Entry # 506. Plaintiffs have never disputed the District Court's determination that " b]ecause Plaintiffs have alleged the Section 1 claim as a per se violation, even at the pleading stage Plaintiffs must set forth sufficient facts evidencing a horizontal conspiracy involving market or customer allocation in order for their claim to survive a motion to dismiss. 2007 WL 1100449, at *10; see also Defendants' Comm. Br. 10 (stating that on appeal, " a]s in the district court, Plaintiffs have abandoned any argument that the complaints] state] a claim under the rule of reason). Plaintiffs argue only that they have, in fact, adequately pled such horizontal conspiracies.

Plaintiffs' obligation to show the existence of a horizontal agreement is not only an ultimate burden of proof but also bears on their pleadings. "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will

not do." *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955 (quoting Fed.R.Civ.P. 8(a)(2)). Because Federal Rule of Civil Procedure 8(a)(2) "requires a 'showing,' rather than a blanket assertion, of entitlement to relief," courts evaluating the viability of a complaint under Rule 12(b)(6) must look beyond conclusory statements and determine whether the complaint's well-pled factual allegations, taken as true, are "enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555 & n. 3, 127 S.Ct. 1955. The test, as authoritatively formulated by *Twombly*, is whether the complaint alleges "enough fact[] to state a claim to relief that is plausible on its face," *id.* at 570, 127 S.Ct. 1955, which is to say, " 'enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal[ity],' " *Arista Records, LLC v. Doe 3*, 604 F.3d 110, 120 (2d Cir.2010) (quoting *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955) (alteration in *Arista Records*).⁷

17

Twombly affirms that Rule 8(a)(2) requires a statement of facts "suggestive enough (when assumed to be true) "to render the plaintiff's claim to relief] plausible, that is, "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal conduct. *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955. *Iqbal*, which reiterated and applied *Twombly*'s pleading standard, endorses this understanding. See *Iqbal*, 129 S.Ct. at 1949-51. Although *Fowler v. UPMC Shadyside*, 578 F.3d 203 (3d Cir.2009), stated that *Twombly* and *Iqbal* had "repudiated the Supreme Court's earlier decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), see *Fowler*, 578 F.3d at 211, we are not so sure. Clearly, *Twombly* and *Iqbal* inform our understanding of *Swierkiewicz*, but the Supreme Court cited *Swierkiewicz* approvingly in *Twombly*, see 550 U.S. at 555-56, 127 S.Ct. 1955, and expressly denied the plaintiffs' charge that *Swierkiewicz* "runs counter to *Twombly*'s plausibility standard, *id.* at 569-70, 127 S.Ct. 1955. As the Second Circuit has observed, *Twombly* "emphasized that its holding was consistent with the Court's] ruling in *Swierkiewicz* that 'a heightened pleading requirement, requiring the pleading of 'specific facts beyond those necessary to state a] claim and the grounds showing entitlement to relief, was 'impermissibl e]. *Arista Records*, 604 F.3d at 120 (quoting *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955 (alterations in *Arista Records*)). In any event, *Fowler*'s reference to *Swierkiewicz* appears to be dicta, as *Fowler* found the complaint before it to be adequate. 578 F.3d at 212; see also *id.* at 211 ("The

demise of *Swierkiewicz*, however, is not of significance here.).

*320 As we have recognized, this plausibility standard is an interpretation of [Federal Rule of Civil Procedure 8](#). *Phillips*, 515 F.3d at 234; *see Twombly*, 550 U.S. at 557, 127 S.Ct. 1955 (stating that the plausibility standard “reflects the threshold requirement of [Rule 8\(a\)\(2\)](#) that the ‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief.’ ” (alteration in original)). *Twombly*'s importance to the case before us, however, goes beyond its formulation of the general pleading standard. *Twombly* is also an essential guide to the application of that standard in the antitrust context, for in *Twombly* the Supreme Court also had to determine whether a Sherman Act claim alleging horizontal conspiracy was adequately pled. ⁸

18 As the Supreme Court has noted, “ context matters in notice pleading. *Phillips*, 515 F.3d at 232, and what suffices to withstand a motion to dismiss necessarily depends on substantive law and the elements of the specific claim asserted. *See Iqbal*, 129 S.Ct. at 1950 (“Determining whether a complaint states a plausible claim for relief so as to satisfy the *Twombly* standard] will ... be a context specific task); *see also id.* at 1947 (“In *Twombly*, the Court found it necessary first to discuss the antitrust principles implicated by the complaint. Here too we begin by taking note of the elements the] plaintiff must plead to state his discrimination] claim (internal citation omitted)). The touchstone of [Rule 8\(a\)\(2\)](#) is whether a complaint's statement of facts is adequate to suggest an entitlement to relief under the legal theory invoked and thereby put the defendant on notice of the nature of the plaintiff's claim. *See Twombly*, 550 U.S. at 565 n. 10, 127 S.Ct. 1955 (noting that “a defendant seeking to respond to plaintiffs' conclusory allegations in the § 1 of the Sherman Act] context would have little idea how to answer). Some claims will demand relatively more factual detail to satisfy this standard, while others require less. *See Arista Records*, 604 F.3d at 120 (stating that the Supreme Court's recent pleading decisions “require factual amplification where] needed to render a claim plausible (internal quotation marks omitted) (alteration in original)). As discussed below, the question of the sufficiency of the complaint in *Twombly* turned largely on the doctrinal fact that “antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475

U.S. 574, 588, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *see Twombly*, 550 U.S. at 554 57, 127 S.Ct. 1955.

The *Twombly* plaintiffs had alleged that defendant telephone companies had “entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet service markets and ha[d] agreed not to compete with one another and otherwise allocated customers and markets to one another.” *Twombly*, 550 U.S. at 551, 127 S.Ct. 1955 (internal quotation marks omitted). The Court found, however, that this sort of “wholly conclusory statement of claim,” *id.* at 561, 127 S.Ct. 1955, was insufficient to plead an entitlement to relief. *Id.* at 564 & n. 9, 127 S.Ct. 1955; *see id.* at 556 57, 127 S.Ct. 1955 (“Without more, ... a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.”). The Court therefore proceeded to examine the entirety of the complaint's allegations, in order to determine whether the complaint contained “enough factual matter (taken as true) to suggest that an agreement was made,” in other words, “enough to render a § 1 conspiracy plausible.” *Id.* at 556, 127 S.Ct. 1955.

*321 [10] In conducting this inquiry, the Court looked to well-settled jurisprudence establishing what is necessary to satisfy the conspiracy requirement of a § 1 claim at various post-pleading stages of litigation. *Id.* at 554, 127 S.Ct. 1955 (citing *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 74 S.Ct. 257, 98 L.Ed. 273 (1954) (affirming denial of directed verdict); *Monsanto Co. v. Spray Rite Serv. Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984) (same); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (addressing whether the record evidence of agreement was sufficient to withstand a motion for summary judgment)). The crux of this case law is that evidence of parallel conduct by alleged co-conspirators is not sufficient to show an agreement. Indeed, “[e]ven ‘conscious parallelism,’ a common reaction of ‘firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions’ is ‘not in itself unlawful.’ ” *Id.* at 553 54, 127 S.Ct. 1955 (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993)) (alterations in *Twombly*). ⁹ Parallel conduct is, of course, consistent with the existence of an agreement; in many cases where an agreement exists, parallel conduct such as setting prices

at the same level is precisely the concerted action that is the conspiracy's object. But as the Supreme Court has long recognized, parallel conduct is “just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.” *Id.* at 554, 127 S.Ct. 1955; see *Matsushita*, 475 U.S. at 594, 106 S.Ct. 1348 (warning that “mistaken inferences” of conspiracy from ambiguous circumstantial evidence may “chill the very conduct the antitrust laws are designed to protect”); see also *supra* note 10. In order “to avoid deterring innocent conduct that reflects enhanced, rather than restrained, competition,” *Flat Glass*, 385 F.3d at 357, and in order to enforce the Sherman Act's requirement of an agreement, the Supreme Court has required that “a § 1 plaintiff's offer of conspiracy evidence must tend to rule out the possibility that the defendants were acting independently,” *Twombly*, 550 U.S. at 554, 127 S.Ct. 1955; see also *Matsushita*, 475 U.S. at 597 n. 21, 106 S.Ct. 1348 (“[C]onduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy.”).

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In a highly concentrated market, “any single firm's price and output decisions will have a noticeable impact on the market and on its rivals, such that when any firm in that market “is deciding on a course of action, any rational decision must take into account the anticipated reaction of the other firms. *Flat Glass*, 385 F.3d at 359 (internal quotation marks omitted); see 6 Areeda & Hovenkamp, *Antitrust Law* ¶ 1429 (2d ed. 2003). According to this “theory of interdependence ... firms in a concentrated market may maintain their prices at supracompetitive levels, or even raise them to those levels, without engaging in any overt concerted action. *Flat Glass*, 385 F.3d at 359. Although this oligopolistic behavior, or “conscious parallelism, is often adverse to consumer interests, courts have nonetheless found that it is not, without more, sufficient evidence of a § 1 violation, both because it is not an agreement within the meaning of the Sherman Act, and because it is resistant to judicial remedies. *Id.* at 359 60. But see Richard A. Posner, *Antitrust Law* 51 100 (2d ed. 2001) (arguing that “conscious parallelism, or “tacit collusion, should sometimes suffice to prove a § 1 violation).

[11] Some courts have denominated these facts, the presence of which may indicate the existence of an actionable agreement, as “plus factors.” *Flat Glass*, 385

F.3d at 360. Although “[t]here is no *322 finite set of such criteria ... [,][w]e have identified ... at least three such plus factors: (1) evidence that the defendant had a motive to enter into a price fixing conspiracy; (2) evidence that the defendant acted contrary to its interests; and (3) ‘evidence implying a traditional conspiracy.’” *Id.* (quoting *Petruzzi's IGA Supermarkets, Inc. v. Darling Delaware Co.*, 998 F.2d 1224, 1244 (3d Cir.1993)). As we have cautioned, however, care must be taken with the first two types of evidence, each of which may indicate simply that the defendants operate in an oligopolistic market, that is, may simply restate the (legally insufficient) fact that market behavior is interdependent and characterized by conscious parallelism. *Id.* at 360 61; see 6 Areeda & Hovenkamp, *Antitrust Law* ¶ 1434c1 (2d ed. 2003); see also *Baby Food*, 166 F.3d at 135 (“[E]vidence of action that is against self-interest or motivated by profit must go beyond mere interdependence.”).²⁰ The third factor, “evidence implying a traditional conspiracy,” consists of “non-economic evidence ‘that there was an actual, manifest agreement not to compete,’” which may include “‘proof that the defendants got together and exchanged assurances of common action or otherwise adopted a common plan even though no meetings, conversations, or exchanged documents are shown.’” *Flat Glass*, 385 F.3d at 361 (quoting *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 661 (7th Cir.2002); 6 Areeda & Hovenkamp, *supra*, ¶ 1434b); see 6 Areeda & Hovenkamp, *supra*, ¶ 1416, at 103 (referring generally to “an overt act more consistent with some pre-arrangement for common action than with independently arrived-at decisions”).

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In fact, “in actual practice, most courts rely on the *absence* of motivation or offense to self interest to preclude a conspiracy inference from ambiguous evidence or mere parallelism. 6 Areeda & Hovenkamp, *supra*, ¶ 1434c2; see, e.g., *Matsushita*, 475 U.S. at 596 97, 106 S.Ct. 1348 (“ [I]f petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.); *Southway Theatres v. Georgia Theatre Co.*, 672 F.2d 485, 494 (5th Cir. Unit B 1982) (The “basic rule is “that the inference of a conspiracy is always unreasonable when it is based solely on parallel behavior that can be explained as the result of the independent business judgment of the defendants.).

[12] [13] One important question raised by *Twombly* is what is the relationship between this summary judgment

(and directed judgment) jurisprudence governing the kind of evidentiary facts necessary to support a finding of conspiracy, on the one hand, and the “antecedent” issue, *Twombly*, 550 U.S. at 554, 127 S.Ct. 1955, of a § 1 plaintiff’s pleading burden, on the other. We think *Twombly* aligns the pleading standard with the summary judgment standard in at least one important way: Plaintiffs relying on circumstantial evidence of an agreement must make a showing at both stages (with well-pled allegations and evidence of record, respectively) of “something more than merely parallel behavior,” *id.* at 560, 127 S.Ct. 1955, something “plausibly suggest[ive of] (not merely consistent with) agreement,” *id.* at 557, 127 S.Ct. 1955. See *id.* at 557 n. 5, 127 S.Ct. 1955 (noting that a plaintiff’s pleadings must cross the line “between the factually neutral and the factually suggestive”). “Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action.” *Id.* at 557, 127 S.Ct. 1955. Put differently, allegations of conspiracy are deficient if there are “obvious alternative *323 explanation[s]” for the facts alleged. *Id.* at 567, 127 S.Ct. 1955.²

21 Although *Twombly*’s articulation of the pleading standard for § 1 cases draws from summary judgment jurisprudence, the standards applicable to Rule 12(b)(6) and Rule 56 motions remain distinct. In expounding this distinction, some judges and commentators have opined that “[e]ven in those contexts in which an allegation of conspiracy based on] parallel conduct will not suffice to take an antitrust plaintiff’s case to the jury, it will sometimes suffice to overcome a motion to dismiss and permit some discovery, perhaps leaving the issue for later resolution on a motion for summary judgment. *Starr v. Sony BMG Music Entmt*, 592 F.3d 314, 329 (2d Cir.2010) (Newman, J., concurring). One of *Twombly*’s formulations of the plausibility pleading standard calling for “enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement, 550 U.S. at 556, 127 S.Ct. 1955 appears to support this view. See also *supra* note 17. In any case, a claim of conspiracy might appear plausible in light of the well pled facts in the complaint, only to appear deficient at the summary judgment stage, when (1) the plaintiff can no longer rely on mere allegations but must adduce evidence,

and (2) the defendant’s uncontroverted evidence is also added to the picture.

A corollary of this proposition is that plaintiffs relying on parallel conduct must allege facts that, if true, would establish at least one “plus factor,” since plus factors are, by definition, facts that “tend[] to ensure that courts punish concerted action an actual agreement instead of the unilateral, independent conduct of competitors.” *Flat Glass*, 385 F.3d at 360 (internal quotation marks omitted); accord *Lum v. Bank of Am.*, 361 F.3d 217, 230 (3d Cir.2004) (describing plus factors as “circumstances under which ... the inference of rational independent choice [is] less attractive than that of concerted action” (quoting *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir.1977))).²²

22 *Twombly* did not explicitly use the term “plus factor” in formulating its pleading standard. But the Court did note that the lower court decision under review had held that “plus factors are not required to be pleaded to permit an antitrust claim based on parallel conduct to survive dismissal. *Twombly*, 550 U.S. at 553, 127 S.Ct. 1955 (quoting 425 F.3d 99, 114 (2d Cir.2005) (emphasis in original)). The basis for the Court of Appeals’ conclusion was that parallel conduct alone was sufficient to plead a § 1 conspiracy, as long as the court could conceive of some set of facts “that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence. 425 F.3d at 114, *rev’d*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929. In reversing, the Supreme Court expressly rejected that premise and retired the “no set of facts language from *Conley v. Gibson*, 355 U.S. 41, 45 46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), on which the Court of Appeals had relied. *Twombly*, 550 U.S. at 561 63, 127 S.Ct. 1955. By repudiating this premise, the Supreme Court necessarily rejected the proposition that plaintiffs may plead conspiracy on the basis of mere parallelism and thus necessarily required the pleading of plus factors. As *Twombly* put it, “[a] statement of parallel conduct ... needs some ... further circumstance, or “further factual enhancement, to plead a plausible § 1 claim. 550 U.S. at 557, 127 S.Ct. 1955. Moreover, as discussed below, the crucial deficiency in the *Twombly* complaint was that the plaintiffs could not demonstrate what we have identified as an important plus factor, see *Petruzzis*, 998 F.2d at 1244, namely that the defendants’ alleged parallel conduct was contrary to their self interest. Accordingly, although a plaintiff still need not plead specific evidence,

see *supra* note 17, *Twombly* abrogates our earlier statements, see, e.g., *Lum*, 361 F.3d at 230, that a theory of agreement resting on parallel conduct need not plead facts that, if true, would constitute plus factors.

[14] [15] [16] It bears noting that, consistent with summary judgment analysis, plus factors need be pled only when a plaintiff's claims of conspiracy rest on parallel conduct. Allegations of direct evidence of an agreement, if sufficiently detailed, are independently adequate. See *Twombly*, 550 U.S. at 564, 127 S.Ct. 1955 (distinguishing *324 "independent allegation[s] of actual agreement" from "descriptions of parallel conduct").²³ But this does not mean that a § 1 claim will be considered adequately pled because of the bare possibility that discovery might unearth direct evidence of an agreement. The Court of Appeals' opinion in *Twombly* had pointed to that possibility as a ground for denying dismissal. 425 F.3d at 114. But the Supreme Court expressly rejected this reasoning, stating that "this approach to pleading would dispense with any showing of a 'reasonably founded hope' that a plaintiff would be able to make a case." *Twombly*, 550 U.S. at 562, 127 S.Ct. 1955 (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005)). After *Twombly*, if a plaintiff expects to rely exclusively on direct evidence of conspiracy, its complaint must plead "enough fact to raise a reasonable expectation that discovery will reveal" this direct evidence. *Id.* at 556, 127 S.Ct. 1955. And if the plaintiff alternatively expects to rest on the circumstantial evidence of parallel behavior, the complaint's statement of facts must place the alleged behavior in "a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent action." *Id.* at 557, 127 S.Ct. 1955.²⁴ In other words, regardless of whether the plaintiff expects to prove the existence of a conspiracy directly or circumstantially, it must plead "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *325 *Id.* at 556, 127 S.Ct. 1955.²⁵

²³ Courts devised the requirement of "plus factors in the context of offers of proof of an agreement that rest on parallel conduct, i.e., circumstantial evidence. On appeals from summary judgment, we have stated that direct evidence of a conspiracy, such as a document or conversation explicitly manifesting the existence of the agreement in question "evidence that is explicit and requires no inferences to establish

the proposition or conclusion being asserted, *Baby Food*, 166 F.3d at 118 obviates the need for such a showing. *Rossi*, 156 F.3d at 466 (citing *Petruzzi*, 998 F.2d at 1233); see also *Cosmetic Gallery, Inc. v. Schoeneman Corp.*, 495 F.3d 46, 52 (3d Cir.2007) (providing examples of direct evidence of conspiracy). "This is because when the plaintiff has put forth direct evidence of conspiracy, the fact finder is not required to make inferences to establish facts, and therefore the Supreme Court's concerns over the reasonableness of inferences in antitrust cases evaporate. *Rossi*, 156 F.3d at 466 (citing *Petruzzi*, 998 F.2d at 1233); see, e.g., *Mack Trucks*, 530 F.3d at 222 (noting that a statement by a vice president of the defendant was "direct evidence of collusion, which, if believed, requires no further inference"); see also *Golden Bridge Tech., Inc. v. Motorola, Inc.*, 547 F.3d 266, 272 (5th Cir.2008) (implying the same distinction between the treatment of direct and circumstantial evidence), *cert. denied*, U.S. , 129 S.Ct. 2055, 173 L.Ed.2d 1149 (2009); *Williamson Oil Co. v. Philip Morris USA*, 346 F.3d 1287, 1300 (11th Cir.2003) (same). Put differently, direct evidence of conspiracy, if credited, removes any ambiguities that might otherwise exist with respect to whether the parallel conduct in question is the result of independent or concerted action.

Twombly noted that no such direct allegations appeared in the complaint before it. See 550 U.S. at 565 n. 11, 127 S.Ct. 1955 (observing that plaintiffs do not "directly allege illegal agreement but rather "proceed exclusively via allegations of parallel conduct"); see also *id.* at 565 n. 10, 127 S.Ct. 1955 ("Apart from identifying a seven year span in which the § 1 violations were supposed to have occurred ..., the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies.).

²⁴ Sometimes, of course, discovery will uncover both direct and circumstantial evidence of agreement. We do not imply that a plaintiff must commit to a single method of proof at the pleading stage, but merely that a plaintiff must put forth *some* statement of facts suggestive of unlawful conspiracy. "O]nce a claim has been stated adequately, it may be supported by showing any set of [evidentiary] facts consistent with the allegations in the complaint. *Twombly*, 550 U.S. at 563, 127 S.Ct. 1955.

²⁵ *Twombly* thus abrogates our earlier holdings that § 1 plaintiffs can survive a motion to dismiss without alleging facts supporting a plausible inference of conspiracy. See, e.g., *Bogosian*, 561 F.2d at 446.

Bogosian correctly observed that “[i]t is not necessary to plead evidence. *Id.* at 446; accord *id.* at 458 (Aldisert, J., dissenting); see also *supra* note 17. But we think the opinion is at odds with *Twombly* insofar as it absolves plaintiffs of the obligation “to plead the facts upon which the [ir] claim is based. *Id.* at 446 (majority opinion). *Bogosian*’s formulation of the pleading standard appears to have derived from the view that a complaint is sufficient so long as “it does not appear to a certainty that plaintiffs can prove no set of facts which ... would entitle them to reach the jury, *id.*, that is, it appears to reflect precisely the pervasive misapprehension of Federal Rule of Procedure 8(a)(2) that led the *Twombly* Court to “retire the oft cited language from *Conley v. Gibson*. See *Twombly*, 550 U.S. at 560 63, 127 S.Ct. 1955. Based on this pre *Twombly* understanding of “the precept that the complaint be liberally construed, *Bogosian* found it sufficient that the complaint provided a statement of alleged consciously parallel conduct by the defendants, along with the unelaborated assertion that the defendants had entered into a “combination. *Bogosian*, 561 F.2d at 445 46. The opinion did not examine whether the allegation of concerted action was plausible in light of the context in which the parallel conduct was situated, instead deferring until after discovery the question of whether such conduct might in fact be perfectly consistent with each defendant’s independent self interest. *Id.* at 446. *Twombly*, we think, clearly demands more scrutiny of a § 1 complaint. As the dissent in *Bogosian* maintained, “an allegation of consciously parallel behavior, without more, does] not state a Sherman Act claim, *id.* at 459 (Aldisert, J., dissenting), and a plaintiff cannot merely assert that the defendants’ actions were concerted without alleging facts plausibly suggesting an agreement.

Because *Twombly* dismissed the antitrust claim before it, the Court did not provide specific examples of allegations that would satisfy its plausibility standard. Nonetheless, the Court did point in general terms to “parallel behavior that would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties.” 550 U.S. at 556 n. 4, 127 S.Ct. 1955 (citing 6 Areeda & Hovenkamp, *supra*, ¶ 1425, at 167 85). More significantly, the shortcomings identified in the *Twombly* complaint provide an important albeit negative gloss on the governing standard.

The *Twombly* plaintiffs proffered two basic theories of anticompetitive collusion. First, they charged that

the defendant regional telephone companies (ILECs) conspired to “inhibit the growth of upstart” competitors (CLECs). 550 U.S. at 550, 127 S.Ct. 1955. Second, they asserted that the ILECs agreed not to compete with one another so as to preserve the preexisting regional monopoly each enjoyed. *Id.* at 551, 127 S.Ct. 1955.

At the outset of its analysis, the Court remarked that the complaint’s sufficiency would “turn[] on the suggestions raised by [defendants’ alleged] conduct when viewed in light of common economic experience.” *Id.* at 565, 127 S.Ct. 1955. Under this lens, the complaint’s first theory immediately revealed its inadequacy because “nothing in the complaint intimate[d] that the resistance to the upstart[CLECs] was anything more than the natural, unilateral reaction of each ILEC intent on keeping its regional dominance.... [T]here [was] no reason to infer that the companies had agreed among themselves to do what was only natural anyway....” *Id.* at 566, 127 S.Ct. 1955. A rudimentary economic analysis also fatally undermined the complaint’s second charge, namely that the ILECs agreed not to enter one another’s markets. The Court recognized that “[i]n a traditionally unregulated industry with low barriers to entry, sparse competition *326 among large firms dominating separate geographical segments of the market could very well signify illegal agreement.” *Id.* at 567, 127 S.Ct. 1955. But in the telecommunications industry at issue in *Twombly*, monopoly had been “the norm ..., not the exception.” *Id.* at 568, 127 S.Ct. 1955. Noting that “[t]he ILECs were born in that world, doubtless liked the world the way it was, and surely knew the adage about him who lives by the sword,” the Court found that “a natural explanation for the noncompetition alleged is that the former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.” *Id.* In fact, “the complaint itself” bolstered this conclusion. *Id.* Not only did it “not allege that competition [against other ILECs] as CLECs was potentially any more lucrative than other opportunities being pursued by the ILECs during the same period,” but “the complaint [was] replete with indications that any CLEC faced nearly insurmountable barriers to profitability owing to the ILECs’ flagrant resistance to the network sharing requirements” of federal law. *Id.* In short, both “common economic experience” and the complaint’s own allegations showed that each defendant ILEC was independently motivated to behave in the ways alleged. Accordingly, neither of plaintiffs’ theories successfully pled a § 1 conspiracy because in

each case, defendants' parallel conduct "was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1950, 173 L.Ed.2d 868 (2009) (summarizing *Twombly*).

[17] In sum, *Twombly* makes clear that a claim of conspiracy predicated on parallel conduct should be dismissed if "common economic experience," or the facts alleged in the complaint itself, show that independent self-interest is an "obvious alternative explanation" for defendants' common behavior. For our present purposes, we find this guidance sufficient.

b. Assessing the Sufficiency of Plaintiffs' Pleadings

As the Supreme Court has instructed, we begin by identifying the complaints' bare assertions that the insurers or brokers entered into horizontal agreements. See, e.g., Comm. SAC ¶ 158 ("[T]he Insurers members of the ... Broker Centered Conspiracy all agreed with [the Broker], and agreed horizontally among themselves, to reduce or eliminate competition for [the Broker's] secured business among the conspiring insurers."); *id.* ¶ 354 ("[T]he Broker 'hubs' simultaneously agreed horizontally not to compete with each other...."). Because these conclusory averments do not "show[]" but merely "assert[]" plaintiffs' entitlement to relief, *Twombly*, 550 U.S. at 555 n. 3, 127 S.Ct. 1955, they cannot carry plaintiffs' pleading burden. See *id.* at 556 57, 127 S.Ct. 1955 ("Without more, ... a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality."); cf. *Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 254 55 (3d Cir.2010) (holding that it was inadequate for the complaint to state in "a conclusory manner" that "Defendants, each with all of the others, have entered into two interrelated conspiracies" and that "every Dealer knew that every other Dealer agreed, or would agree, to th[e] same [allegedly unlawful] plan" (emphasis omitted)). Accordingly, we must examine the entirety of the complaints' factual allegations and determine whether, taken as true, they support a plausible inference of horizontal conspiracy.

(a) Conspiracies Not Involving Bid Rigging

[18] As the District Court recognized, plaintiffs' "broker-centered conspiracies" are alleged as hub-and-spoke conspiracies, with the broker as the hub and its insurer-partners as the spokes. This type of conspiracy has "a long history in antitrust jurisprudence." *Dentsply Int'l*, 602 F.3d at 255 (citing *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1939)) (discussing general hub-and-spoke model). "[T]he critical issue for establishing a *per se* violation with the hub and spoke system is how the spokes are connected to each other." *Total Benefits Planning Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 436 (6th Cir.2008). Here, the District Court found plaintiffs had not adequately alleged the existence of a "wheel" or "rim" (that is, a horizontal agreement) connecting the insurer-spokes. 2007 WL 2533989, at *17; see *Dickson v. Microsoft Corp.*, 309 F.3d 193, 203 (4th Cir.2002) ("A rimless wheel conspiracy is one in which various defendants enter into separate agreements with a common defendant, but where the defendants have no connection with one another, other than the common defendant's involvement in each transaction.") (citing *Kotteakos v. United States*, 328 U.S. 750, 755, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)); cf. *Dentsply Int'l*, 602 F.3d at 255 (concluding that "even assuming the Plaintiffs have adequately identified the hub (Dentsply) as well as the spokes (the Dealers), ... the amended complaint" fails to allege adequately "an agreement among the Dealers themselves").

[19] Plaintiffs' allegations in support of horizontal conspiracy in the broker-centered schemes fall into two different categories. First, plaintiffs assert that the very nature of the contingent commission agreements between the broker and each of its insurer-partners implies an agreement among the brokers. Second, plaintiffs rely on specific details about the operation of the customer steering schemes, particularly the "devices" used to ensure that a particular piece of business was placed with the designated insurer. With the exception of the bid rigging alleged in the Marsh-centered commercial conspiracy, we agree with the District Court that plaintiffs' allegations do not give rise to a plausible inference of horizontal conspiracy.

Contrary to plaintiffs' arguments, one cannot plausibly infer a horizontal agreement among a broker's insurer-

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partners from the mere fact that each insurer entered into a similar contingent commission agreement with the broker. As the District Court concluded, the first stage of the alleged broker-centered conspiracies—the consolidation of the groups of insurers to which each broker referred business—evinces nothing more than a series of vertical relationships between the broker and each of its “strategic partners.” 2007 WL 2533989, at *15.

According to the complaints, the defendant brokers decided to consolidate the pool of insurers to which they referred business in order to improve efficiency and extract higher commissions from each of their insurer-partners. As defendants point out, “[o]nce a broker decided to organize its business in this fashion, each insurer had sound, independent business reasons to pay contingent commissions to become and remain a ‘preferred insurer.’ Paying such commissions helped the insurer to compete for and retain a larger share of its partners’ business than if it had no such vertical relationships.” Defendants’ EB Br. 38. In short, the obvious explanation for each insurer’s decision to enter into a contingent commission *328 agreement with a broker that was consolidating its pool of insurers was that each insurer independently calculated that it would be more profitable to be within the pool than without. The complaints themselves reinforce this conclusion with their portrait of a concentrated brokerage market, in which a handful of brokers controlled the majority of client business, and an unconcentrated, more competitive market of insurers vying for premium dollars. Comm. SAC ¶¶ 70–76; EB SAC ¶¶ 67–73. According to plaintiffs’ own account, “[t]he Insurer Defendants are thus largely dependent on the Broker Defendants to assure access to business and protect their market share.” EB SAC ¶ 73; accord Comm. SAC ¶ 76; see also *id.* ¶ 73 (“The close bond between broker and client gives brokers tremendous influence, and often decisive control, over the placement of their clients’ insurance business.”). Given this economic landscape, each insurer had an obvious incentive to enter into the “strategic partnerships” offered by the defendant brokers, irrespective of the actions of its competitors.

Refusing to concede this point, plaintiffs argue that the parallel decisions of insurers to join the broker-centered conspiracies plausibly imply a horizontal agreement among the insurers because “an insurer would not pay enormous contingent commissions in order to access premium volume if its major rivals were getting the same

access for free.” Plaintiffs’ EB Reply Br. 8 (emphasis omitted). This contention is implausible. Although each insurer would be motivated to achieve the best deal possible with the broker—and would doubtless like to obtain terms as least as favorable as those negotiated by other insurers—the determinative consideration would be whether the insurer is better off paying contingent commissions for privileged access to the broker’s clients than it would be saving those payments and foregoing the broker’s assistance in winning and retaining business. Especially in light of the market dynamics alleged by plaintiffs, the obvious explanation for the decision of the defendant insurers to enter into contingent commission agreements with the consolidating brokers is that each insurer found that the benefits justified the costs. In fact, the complaints relate incidents in which insurers who were reluctant to conform to the contingent commission demands of a broker nonetheless did so when faced with the prospect of losing their privileged access to the broker’s book of business. See, e.g., Comm. SAC ¶¶ 135–140; EB SAC ¶¶ 163–168; *id.* ¶¶ 214–226. These anecdotes only strengthen the obvious conclusion that no horizontal agreement was necessary to induce the insurers to become “strategic partners.”

Moreover, plaintiffs’ argument proves too much. If the parallel decisions by several insurers to pay contingent commissions imply a horizontal agreement, then it is difficult to see why parallel decisions to pay standard commissions (that is, a fixed percentage of each policyholder’s premium payment) would not also imply an agreement. For that matter, plaintiffs’ logic would divine a horizontal agreement from virtually any parallel expenditures for marketing services, on the mistaken ground that a firm would not pay for advertising, for example, in the absence of an agreement with its competitors to enter into similar contracts with the advertising company. Cf. *Twombly*, 550 U.S. at 566, 127 S.Ct. 1955 (noting that “resisting competition is routine market conduct,” and that “if alleging parallel decisions to resist competition were enough to imply an antitrust conspiracy, pleading a § 1 violation against almost any group of competing *329 businesses would be a sure thing”).²⁶ The District Court correctly found that the brokers’ alleged consolidation of the insurers with which they did business did not plausibly imply an agreement susceptible to *per se* condemnation.

26 Plaintiffs distinguish contingent commissions from advertising costs on two grounds, neither of which is relevant. First, plaintiffs stress that unlike advertising, which is procompetitive, the customer allocation schemes allegedly linked to the contingent commission payments were antagonistic to competition. This response, however, misunderstands the thrust of the advertising analogy. Even assuming defendants' practices unreasonably restrained trade, plaintiffs' § 1 claims must also plausibly suggest that these practices were the product of an agreement among the insurers. The advertising analogy illustrates plaintiffs' failure to satisfy this element of their pleading burden; parallel conduct, such as the payment of contingent commissions, does not plausibly imply the existence of an agreement when each defendant had a strong, independent motive to engage in that conduct.

Second, plaintiffs allege that contingent commission agreements were not customary before the brokers' decisions in the 1990's to consolidate their pool of insurers, and that the insurers received no additional benefits in exchange for these payments. Even if that is true, however and the complaints' assertions of increasing premium revenue by defendant insurers during the proposed class period suggest otherwise the point is that, once the brokers had undertaken that consolidation, insurers had much to lose if they did not become a "strategic partner, which provided each of them with an independent business reason to pay brokers contingent commissions.

Plaintiffs seek to bolster the inference of horizontal agreement with allegations of information-sharing among the members of each putative broker-centered conspiracy. Plaintiffs assert numerous instances, for example, in which a broker communicated the details of its contingent commission agreement with one insurer-partner to other insurer-partners, in violation of confidentiality provisions forbidding such disclosures. In plaintiffs' view, these alleged disclosures helped defendants to police the broker-centered conspiracies by assuring each conspiring insurer that none of the other insurer-partners was "cheating" by taking more than the allegedly agreed-upon share of premium volume.

But there is a significant obstacle to plaintiffs' attempts to infer a horizontal agreement from this sharing of information. The complaints allege only that the brokers made the disclosures; there are no allegations that any insurer ever horizontally disclosed to its competitors

the details of its vertical agreement with a broker. Furthermore, there are obvious reasons for each broker to share this information with its insurer-partners, reasons that have nothing to do with preexisting agreements of any kind. The details of commission agreements with other insurers, for example, could be a powerful tool for a broker attempting to negotiate a more favorable agreement with a particular insurer-partner. Either match the "market" price for my premium volume, a broker might threaten, or I will transfer your share of my business to other, higher-commission-paying insurer-partners. This tactic would seem to be an effective way for brokers to exploit the leverage that, according to the complaints, they enjoyed over the insurers. And in fact, the complaints show that brokers used the information in precisely this way. *See, e.g.*, EB SAC ¶ 126 (recounting an incident in which a broker "reveals [to a particular insurer] that the bonus compensation arrangement it was seeking from [that particular insurer] had been agreed to by the other conspiring Insurers, and that [the particular insurer] should offer terms like those put forth by another Insurers [sic]"). Just as a manufacturer's practice of informing *330 each of its distributors of the identities of its other distributors as well as the prices they paid and the volume of product they received would not plausibly imply a horizontal agreement among the distributors, the disclosure of information alleged here fails to plausibly suggest a conspiracy among the insurers. It is true that *if* a horizontal conspiracy of the sort asserted by plaintiffs existed, the exchange of information alleged could conceivably serve the "policing" function plaintiffs describe. But it does not follow that this disclosure of information plausibly implies such a conspiracy; it is at least equally consistent with unconcerted action.²⁷

27 Plaintiffs contend that "i]t strains credulity to insist that an insurer, which repeatedly and systematically receives confidential information about a rival's contingent commission arrangements and premium volume, would not expect and understand that its rivals were being provided with the same information about its business. Plaintiff's EB Reply Br. 13. But the allegation that insurers knew that the brokers would disclose the details of their vertical agreements to other insurer partners does not imply that insurers intended that the information be so disclosed, let alone that they had entered into a horizontal agreement with other insurers. Plaintiffs' reliance on *United States v. Container Corp. of America*, 393 U.S. 333, 89 S.Ct. 510, 21 L.Ed.2d 526 (1969), is

thus inapposite. In *Container Corp.*, the Supreme Court found that the exchange among competitors of information about the prices they charged to customers constituted a horizontal conspiracy to limit price competition in violation of the Sherman Act. The disclosure of information alleged here, by contrast, is vertical and, unlike the exchange in *Container Corp.*, does not give rise to an inference of harm to competition. See *id.* at 337, 89 S.Ct. 510; see also *id.* at 338, 89 S.Ct. 510 (“Price is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition. ”).

The manufacturer analogy highlights a basic fallacy that undergirds much of plaintiffs' argumentative strategy. Plaintiffs repeatedly insist that

when [an] insurer knows that it is buying competitive protections for its incumbent business and it knows that other insurers are not getting a real opportunity on its incumbent business, and it knows that there are other partners of the broker who have the same competitive protections bought with the same contingent commissions, it is a fair inference ... that this describes ... a horizontal conspiracy.

Tr. of Oral Arg. 15 16. “Competitive protections” sound vaguely sinister, but what insurers were allegedly buying was a portion of the client business controlled by the broker. Whatever portion of that business one insurer buys is, of course, a portion unavailable to other insurers. Each contract between an insurer and the broker is, in this sense, a restraint of trade, but only in the way that every contract is a restraint of trade. See *Bd. of Trade v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 62 L.Ed. 683 (1918) (“Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence.”); cf. *Am. Needle, Inc. v. NFL*, U.S. , 130 S.Ct. 2201, 2208, 176 L.Ed.2d 947 (2010) (“[E]ven though, read literally, § 1 would address the entire body of private contract, that is not what the statute means.” (internal quotation marks omitted)). A similar restraint occurs when a manufacturer signs a contract with a distributor, agreeing to sell the distributor a certain percentage of

the manufacturer's product. This arrangement alone does not signify an agreement to unreasonably restrain trade, let alone a horizontal agreement to unreasonably restrain trade. Nor would an inference of horizontal conspiracy arise from the fact that each distributor knows which of its competitors have purchased the remaining *331 portions of the manufacturer's product, as well as the specific terms of the other deals. Here, plaintiffs claim the brokers' ability to “guarantee” insurers certain amounts of premium volume depended on deceiving their clients into believing that the brokers had solicited competitive bids from the insurers, and that in a given transaction, the insurer recommended by the broker was the one who had made the most attractive offer. These allegations of fraud, however, involve only the manner in which the brokers obtained the “product” they sold to insurers; they do not make the sales themselves an antitrust violation.²⁸ Contrary to plaintiffs' contentions, the allegations that each insurer knew about the “competitive protections” purchased by the other insurer-partners manifestly do not “describe[] ... a horizontal conspiracy” to unreasonably restrain trade.

²⁸ See *infra* note 31 and accompanying text. We discuss below plaintiffs' argument that the specific means allegedly used to steer clients, e.g., first looks, last looks, and the solicitation of intentionally uncompetitive bids, imply a horizontal agreement among the insurers.

Plaintiffs maintain that this conclusion is at odds with the holdings in two hub-and-spoke-conspiracy cases, *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1939), and *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir.2000). In *Interstate Circuit*, a theater chain company, Interstate, wrote to each of eight movie distributors, asking them to meet certain conditions in exchange for the theater company's “continued exhibition of the distributors' films in its ... first-run theatres” at a prescribed price of admission. 306 U.S. at 216 17, 59 S.Ct. 467. The conditions operated to restrict the terms under which the distributors could license their films to subsequent-run theatres, Interstate's competitors. Although there was no evidence of any direct communications among the eight distributors, the letter sent to each distributor listed all eight distributors as addressees; in other words, “from the beginning each of the distributors knew that the proposals were under consideration by the others.” *Id.* at 222, 59 S.Ct. 467. Each distributor accepted Interstate's proposed terms. The

district court found this evidence proved concerted action by the distributors in violation of § 1 of the Sherman Act, and the Supreme Court affirmed. Plaintiffs cite *Interstate Circuit* for the proposition that an actionable horizontal conspiracy does not require direct communication among the competitors.

We do not dispute this principle, but it does not relieve plaintiffs of the obligation to “allege facts plausibly suggesting ‘a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.’ ” *Dentsply Int’l*, 602 F.3d at 254 (quoting *Copperweld*, 467 U.S. at 771, 104 S.Ct. 2731). Key to *Interstate Circuit*’s conspiracy finding was its determination that each distributor’s decision to accede to Interstate’s demands would have been economically self-defeating unless the other distributors did the same: “Each was aware that ... without substantially unanimous action ... there was risk of a substantial loss of the business and good will...” *Interstate Circuit*, 306 U.S. at 222, 59 S.Ct. 467. In the absence of common action, agreeing to Interstate’s demands would have meant reducing output (specifically, surrendering the distributor’s share of the subsequent-run theater business) with no reasonable prospect of countervailing benefits; only collective conduct by the distributors could exert the market power necessary to increase profits in the first-run arena. The Court stated that it would “tax[] credulity to believe that the several distributors *332 would, in the circumstances, have accepted and put into operation with substantial unanimity such far-reaching changes in their business methods without some understanding that all were to join, and we reject as beyond the range of probability that it was the result of mere chance.” *Id.* at 223, 59 S.Ct. 467.

As noted, however, in the circumstances alleged here, the rationality of each insurer’s decision to enter into a “strategic partnership” with the broker does not presuppose concerted action. The advantages of the partnership to the insurers flowed from the broker’s control of its clients’ business, not the market power of the insurers. If anything, an insurer here would prefer that fewer of its competitors participate in the scheme, as it would then enjoy that much more of the broker’s steered business. *See, e.g.*, Comm. SAC ¶ 242 (noting that one of broker HRH’s insurer-partners preferred that HRH have only three other partners, whereas HRH wanted four). The opportunity to become a broker’s “strategic partner”

was an opportunity for the insurer to increase output, not reduce it.

Toys “R” Us is likewise distinguishable. There, Toys “R” Us, a toy retailer, invited manufacturers to stop selling toys to wholesale toy clubs, which competed with Toys “R” Us. The manufacturers did so. The Court of Appeals for the Seventh Circuit affirmed the FTC’s finding of § 1 conspiracy among the manufacturers. The court acknowledged that the “agreements between [Toys “R” Us] and the various manufacturers were, of course, vertical agreements,” 221 F.3d at 932, which could not in themselves constitute a per se violation. But the court determined that the FTC’s finding of a horizontal agreement among the manufacturers was warranted under the circumstances. The evidence showed that the manufacturers were “reluctan[t] to give up a new, fast-growing, and profitable channel of distribution,” *id.* (quoting FTC opinion); they “were in effect being asked by [Toys “R” Us] to reduce their output ..., and as is classically true in such cartels, they were willing to do so only if [Toys “R” Us] could protect them against cheaters,” *id.* at 936. In fact, the FTC had direct evidence, in the form of statements by the manufacturers’ executives, that each manufacturer agreed to Toys “R” Us’s proposal on the explicit condition that its competitors do the same. *Id.* As the Seventh Circuit noted, *Toys “R” Us* “is a modern equivalent of the old *Interstate Circuit* decision.” *Id.* at 935. In both cases, the evidence clearly indicated that the defendants would not have undertaken their common action without reasonable assurances that all would act in concert.

Here, the parallel vertical agreements are of a different sort. *Interstate* and *Toys “R” Us* solicited exclusive-dealing agreements from movie distributors and toy manufacturers, respectively, in an attempt to exploit the latter’s collective market power. Plaintiffs here do not allege that the insurers possessed market power (as noted, plaintiffs instead emphasize the brokers’ market power, *see* Comm. SAC ¶ 76; EB SAC ¶ 73), nor that each broker wanted its insurer-partners to deal exclusively with it (the complaints show that some insurers had contingent commission agreements with multiple brokers²⁹). Instead, plaintiffs allege that brokers demanded contingent commissions in exchange for given amounts of broker-controlled business. And the complaints show that each insurer had an incentive to pay these commissions based solely on the brokers’

ability to guarantee *333 delivery of premium volume. Each insurer's share of the market thus depended on its ability to gain the broker's favor, not on the choices of its competitors.

29 See *supra* note 6.

Plaintiffs' attempt to compare their allegations with the facts of *Interstate Circuit* and *Toys "R" Us* is thus misguided. If anything, the fundamentally different factual contexts in those cases reinforce our view that the alleged information-sharing by the brokers here does not plausibly support a claim of horizontal conspiracy.³⁰ We believe the alleged contingent commission agreements between brokers and insurers which form the backbone of plaintiffs' alleged "broker-centered conspiracies" find a more apt analogue in the facts of *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 119 S.Ct. 493, 142 L.Ed.2d 510 (1998). In *NYNEX*, plaintiff Discon alleged that Material Enterprises, a NYNEX subsidiary, had switched its purchase of certain services from Discon to AT & T Technologies, one of Discon's competitors, despite the fact that Discon was the less expensive servicer. According to Discon, the transaction was part of a fraudulent scheme in which Material Enterprises "could pass the higher prices on to New York Telephone, which in turn could pass those prices on to telephone consumers in the form of higher regulatory-agency-approved telephone service charges. At the end of the year, Material Enterprises would receive a special rebate from AT & T Technologies, which Material Enterprises would share with its parent, NYNEX." *Id.* at 132, 119 S.Ct. 493. The scheme allegedly allowed New York Telephone, a lawful monopoly, to circumvent regulatory restrictions on the telephone services charges it could impose on consumers, to the profit of the participating entities. Discon alleged that Material Enterprises refused to choose it as the service provider, despite its lower price, because it refused to go along with the scheme. The Supreme Court "concede[d] Discon's claim that the petitioners' behavior hurt consumers by raising telephone service rates" but refused to apply a rule *334 of per se condemnation to this vertical restraint, noting further that the consumer injury "naturally flowed" not so much from a less competitive market for removal services as from New York Telephone's exercise of its lawfully held market power "combined with a deception worked upon the regulatory agency." *Id.* at 136, 119 S.Ct. 493. Rather than § 1 of the Sherman Act, the Court suggested, a

more appropriate remedy might be found in "other laws, for example 'unfair competition' laws, business tort laws, or regulatory laws, [which] provide remedies for various competitive practices thought to be offensive to proper standards of business morality." *Id.* at 137, 119 S.Ct. 493 (internal quotation marks omitted).

30 Plaintiffs place special emphasis on the alleged information sharing in the HRH and Wells Fargo/Acordia centered commercial conspiracies, but these allegations do not overcome the basic deficiency we have just described. Plaintiffs allege that HRH allocated its book of business among three insurers and assert that "[t]he number of insurers] to which HRH allocated its business was discussed among and agreed to by the three chosen insurers. Comm. SAC ¶ 242. When we search for additional information about this putative agreement, we find mostly allegations common to the other broker centered conspiracies, namely that each insurer partner knew the identities of the others and the details of their similar contingent commission agreements with the broker. Plaintiffs' pleadings suggest that one insurer wanted HRH to have one fewer insurer partner than HRH originally had in mind. See Comm. RPS ¶ 281 ("During its negotiations with HRH, the insurer] was aware of the existence of other proposed carrier partners and expressed concern that HRH was considering consolidating its business with four Insurers rather than only three, which the insurer] preferred.). But this vertical effort to persuade HRH (with apparent success) to *exclude* the participation of a competitor hardly implies horizontal conspiracy among the insurers. (It also stands in stark contrast to the hub and spoke conspiracies found in *Interstate Circuit* and *Toys "R" Us*, in which each firm's motivation to enter into the vertical agreement was contingent on all of its competitors' doing the same.) To the contrary, the obvious alternative explanation for the insurer's behavior is a desire to maximize its piece of HRH's guaranteed premium volume pie.

Similarly, the allegations in the Well Fargo/Acordia conspiracy indicate only that the insurer partners knew one another's identities, and knew that each was benefitting in similar ways from the broker's ability to steer business. They do not imply that any insurer partner's agreement with Wells Fargo/Acordia was dependent on the conduct of its competitors.

Here, too, the "strategic partnerships" alleged by plaintiffs imply only a vertical restraint. Furthermore, the complaints show that the injury to purchasers

of insurance “naturally flowed” primarily from the nature of the broker-client relationship and the ability it afforded brokers to deceive clients about the quality and competitive status of the bids received from insurers. Contingent commission agreements were the means by which the brokers converted this power into profit, ultimately at their clients' expense; contingent commissions were the “rebate” insurers paid to brokers. But none of the allegations examined to this point give reason to believe that the broker-centered schemes were underwritten by horizontal agreements among the insurer-partners. Purchasers may have some cause of action against the defendants for their alleged deception and unfair trade practices, *see id.* (listing possible legal remedies), but plaintiffs' allegations of parallel contingent-commissions-for-guaranteed-premium-volume agreements between each broker and its insurer-partners do not adequately plead a per se violation of § 1 of the Sherman Act.³

31 Hovenkamp's discussion of *NYNEX* is also relevant to this case:

[T]he allegations in *NYNEX*] contained an element of fraud, but many thousands of contracts have exchanged exclusivity for kickbacks or some deception on consumers or third parties. An agreement giving a waste removal or towing company an exclusive right to the buyer's business in exchange for a secret rebate or kickback does not injure competition simply because of the fraud. Such a holding would cross the line from antitrust to consumer protection. And while protecting consumers from such schemes is certainly a worthy goal of legal policy generally, it is not an antitrust goal.

Hovenkamp, *supra*, ¶ 1902d, at 223. Here, too, the basic scheme alleged by plaintiffs is one in which defendant brokers exchanged exclusivity (premium volume) for kickbacks (contingent commissions). To be sure, here the brokers dealt “exclusively with multiple parties the exclusive dealing involved individual insurance policies (most notably those already placed with a particular insurer and up for possible renewal), rather than a broker's entire roster of clients but this difference does not materially alter the basic exclusivity for kickbacks model. It merely presents multiple, parallel instantiations of that model.

The gravamen of plaintiffs' allegations lies in what the District Court described as the second stage of the asserted

schemes: the operation of the “incumbent protection rackets” within each broker-centered conspiracy. Even if the parallel decisions to become strategic partners of the broker do not in themselves bespeak a horizontal agreement, plaintiffs contend their allegations about the “devices” used to conduct the customer-steering schemes suffice to meet the *Twombly* threshold.

According to the complaints, several of the devices that allegedly facilitated the schemes are common to all of the broker-centered conspiracies. For instance, plaintiffs allege that brokers often afforded insurer-partners “first looks” and “last looks” in bidding on policies. Once again, *335 however, the practices identified by plaintiffs are strictly vertical in nature. On the complaint's own account, first and last looks were techniques utilized by brokers to ensure that a given client's policy was placed (or remained) with a designated insurer-partner. *See, e.g.,* Comm. SAC ¶ 88 (“Broker Defendants shielded their insurer partners from normal competition by agreeing not to bid renewals competitively, or by limiting the circumstances under which renewals could be marketed. Broker Defendants also routinely promised to provide competitive advantages to Insurer partners, by disclosing other carriers' bids, providing first or last looks, and other methods.”). The complaints describe “[t]he close bond between broker and client,” which “gives brokers tremendous influence, and often decisive control, over the placement of their clients' insurance business. Given the high degree of financial investment and trust placed in their broker, clients will rarely if ever seek quotes from insurers other than those recommended by the broker.” *Id.* ¶ 73. In other words, the complaints themselves provide obvious reasons to conclude that the brokers were able to steer clients to preferred insurers without the need for any agreement among the insurers. Whatever the vices of these steering techniques, they do not give rise to a plausible inference of horizontal conspiracy.

Also insufficient are two allegations of certain “bid manipulation” within the broker-centered conspiracies in the Employee Benefits Case. In the first example, the complaint asserts only that a broker unilaterally refused to submit an insurer's bid to the client. In the second, a broker successfully persuaded one of its insurer-partners not to withdraw a bid the insurer had come to view as unacceptably low. If the insurer had withdrawn the bid, another, non-partner insurer would have become a “finalist,” an outcome the broker wished to avoid. To

allay the insurer-partner's concerns, the broker assured it that it would not end up winning the contract because another insurer had submitted an even lower bid. Shortly afterward, the broker placed a large account with the insurer-partner. Neither example provides a plausible basis for inferring anything more than vertical agreements between brokers and individual insurers.

In the Employee Benefits Case, plaintiffs allege that defendant insurers used similar strategies to evade their obligation to report contingent commission payments on Form 5500. But the asserted fact that the insurers intended to violate their reporting obligations, and that they all adopted the same deceptive reporting model, does not plausibly suggest a horizontal agreement. If anything, the allegations suggest that each insurer would be independently motivated to evade the requirement, and that each had access to the same effective model of how to accomplish this deception. Cf. *In re Elevator Antitrust Litig.*, 502 F.3d 47, 51 (2d Cir.2007) (observing that “similarities in contractual language ... do not constitute ‘plausible grounds to infer an agreement’ ” because “[s]imilar contract language can reflect the copying of documents that may not be secret”). The insurers would be disinclined to expose their competitors' reporting violations for fear of calling attention to their own self-interested deception. Cf. *Twombly*, 550 U.S. at 568, 127 S.Ct. 1955 (finding that the failure of the defendants to compete in one another's regions was most plausibly explained by the fact that the defendants “liked the world the way it was, and surely knew the adage about him who lives by the sword”).

In sum, the allegations discussed thus far do not provide “plausible grounds to infer” a horizontal agreement. *Id.* at 556, 127 S.Ct. 1955. This does not mean that *336 defendants' alleged treatment of insurance purchasers was praiseworthy or even lawful but that it fails to plead a per se violation of § 1 of the Sherman Act. Plaintiffs have pled facts showing that brokers deceptively steered their clients to preferred insurer-partners in order to obtain contingent commission payments from those partners, but this in itself is insufficient to plausibly imply a horizontal conspiracy.

(b) Bid-Rigging Allegations

[20] There is, however, one notable exception to this conclusion. In the Marsh-centered commercial conspiracy, plaintiffs provide detailed allegations of bid rigging by the insurer-partners.³² According to these allegations, insurers furnished purposefully uncompetitive sham bids on policies in order to facilitate the steering of business to other insurer-partners, on the understanding that the other insurers would later reciprocate. Bid rigging or more specifically, as alleged in this case, bid rotation³³ is quintessentially collusive behavior subject to per se condemnation under § 1 of the Sherman Act. See *United States v. All Star Indus.*, 962 F.2d 465, 469 73 (5th Cir.1992); see also *United States v. Heffernan*, 43 F.3d 1144, 1147 (7th Cir.1994) (citing *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 317 (4th Cir.1982)) (noting that bid rotation may be especially anticompetitive because it “eliminate[s] all competition rather than just price competition”); 12 Hovenkamp, *Antitrust Law* ¶ 2006, at 77 (2d ed. 2005) (“[B]id-rigging and bid rotation schemes are really nothing more than output or market share agreements.”).³⁴ This point does not quite end our inquiry, as plaintiffs do not seek to hold defendants liable for a bid-rigging conspiracy, but instead proffer the alleged bid rigging as circumstantial evidence of a “broader” agreement. Accordingly, we must assess the bid-rigging allegations, like the other alleged circumstantial evidence discussed above, to determine whether, if true, they plausibly imply the existence of the horizontal agreement on which plaintiffs' claim is predicated (and if so, whether *that* agreement is subject to per se condemnation). For the reasons that follow, we believe the bid-rigging behavior does plausibly suggest concerted action by the insurers; it proffers “enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement,” *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955 more specifically, a horizontal *337 agreement among the insurers not to compete for one another's incumbent business.

³² Apart from the multiple, detailed incidents of bid rigging in the Marsh centered commercial conspiracy, plaintiffs appear to allege one incident of bid rigging in each of the Willis centered and Gallagher centered commercial conspiracies. Comm. SAC ¶¶ 275, 336. In their briefs and at oral argument, however, plaintiffs's bid rigging discussion appears to be limited to Marsh and its insurer partners. See, e.g., Tr. of Oral Arg. 12 (affirming that “[t]he specific

instances of bid rigging ... occurred with respect to the Marsh broker centered conspiracies sic]).

33 See *United States v. Heffernan*, 43 F.3d 1144, 1146 (7th Cir.1994) (contrasting bid rotation, in which “for each job the competitors agree which of them shall be the low bidder, and the others submit higher bids to make sure the designated bidder wins, with identical bidding, in which the competitors all agree to bid the same price).

34 As one treatise explains:

A strong inference of coordinated behavior arises when a participant actively seeks to lose a bid. Deliberate sacrifice of a contract implies an unusual confidence that the winning party will return the favor. Moreover, spurious bidding indicates an awareness of wrongdoing coupled with a desire to hide it by simulating normal bidding. A spurious bid is almost always anticompetitive....

6 Areeda & Hovenkamp, *supra*, ¶ 1420b, at 140.

The District Court did not find the bid-rigging allegations sufficient to imply any sort of horizontal agreement among Marsh's insurer-partners, even one to rig bids. The court appears to have believed that because Marsh, the broker, was the one who directed the insurers to provide sham bids, the bid rigging was not indicative of an agreement among insurers but simply reflected the desire by individual insurers to propitiate Marsh in order to ensure that Marsh would continue to steer premium volume their way. See 2007 WL 2533989, at *16 17 (acknowledging that “Plaintiffs presented a panoply of facts ... which allege that certain actions were taken by the Insurer Defendants at the request of the Broker Defendants, such as ... protective bidding and bid-rigging,” but concluding that “[t]he fact that Broker Defendants demanded or expected certain behavior from the Insurer Defendants does not necessarily amount to a horizontal agreement amongst the Defendant Insurers.”).³⁵

35 We note that, under *Twombly*, the test is not whether plaintiffs' allegations necessarily amount to an unlawful horizontal agreement, but rather whether they plausibly imply that is, “raise a reasonable expectation that discovery will reveal evidence of such an agreement. 550 U.S. at 556, 127 S.Ct. 1955.

We agree that plaintiffs' allegations portray a conspiracy masterminded and directed by defendant broker Marsh, but this fact does not make implausible the inference of a

horizontal agreement among the insurers. If the defendant insurers supplying sham bids were truly indifferent as to whether Marsh's other insurer-partners would ever reciprocate, then the bid rigging might not plausibly imply a horizontal agreement.³⁶ On a motion to dismiss, however, we must assume the truth of the complaint's statement of facts, and the complaint here sets forth a plausible basis for inferring that each bid-rigging defendant's decision not to compete was conditioned on an expectation of reciprocity from its competitors and not based purely on independent motivation or broker Marsh's behavior, as the District Court concluded. See Comm. SAC ¶ 109 (quoting statement by a former employee of a defendant insurer to the effect that the Insurer had agreed to “provide[] losing quotes” to its broker-partner in exchange for, among other things, the broker's “getting ‘quotes from other [insurance] carriers that would support the [Insurer, at least when it was the incumbent carrier] as being the best price’ ”).

36 This aspect of the District Court's reasoning as to why the bid rigging does not imply a horizontal agreement is more fully developed in its evaluation of the RICO claims. See 2007 WL 2892700, at *21. Accordingly, the bulk of our analysis on this point occurs in Section II.B.2.a.i. *infra*.

The fact that Marsh, an entity vertically oriented to the insurers, appears to be a *sine qua non* of the alleged horizontal agreement is not necessarily an obstacle to plaintiffs' claim. As one of our sister courts of appeals has written, “defendants cannot escape the per se rule [for certain horizontal restraints of trade] simply because their conspiracy depended upon the participation of a ‘middle-man’, even if that middleman conceptualized the conspiracy, orchestrated it ... and collected most of the booty.” *All Star*, 962 F.2d at 473.

The conspiracy alleged in *All Star* has some striking similarities with the broker-centered conspiracy alleged here. In *All Star*, a criminal prosecution for antitrust conspiracy in the specialty pipe industry, the government's theory was that defendant Texas Pipe Bending Company (TPB), *338 which performed fabrication jobs on a cost-plus basis, coordinated a bid-rigging scheme among defendant pipe distributors. The distributor(s) designated to win a particular bid would be protected by higher bids submitted by the other bidders, and the winning distributors rebated some portion of their sales revenue which was significantly inflated over the price that

would have prevailed in competitive bidding to TPB. *Id.* at 467-68. In both *All Star* and (as alleged) this case, competitors agreed to submit intentionally uncompetitive bids in order to dictate the firm to which a particular contract would be awarded, as well as (by implication if not design) the price of that contract. This conduct plausibly implies a horizontal conspiracy, and the fact that here it was the broker, Marsh, that allegedly designated the winner and solicited the sham bids does not alter that conclusion. Marsh may have been an essential conduit and coordinator, but the insurers' agreement to provide protective bids to one another was also instrumental to the operation of the asserted broker-centered conspiracy. Even if the broker could have allocated customers on its own, without enlisting the assistance of other insurer-partners, the alleged willingness of those partners not only to refrain from competing with one another, but also actively to assist in the deceptive steering practices, plausibly suggests that customer allocation could be the result not only of vertical collusion, but also of a horizontal agreement among the insurers.³⁷ The anticompetitive danger inherent in insurers' alleged concerted efforts to rotate bids is not necessarily mitigated by the fact that the broker managed the details of each bid, nor by the likelihood that the horizontal collusion would not have occurred without the broker's involvement.

³⁷ As noted, it may be more precise to say that allegations of brokers' unilateral acts of fraud against their clients, while undeniably asserting a form of consumer injury, do not plead an injury to *competition*, which is adequately alleged in the Marsh centered scheme only by virtue of the well-pled horizontal agreement among the insurer spokes. See *supra* note 31 and accompanying text.

On appeal, defendants do not dispute that the bid-rigging allegations plausibly imply a horizontal agreement among the insurers. For several reasons, however, they contend this agreement is insufficient to support plaintiffs' antitrust claims. Defendants do not deny that plaintiffs have set forth particularized allegations of unlawful bid rigging, but they contend that plaintiffs have no standing to challenge this activity because plaintiffs do not assert that the bids were rigged on any of the policies they purchased. Plaintiffs, in turn, insist that this argument misses the point, since their claim is not that defendants engaged in an actionable bid-rigging conspiracy; as noted, the alleged horizontal agreement on which they base their § 1 claim is *not* an agreement to rig bids. Instead,

they complain of a “broader scheme” of “incumbent protection,” and the incidents of bid rigging are alleged as evidence of this “broader scheme.” Tr. of Oral Arg. 70.³⁸

³⁸ At oral argument, counsel for plaintiffs explained: “[T]he defendants take a lot of time talking about how we can't win in a big [sic] rigging scheme because we didn't allege a bid rigging scheme. And that's right. We have instead] alleged an agreement among these participants in the Marsh broker centered conspiracies ... to protect each other's incumbent business. Tr. of Oral Arg. 72; see also Letter from Plaintiffs to the District Court, No. 04-5184, Dkt. Entry # 669, at 2 (“Plaintiffs do not allege that defendants are liable under the antitrust laws because they engaged in ‘bid rigging.’ Instead, the theory of the Complaint is that defendants are liable under the antitrust laws because they participated in a conspiracy to allocate customers, using, on some occasions, bid rigging, last looks and other manipulative devices as overt acts to achieve the conspiracies' end.”).

*339 To evaluate the merit of this argument—that is, to determine whether the bid-rigging allegations satisfy *Twombly's* pleading standard—it is necessary to identify the scope of this “broader scheme” with precision. This imperative derives from the requisite elements of a claim under § 1 of the Sherman Act. As noted, since plaintiffs have elected to forego a rule-of-reason analysis, they must adequately plead (1) a horizontal agreement among insurers (2) to engage in an unreasonable restraint of trade.³⁹ Plaintiffs might be able to allege some sort of horizontal agreement among defendants, the object of which would nonetheless not amount to an unreasonable restraint of trade. Alternatively, they might be able to allege that defendants engaged in activity unreasonably restraining trade, but nonetheless fail to plead that this conduct was the product of an agreement. In both cases, plaintiffs would have failed to plead a § 1 claim. Accordingly, we must define the object of the horizontal agreement alleged in the complaint. See *generally* 6 *Areeda & Hovenkamp, supra*, ¶ 1409, at 54 (noting the importance of “ask[ing] precisely (1) who was in agreement with whom, and (2) about what?”).

³⁹ Furthermore, because of the way plaintiffs have pled their claim, plaintiffs must plead a type of horizontal restraint that can be deemed unreasonable without evaluation of market power. See *Leegin*,

551 U.S. at 886, 127 S.Ct. 2705 (“Restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices or to divide markets. (internal citations omitted)); *cf. R.C. Dick Geothermal Corp. v. Thermogenics, Inc.*, 890 F.2d 139, 162 (9th Cir.1989) (en banc) (Norris, J., dissenting) (citing *NCAA*, 468 U.S. 85, 104 S.Ct. 2948) (noting that the Supreme Court has “recognized a caveat to the *per se* rule against horizontal restraints on competition,] holding that some horizontal relationships have unique aspects that can create procompetitive justifications for particular horizontal restraints).

Having reviewed the complaint, we believe it asserts two different conceptions of this horizontal agreement. According to the broader of the two conceptions, Marsh's insurer-partners agreed that Marsh would deliver to each insurer an amount of premium volume necessary to trigger the payment of a contingent commission under the vertical agreement between Marsh and that insurer. *See* Comm. SAC ¶ 130 (“[Premium] volume threshold commitments reflected a tacit agreement among the conspiring parties that Marsh was guaranteeing the delivery of a specified minimum amount of premium volume.”). Reading the complaint in the light most favorable to plaintiffs, we find such a horizontal agreement implausible. Given the context presented by plaintiffs, it is not plausible that the insurers agreed among themselves that a third party, the broker, would guarantee delivery of differing amounts of premium volume to each of them. Perhaps such a claim would be coherent if the insurers had power to extract such guarantees from the broker, but the complaint demonstrates in abundant detail that it was Marsh who held the reins. Plaintiffs note that the contingent commission thresholds were established in vertical agreements between the broker and each insurer, and they recount stories of insurers who balked at Marsh's demands and refused to continue to pay contingent commissions, only to relent and agree to resume payments after Marsh steered a significant volume of business away from them. At the same time, however, plaintiffs incongruously assert that the contingent commission thresholds in Marsh's contracts with each of its insurer-partners were somehow the product of an agreement among *all* of the insurers. *340 This attempt to bootstrap vertical contracts into horizontal conspiracy is at odds with both “common economic experience,” *Twombly*, 550 U.S. at 565, 127 S.Ct. 1955, and the complaint's own factual allegations, *cf. id.* at 568, 127 S.Ct. 1955.

The complaint also posits a narrower agreement among Marsh's insurer-partners, namely, an agreement not to compete for other partners' incumbent business. *See, e.g.,* Comm. SAC ¶ 89 (“[T]he Broker Defendants orchestrated a horizontal agreement among rival Insurers not to compete for each others' [sic] customers.”). Unlike the previous alleged agreement, this one is not necessarily incompatible with the complaint's account of a market in which Marsh pulled most of the strings and called most of the shots. The complaint alleges that Marsh prepared broking plans “when an account was up for renewal. The broking plans assigned the business to a specific insurer at a target price and outlined the coverage.... If the incumbent Insurer hit the ‘target’, it would get the business....” *Id.* ¶ 117. An agreement by the insurers not to compete with the incumbent designated by Marsh would obviously facilitate Marsh's placement goals. That the bid-rigging allegations refer not to closed, bilateral agreements in which insurers X and Y each help the other win a specific account, but rather to open-ended agreements in which insurer X provides “protection” of Y's “renewal” or “incumbent” account in exchange for an assurance of similar assistance from some other insurer (not necessarily Y) plausibly supports the inference that the bid rigging was in service of a broader agreement not to compete for one another's incumbent business. As we have seen, plaintiffs allege that the customer allocation schemes employed other mechanisms that do not appear to have entailed a horizontal agreement among the insurers, but this does not alter the fact that the bid-rigging allegations plausibly imply a “broader” horizontal non-competition agreement designed to aid the posited (broader still) customer allocation scheme instigated by Marsh.

Nonetheless, one might reasonably ask (especially in light of the allegations involving the other broker-centered schemes) whether the insurers had an opportunity to compete in the first place—that is, an opportunity other than that afforded by Marsh's solicitations of sham bids. An agreement not to compete necessarily presupposes the existence of an opportunity *to* compete, and if the only opportunities for insurers to compete were Marsh's requests for rigged bids,⁴⁰ then the alleged bid rigging could not imply a “broader” horizontal agreement not to compete for incumbent business. And in fact, certain allegations in the complaint might be read to suggest that the solicitation of rigged bids provided the *only* opportunity for insurers to compete, that Marsh would either steer clients to the target insurers on its own, or, in

the rare cases when clients required it to show them bids from multiple insurers,⁴ would *341 solicit sham bids from other insurer-partners. *See, e.g., id.* ¶ 109 (“Marsh would protect the incumbent of an excess casualty risk by not sending submissions on that risk out to competition, or by getting quotes from other carriers that would support the incumbent as being the best price.” (internal quotation marks omitted)).

40 The complaint shows how in providing these intentionally non competitive bids, the insurers necessarily passed up the opportunity to compete. According to the complaint, one insurer who was dissatisfied by Marsh's protection of its own incumbent business contemplated supplying competitive bids in response to Marsh's request for non competitive offers. “If we can not get proper protection, the insurer stated, “we will go hard after another insurer's incumbent business] that we feel Marsh is] protecting. We will no longer provide Marsh] with protective quotes for that insurer] but will put out quotes that Marsh] will be forced to release.... Comm. SAC ¶ 107.

41 *See* Comm. SAC ¶ 73 (“Given the high degree of financial investment and trust placed in their broker, clients will rarely if ever seek quotes from insurers other than those recommended by the broker.).

In reviewing a motion to dismiss, however, we “construe the complaint in the light most favorable to the plaintiff.” *Phillips*, 515 F.3d at 233 (internal quotation marks omitted).⁴² Accordingly, we do not interpret the complaint as disavowing the possibility of opportunities to compete beyond those afforded by Marsh's bid-rigging requests. In any case, defendants themselves have not advanced a no-other-opportunity-to-compete argument in support of their motion to dismiss. They may, of course, raise this objection at a subsequent stage of the proceedings.

42 As the Supreme Court reiterated in *Iqbal*, the *Twombly* standard does not impose a “probability requirement. *Iqbal*, 129 S.Ct. at 1949 (quoting *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955); it does not require as a general matter that the plaintiff plead facts supporting an inference of defendant's liability more compelling than the opposing inference. *Twombly* requires the plaintiff to plead only enough “factual content to] allow] the court to draw a] reasonable inference that the defendant is liable

for the misconduct alleged. *Id.* (emphasis added). Accordingly, “i]t remains an acceptable statement of the standard for reviewing a motion to dismiss under Rule 12(b)(6)] ... that courts accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief. *Phillips*, 515 F.3d. at 233 (internal quotation marks omitted). As noted, of course, *Twombly* makes clear that in the specific context of a claim under § 1 of the Sherman Act, it is unreasonable to infer an agreement from allegations of parallel conduct that are equally consistent with independently motivated behavior. *See Twombly*, 550 U.S. at 556 57, 127 S.Ct. 1955.

Defendants argue that plaintiffs have alleged only “isolated episodes” of bid rigging. Defendants' Comm. Br. 43. To the extent defendants object that the allegations of bid rigging within the Marsh-centered commercial conspiracy cannot support claims of horizontal agreements within other alleged broker-centered conspiracies, their point is well-taken. But insofar as defendants contend that the bid-rigging allegations do not adequately support the more general allegation of an agreement among the defendant insurers to allocate customers in the Marsh-centered commercial conspiracy, we reject their argument for the reasons given. At this stage of the litigation, Rule 8(a)(2) requires plaintiffs to plead only “enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement,” *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955,⁴³ in this case an agreement among the Marsh partner-insurers not to compete for renewal business. We find that the complaint satisfies this standard with respect to those participants in the asserted Marsh-centered commercial conspiracy who allegedly engaged in bid rigging.⁴⁴

43 As the Supreme Court explained:

In applying the] general standards of Rule 8(a)(2)] to a § 1 claim, we hold that stating such a claim requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.

Twombly, 550 U.S. at 556, 127 S.Ct. 1955.

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The number of defendants alleged to have engaged in bid rigging appears to be slightly smaller than the number of defendants alleged to be participants in the Marsh centered commercial conspiracy. *Compare* Comm. SAC ¶ 95 (naming “AIG, ACE, CNA, Chubb, Crum & Forster, Hartford, Liberty Mutual, Travelers, Zurich, Fireman's Fund, Munich, XL and Axis as defendant insurers in the Marsh broker centered conspiracy), *with* Plaintiffs' Comm. Br. 78 n. 17 (claiming that the defendant insurers that engaged in bid rigging are “AIG, ACE, Axis, Chubb, XL, Munich/AmRe, Liberty Mutual, St. Paul Travelers, Fireman's Fund, and Zurich), *and* Comm. RPS ¶¶ 27 56 (detailing bid rigging allegations).

Our disposition must also take account of the fact that although the complaint's narrative of wrongdoing speaks primarily (if not exclusively) in terms of parent entities or corporate groups, subsidiary corporate entities are also named as individual defendants. *See* Comm. SAC ¶¶ 37 63 (stating that the use of the parent or group entity name is meant to incorporate the subsidiaries by reference). Defendants contend that the bid rigging allegations are limited to a single line of commercial insurance, namely excess casualty. Plaintiffs appear to concede this point. *See* Plaintiffs' Comm. Reply Br. 11 (referring to the “Marsh Excess Casualty conspiracy). As noted, without the bid rigging allegations, plaintiffs have not stated “enough factual matter ... to suggest that an agreement was made among the insurers. *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955. Accordingly, any subsidiary entities not alleged to have dealt in excess casualty (and thus not alleged to have engaged in bid rigging) must be dismissed, as the complaint fails to plausibly imply that they entered into a horizontal agreement to unreasonably restrain trade.

Plaintiffs argue that subsidiary companies “act] at the common direction of the parent], Plaintiffs' Comm. Reply Br. 12, and that “in reality a parent and a wholly owned subsidiary always have a unity of purpose or a common design, Plaintiffs' EB Reply Br. 35 (quoting *Copperweld*, 467 U.S. at 771, 104 S.Ct. 2731) (internal quotation marks omitted). Emphasizing these features of the parent subsidiary relationship, the Supreme Court held in *Copperweld* that parents and subsidiaries could not conspire for purposes of § 1 of the Sherman Act. 467 U.S. at 776, 104 S.Ct. 2731; *see Am. Needle*, 130 S.Ct. at 2212 (noting that an “agreement is cognizable under § 1 only if it “joins together ‘independent centers of decisionmaking (quoting *Copperweld*, 467 U.S. at 769, 104 S.Ct.

2731)). Contrary to plaintiffs' suggestion, however, it does not follow from *Copperweld* that subsidiary entities are automatically liable under § 1 for any agreements to which the parent is a party. As a matter of well settled common law, a subsidiary is a distinct legal entity and is not liable for the actions of its parent or sister corporations simply by dint of the corporate relationship. *See* 1 William Meade Fletcher, *Cyclopedia of Law of Private Corporations* § 33, at 89 (perm. ed. rev.vol.2006) (observing that “the mere fact that there exists a parent subsidiary relationship between two corporations does not] make the one liable for the torts of its affiliates); *see also Burks v. Lasker*, 441 U.S. 471, 478, 99 S.Ct. 1831, 60 L.Ed.2d 404 (1979) (“Congress has never indicated that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute.). As plaintiffs allege no other basis for imputing § 1 liability to defendant entities that are not plausibly alleged to be directly liable that is, are not plausibly alleged to have themselves entered into unlawful agreements the antitrust claims against these entities must fail.

*342 Defendants attempt to resist this conclusion with a number of different arguments, but after due consideration we find none have merit. According to defendants, the scheme alleged by plaintiffs is incoherent. To illustrate its implausibility, defendants contrast it with the conspiracy at issue in *Petruzzi's IGA Supermarkets, Inc. v. Darling Delaware Co.*, 998 F.2d 1224 (3d Cir.1993). The *Petruzzi's* plaintiff alleged a conspiracy to allocate customers in the fat and bone rendering industry. *Id.* at 1228. More specifically, the plaintiff claimed that although the defendant rendering companies would compete for new accounts, once an account was won the non-incumbent defendants would not compete over renewal business and sometimes “put forward sham bids.” *Id.* at 1228 29. If any defendant violated the agreement, the remaining conspirators would purportedly punish it through predatory pricing. *Id.* Given the circumstances of the industry, we *343 found that the plaintiff's theory of conspiracy was not only “not implausible,” but made “perfect economic sense.” *Id.* at 1232.

Defendants contend that at least two salient features distinguish the *Petruzzi's* conspiracy from the one alleged here. First, in *Petruzzi's* the method for allocating business was transparently obvious. Each conspirator could easily ascertain which member of the scheme was entitled to

a given account—namely, the incumbent holder of the account. Here, defendants argue, there is no way for an insurer to know with which conspirator a given policy should be placed. Plaintiffs propose that the allocation was structured not by particular policies but by premium volume, but defendants insist that such a basis of allocation would be unworkable in light of the various contingent commission incentives detailed in the complaint. In addition to contingent commission payments triggered by a threshold volume of incumbent business retained, the contractual agreements between the brokers and insurers also provided for commission payments based on the overall volume of premium steered to an insurer, growth in volume over a particular benchmark (such as the previous year's level), and the quality of the premium volume (i.e., premiums for policies requiring relatively small indemnification payments for covered losses). Defendants contend that these multifarious incentives would often conflict with the alleged scheme's posited goal of incumbent protection. For example, a broker's placement of a given policy with incumbent insurer X might bring the broker that much closer to the negotiated contingent commission threshold for premium volume renewed with that broker. But placement of that same policy with another insurer might trigger a contingent commission payment for overall premium volume or volume growth—and that commission payment might be larger than the one negotiated with the incumbent. “It defies credulity,” defendants insist, “to assert, as Plaintiffs do, that ... insurers agreed to join conspiracies in which they agreed to allow brokers to unilaterally decide who got what business based on what was most profitable for the brokers.” Defendants' Comm. Br. 51.

Second, defendants contend that while the scheme in *Petruzzi's* included an obvious mechanism for the conspirators to discipline deviant members, the conspiracy alleged here is “hardly a scheme of market allocation that the insurers could enforce.” Tr. of Oral Arg. 43. According to defendants, since virtually all of the power to steer insurance purchasers belonged to the brokers, who operated under the competing incentives created by the variegated contingent commission agreements, there could be no feasible mechanism to enforce a customer allocation scheme.

We agree with defendants that the scheme alleged by plaintiffs appears a good deal more complex than the

one in *Petruzzi's*. And as noted, we agree that based on the facts alleged, it is implausible to claim that the defendant insurers came to an agreement together and instigated an arrangement whereby each would receive whatever volume of premium happened to be prescribed by each's contingent commission agreement with Marsh. But as also noted, a narrower horizontal agreement not to compete for one another's incumbent business does not appear incompatible with the larger picture painted by the complaint, in which Marsh was the dominant force.

The complaint also provides a coherent mechanism for disciplining recalcitrant insurers. Consistent with the complaint's general narrative of broker power, it was Marsh that did the enforcing. In a vivid *344 illustration of this enforcement potential, the complaint recounts the following alleged statement from a high-ranking Marsh executive:

[I]f an alternative [i.e., a non-incumbent insurer from which Marsh has solicited a sham bid] quotes below [the incumbent insurer's target bid] then they have made a conscious decision to quote below [the incumbent insurer] and pull [the incumbent] down. If that happens, then ... we will put this guy in open competition on every acct. and CRUCIFY him. Further, we must make sure [the] incumbent [or another insurer] keep[s] this [account] and NOT give it to the alternative and reward them.

Comm. SAC ¶ 118 (emphasis omitted). According to the complaint, insurers who breached the non-competition agreement would not only find themselves deprived of the conspiracy's protection, but their renewal business would be specifically targeted for transfer.

Although we acknowledge that the hub-and-spoke conspiracy alleged by plaintiffs has a more prominent vertical dimension than most, if not all, other examples found in the case law—owing to the relative power of broker Marsh and the relative dependence of its insurer-partners—we believe the complaint contains enough well-

pled factual matter to suggest a plausible horizontal agreement among the insurers not to compete for renewal business. On the complaint's own account, the conspiracy was instigated, coordinated, and policed by Marsh, but this does not belie the alleged horizontal agreement. On the contrary, Marsh's influence could create a powerful incentive for exactly such an agreement: join and enjoy renewals at inflated premium rates and without threat of competition, or remain outside the "strategic partnership" and be denied access to Marsh's large and loyal clientele. To be sure, the complaint suggests that Marsh could be a tough master, threatening at times to transfer business to another insurer in order to coerce a more lucrative contingent commission agreement. And in some cases, as defendants suggest, Marsh may even have steered renewal business away from an incumbent insurer-partner in order to realize a more profitable commission offered by another partner.⁴⁵ If so, however, this would show only that Marsh, and not the insurers, had the negotiating power to set the terms of participation in the scheme. It does not make implausible the inference, created by the bid-rigging allegations, that insurer-partners agreed not to compete for one another's renewal business. As we have noted, plaintiffs' allegations paint a conspiracy in which the hub, Marsh, held an unusual amount of power and may even have been able economically to "coerce" the insurers into the non-competition agreement. Defendants *345 have failed, however, to show why this feature would preclude per se condemnation of the horizontal agreement. See 6 Areeda & Hovenkamp, *supra*, ¶ 1408c ("[S]ociety prefers that coerced parties seek the protection of public authorities rather than help create a cartel.").

⁴⁵ We find the complaint somewhat ambiguous on this question. Plaintiffs allege that under the customer allocation scheme, "each conspiring insurer would be permitted to keep its own incumbent business. Comm. SAC ¶ 96. But as defendants point out, the alleged contingent commission agreements tied commissions to factors other than incumbent business, which might motivate Marsh to transfer business away from incumbents. Plaintiffs contend that Marsh only used new business and business transferred from non partner insurers to satisfy these thresholds. More problematic for plaintiffs' claim of guaranteed incumbent protection may be the complaint's statement that Marsh "grouped its preferred insurers into three tiers, classified as A, B, and C tiers, based on how much they were paying in contingent commissions. Tiers A and B were the

more preferred markets to which the bulk of premium was allocated. Comm. SAC ¶ 101. It is unclear from the complaint's brief description whether incumbent business from lower tier insurers would sometimes be transferred to higher tier insurers or whether the "premium mentioned came only from new or non insurer partner held accounts.

Defendants next argue that "even if there were agreements that could have existed among the insurers," the vertical element of the hub-and-spoke conspiracy would defeat plaintiffs' claim. Tr. of Oral Arg. 43. In defendants' view, "horizontal restraints that are ancillary to vertical arrangements, in other words horizontal agreements that exist to facilitate the vertical ones, are judged under the rule of reason which the plaintiffs have disclaimed." *Id.* (citing *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir.1898), *modified and aff'd*, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899)). Any horizontal agreement among the brokers, defendants contend, "would plainly have been ancillary to the agreements that those insurers had with the brokers." *Id.* Therefore, the horizontal agreements cannot be condemned per se.

Defendants' contention draws on a fundamental principle of antitrust law but misapplies it here. It is well settled that "ancillary" restraints of trade are less suspicious than "naked" ones, and that to qualify for per se condemnation, a restraint must be of the naked horizontal type. *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 188 89 (7th Cir.1985). Ancillary restraints are "those that are part of a larger endeavor whose success they promote." *Id.* at 189; see 11 Hovenkamp, *supra*, ¶ 1904 ("To say that a restraint is 'ancillary' is to conclude that it is an essential or at least an important part of some arrangement that has potentially redeeming virtues."). By contrast, a "naked" restraint is one that is not an integral part of an arrangement with redeeming competitive virtues. See *Polk Bros.*, 776 F.2d at 188 (describing naked restraints as "those in which the restriction on competition is unaccompanied by new production or products"); 11 Hovenkamp, *supra*, ¶ 1904. The quintessential example of an ancillary restraint is a restrictive agreement that is an integral part of a joint venture. An agreement by two competing manufacturers to price a product identically, for instance, would be ancillary if manufacture of the product were a collaborative effort between the two firms and the pricing agreement could reasonably be viewed as a necessary condition of the joint venture, which increased output.

[21] As this example indicates, “[d]etermining ancillarity requires [courts] to consider *first*, whether any aspect of the defendants’ association contains a significant promise of integration or cooperation yielding an increase in output. *Second*, some determination must be made whether the challenged agreement is an essential part of this arrangement, whether it is important but perhaps not essential, or whether it is completely unnecessary.” 11 Hovenkamp, *supra*, ¶ 1908b, at 253 (footnote omitted); see *MLB Props., Inc. v. Salvino, Inc.*, 542 F.3d 290, 339 (2d Cir.2008) (Sotomayor, J., concurring in the judgment) (“[A] restraint that is unnecessary to achieve a joint venture’s efficiency-enhancing benefits may not be justified based on those benefits.... In contrast, where a restraint *is* reasonably necessary to achieve a joint venture’s efficiency-enhancing purposes (i.e., ancillary), it will be analyzed under the rule of reason as part of the joint venture because the effects of that restraint are not so plainly anticompetitive as to make a *per se* or quick-look approach appropriate.”); see also 11 Hovenkamp, *supra*, ¶ 1908b, at 253 (“[T]he ‘essentiality’ query ... considers whether *346 the challenged restraint is an inherent feature of the joint venture at all, or simply an unnecessary, output-limiting appendage.”); cf. *NCAA*, 468 U.S. at 114, 104 S.Ct. 2948 (denying the NCAA’s claim that its television plan enhanced the competitiveness of college football television rights because in light of the district court’s findings, “it cannot be said that the [challenged] agreement on price is necessary to market the product at all” (internal quotation marks omitted)). Contrary to defendants’ argument, then, a restraint is not automatically deemed ancillary simply because it “facilitates” a procompetitive arrangement.

Defendants are unable to identify among plaintiffs’ allegations any procompetitive venture to which the insurers’ alleged horizontal agreement not to compete for incumbent business could reasonably be deemed integral. Defendants stress that vertical “preferred provider” agreements, used here by the brokers to consolidate the insurers with which they did business, have consistently been found by courts to have competitive benefits. But defendants cannot explain why a non-competition agreement among those providers is an essential or reasonably necessary component of those agreements; the benefits of preferred provider agreements do not depend on such a horizontal restraint of trade, as other provider agreements well illustrate.⁴⁶

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See, e.g., *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 61–64 (1st Cir.2004) (recognizing potential consumer benefits of, and refusing to apply the *per se* rule to, a vertical “exclusive dealing arrangement in which an insurer’s pharmacy manager created a “closed network of pharmacies providing prescription benefits to the insurer’s subscribers); *Kartell v. Blue Shield of Mass., Inc.*, 749 F.2d 922, 924, 932 (1st Cir.1984) (Breyer, J.) (rejecting physicians’ antitrust challenge to health insurer’s preferred provider organization, which allegedly put pressure on doctors to join “because of the large number of patient] subscribers, and emphasizing that there was no “evidence of a horizontal conspiracy); *Quality Auto Body, Inc. v. Allstate Ins. Co.*, 660 F.2d 1195, 1203–04 (7th Cir.1981) (describing procompetitive benefits of insurance companies’ contracting with a specific set of “preferred auto repair shops for repair work at prescribed rates).

Defendants also contend that the insurers competed with one another to win a favored position with Marsh. See *supra* note 45 (discussing Marsh’s classification of its insurer-partners into hierarchical tiers). Without doubt, according to the complaint’s allegations, Marsh’s ability to guarantee competition-free access to business in part by enforcing a non-competition agreement among its insurer-partners motivated the insurers to pay Marsh larger commissions in order to receive a larger slice of the competition-free premium pie. We fail to see, however, how this kind of rivalry among the insurers would increase output in the market for insurance.⁴⁷

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The facts in the seminal case of *Addyston Pipe* offer a useful comparison. There, a cartel of pipe manufacturers rigged bids for pipes sold principally to municipalities. The winning bidder would pay a “bonus to the other bidders. First, the amount of the winning bid was determined, and then the bidders conducted a *competitive* bid among themselves to determine who was willing to pay the largest bonus to the others. The winner of that competition obtained the right to submit the winning bid in the rigged auction. The structure of the scheme meant that the most efficient or lowest cost manufacturer and thus the one able to pay the largest bonus to the others would generally win the rigged bid, just as in a competitive market. But the conspiracy ensured that the price of the winning bid was supracompetitive and output reducing. *Addyston Pipe*, 85 F. at 274. The

court did not find that the competition among the manufacturers within the bounds of the bid rigging scheme redeemed the restraint.

Toys “R Us provides another illustration. Suppose the toy manufacturers in that case competed with one another over the amount of product Toys “R Us would buy from each. This competition for Toys “R Us’s business would not alter the basic fact that the horizontal agreement to sell exclusively to Toys “R Us reduced output.

*347 Furthermore, defendants’ argument proves too much. If all “horizontal agreements that exist to facilitate ... vertical ones,” Tr. of Oral Arg. 43, must be tested by the rule of reason, then per se condemnation of hub-and-spoke conspiracies would appear to be impossible. In all hub-and-spoke conspiracies, the horizontal agreement among the spokes supports the agreements between the hub and each spoke, and vice versa. See, e.g., *Interstate Circuit v. United States*, 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1939); *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir.2000); *United States v. All Star Indus.*, 962 F.2d 465 (5th Cir.1992).

Although we have found that the bid-rigging allegations suffice to plead a § 1 claim for purposes of [Federal Rule of Civil Procedure 8\(a\)\(2\)](#), defendants insist that plaintiffs must surmount not only this general requirement, but also the heightened pleading standard set forth in [Rule 9\(b\)](#). That Rule provides that “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.” [Fed.R.Civ.P. 9\(b\)](#).⁴⁸ Defendants contend the antitrust claims here “sound in fraud” and argue that the complaints fail to satisfy [Rule 9\(b\)](#)’s particularity requirement. Defendants’ Comm. Br. 31. Plaintiffs, on the other hand, maintain [Rule 9\(b\)](#) is inapplicable to the alleged antitrust conspiracies.

⁴⁸ The Rule nonetheless allows “[m]alice, intent, knowledge, and other conditions of a person’s mind to] be alleged generally. *Id.*

In *Lum v. Bank of America*, we stated that [Rule 9\(b\)](#) requires fraud to be “pled with particularity in all claims based on fraud.” 361 F.3d 217, 220 (3d Cir.2004). Accordingly, although we acknowledged that “antitrust claims generally are not subject to the heightened pleading requirement of [Rule 9\(b\)](#),” we found that standard applicable to a complaint in which “the antitrust claim [was] based on fraud on misrepresentations in the information given to consumers

and on misrepresentations in the information given to ... independent financial publications.” *Id.*; see *id.* at 228 (“Because plaintiffs allege that the defendant[banks] accomplished the goal of their conspiracy [to set an artificially high floor on interest rates by agreeing to raise the prime rate] through fraud, the Amended Complaint is subject to [Rule 9\(b\)](#).”). Citing *Lum*, the District Court here agreed with defendants that [Rule 9\(b\)](#) applied to plaintiffs’ allegations of antitrust conspiracy, as they were “predicated on fraud.” 2007 WL 1100449, at *8. As both plaintiffs and defendants appear to agree,⁴⁹ however, the District Court’s final dismissal order rested only on *Twombly*’s general pleading standard; the court did not appear to make a separate determination as to whether plaintiffs’ allegations satisfied the particularity requirement of [Rule 9\(b\)](#).⁵⁰ Insofar as we find that plaintiffs *348 have satisfied the *Twombly* standard with respect to defendants alleged to have engaged in bid rigging in the asserted Marsh-centered commercial conspiracy, we will remand for the District Court to determine in the first instance the extent, if any, to which [Rule 9\(b\)](#) applies to those § 1 claims, and whether plaintiffs’ pleadings are sufficiently particularized.⁵ We express no opinion on these issues here.

⁴⁹ See Plaintiffs’ Comm. Br. 14 n. 3; Defendants’ Comm. Br. 31.

⁵⁰ In its initial October 3, 2006 opinion, the District Court found that plaintiffs’ First Amended Complaint did “not specifically identify the entities which allegedly conspired with each Broker Defendant in the alleged broker centered conspiracies. 2006 WL 2850607, at *13. Granting leave to amend, the court instructed plaintiffs to file a “supplemental statement of particularity setting forth, “with the degree of particularity required under [Rule 9\(b\)](#), the identity of the conspirators and the role of each Defendant in the alleged conspiracies. *Id.* at *14. Reviewing these revised pleadings in its second dismissal order filed on April 5, 2007, the court pronounced itself “satisfied ... with the level of specificity contained in the Particularized Statements which identify the majority of the conspirators and their roles in the conspiracy. 2007 WL 1100449, at *15. But the court found that these allegations were insufficient to show “that the conduct alleged, *i.e.*, the consolidation of the insurance markets and the steering of certain customers based on contingent commission payments, constitutes a *per se* illegal

horizontal customer or market allocation scheme. *Id.* at *18. It is unclear whether Rule 9(b) played a role in this determination. In its final antitrust opinion, filed on August 31, 2007, and dismissing plaintiffs' claims with prejudice, the District Court appeared to apply only *Twombly's* plausibility standard. *See*, 2007 WL 2533989, at *18 19. Having determined that both complaints failed to satisfy this general standard, the court had no occasion to test plaintiffs' allegations against the heightened pleading requirements of Rule 9(b).

51 The District Court's Rule 9(b) analysis should be directed to the specific antitrust conspiracy we have found adequately pled for purposes of Rule 8(a) (2) namely, a horizontal agreement among certain of Marsh's insurer partners not to compete for incumbent business.

ii. The Global Conspiracy

[22] Overlaying the broker-centered conspiracies, plaintiffs aver, was a "global conspiracy." In this alleged scheme, the defendant brokers, "with the complicity of the Defendant Insurers," EB SAC ¶ 301, agreed "to conceal from the general public and other brokers [i.e., non-conspiring brokers]" the existence of the broker-centered conspiracies and the details of the contingent commission agreements. *Id.* ¶ 314. Plaintiffs contend that this "agreement not to disclose the Contingent Commission agreements and resulting profits was a naked horizontal restraint of informational output that directly affected the price of insurance." *Id.* ¶ 303.

The District Court concluded that the complaints' factual allegations fail to plausibly imply horizontal non-disclosure agreements among the defendant brokers or the defendant insurers. 2007 WL 2533989, at *19. We agree. Plaintiffs explain that defendants engaged in similar broker-centered schemes, which were all structured by similar contingent commission agreements. Plaintiffs further note that these schemes "were very successful and yielded enormous profits," and that "[t]he Broker and Insurer Defendants were thus heavily invested in their Broker Centered schemes during the Class Periods and did not want to risk losing their resulting profits by disclosing their schemes to each others' [sic] clients." EB SAC ¶ 313. In other words, no broker could expose its competitors' contingent commission agreements without drawing unwelcome attention to

its own golden-egg-laying goose. Having just cogently explained why each broker had ample independent motive to avoid disclosure, however, the complaints discordantly conclude: "Therefore [the defendants] *agreed* not to [disclose]." *Id.* (emphasis added); *accord* Comm. SAC ¶¶ 355 56. We cannot credit this *ipse dixit*, which is in conflict with its own premises.

Plaintiffs contend that "[i]n a truly competitive environment, brokers could utilize information about another broker's charging of supra-competitive premiums through inclusion of Contingent Commissions ... to compete for that broker's *349 business. An economically rational broker would maximize its opportunity to increase market share by telling its rival's customers they are paying too much for their insurance." EB SAC ¶ 315. But this argument fails, much like the *Twombly* plaintiffs' contention that the defendant ILECs' reluctance to challenge one another's regional monopolies bespoke agreement. *See Twombly*, 550 U.S. at 567 69, 127 S.Ct. 1955. Reaping "enormous profits" from their own furtive use of contingent commission agreements, the brokers had no desire to upset the apple cart.⁵² *See id.* at 568, 127 S.Ct. 1955; *see also id.* (noting that the complaint "does not allege that competition ... was potentially any more lucrative" than the defendants' behavior during the relevant period).

52 The Employee Benefits complaint "alleges that the brokers knew, through industry studies and other means, that disclosure of the contingent commission] arrangements would cause a decrease in commission income (which was almost exclusively profit to the brokers) of between 5% to 25%. Plaintiffs' EB Br. 20. But this fact does nothing to strengthen the inference that the brokers' similar silence on contingent commissions was the product of an agreement. The "obvious alternative explanation remains: each broker decided, perhaps on the basis of the same industry studies, that disclosure was not in its best interest, just as each ILEC in *Twombly* decided that competition with the other regional monopolies would not benefit its bottom line.

Nor do plaintiffs' other proffered "plus factors" plausibly imply a horizontal agreement among the brokers. The Commercial complaint alleges that the defendant brokers "issued substantially similar purported 'disclosure' statements modeled after the CIAB's position statement" advising brokers on how to respond to

questions regarding contingent commissions. Comm. SAC ¶ 452. According to plaintiffs, these statements misleadingly disguised the existence and effect of the contingent commission agreements. But neither defendants' membership in the CIAB, nor their common adoption of the trade group's suggestions, plausibly suggest conspiracy. *Cf. Twombly*, 550 U.S. at 567 n. 12, 127 S.Ct. 1955 (rejecting the contention that the defendants' common membership in a trade union, combined with parallel conduct, plausibly suggests conspiracy); *Elevator Antitrust Litig.*, 502 F.3d at 51 (finding that allegations that the defendants used similar contractual language did not plausibly imply conspiracy because "similar contract language can reflect the copying of documents that may not be secret"). While these allegations indicate that the brokers had an opportunity to conspire, they do not plausibly imply that each broker acted other than independently when it decided to incorporate the CIAB's proposed approach as the best means of protecting its lucrative arrangements from hostile scrutiny. *See Petruzzi's*, 998 F.2d at 1242 n. 15 ("Proof of opportunity to conspire, without more, will not sustain an inference that a conspiracy has taken place." (internal quotation marks omitted)).

Even if we read the complaint to assert that the defendant brokers collaborated in crafting these allegedly misleading disclosures (insofar as these defendants allegedly "control the affairs of ... CIAB," Comm. SAC ¶ 515, which produced the "position statement" allegedly incorporated into defendants' disclosures to clients), this still would be insufficient to show a horizontal agreement not to disclose one another's contingent commissions. If proven, this allegation would plausibly show that defendants agreed to work together to determine the best way of disguising activity in which each engaged. But this allegation would not plausibly imply that the decision to disguise that activity *350 (namely, the alleged use of contingent commissions as part of a scheme to steer customers to particular insurers) was itself the product of an agreement not, at least, in the face of the complaint's many allegations showing that each defendant had ample independent motive to conceal its own contingent commission arrangements. A contrary holding would be tantamount to finding that any collaborate effort to refine a "pernicious industry practice," *In re Ins. Brokerage Antitrust Litig.*, 2007 WL 2892700, at *24 (so describing the conduct alleged by plaintiffs), plausibly suggests a conspiracy among all industry participants not

to reveal the fact that other participants engage in the same practice. Where, as here, the "obvious alternative explanation" for such an industry practice is that each member of the industry believes its profits would suffer without the practice, it is not plausible to infer that each member's decision not to expose its competitors' use of the practice that is, not to engage in mutually assured destruction is the product of an agreement.⁵³

53 Plaintiffs describe the alleged "Global Conspiracy as "the Broker Defendants' agreement not to disclose or advertise truthful pricing information and to limit consumer information about price. Comm. SAC ¶ 358. This language, however, elides the significant difference between this case and those in which defendants are alleged to have agreed to refrain from disclosing information about their *own* practices. *Cf. Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 759 62 & n. 1, 119 S.Ct. 1604, 143 L.Ed.2d 935 (1999) (describing FTC's allegations that dentists agreed not to engage in advertising about pricing discounts or quality of service). When each defendant would be expected to have an independent motive to disclose information about its own product or services (such as when that information would presumably enhance the value of that product or services to potential customers), the fact that defendants made parallel decisions not to do so conceivably raises a suspicion of agreement. Here, by contrast, the allegation is that defendants agreed not to disclose unflattering information about their competitors' practices. But given that each defendant is alleged to have engaged in the same practice, so that such disclosure would inevitably be self defeating, the inference that the lack of disclosure is the result of agreement is implausible.

In the Employee Benefits Case, plaintiffs allege that "Defendants executed substantially similar disclosure policies regarding contingent compensation matters, including failing to disclose contingent compensation information to ERISA plan administrators on Form 5500s, as required by governmental regulations." EB SAC ¶ 324. Plaintiffs also allege instances in which defendants exchanged information about how they accounted for, and reported, this compensation. These allegations, like the other allegations of shared information and similar disclosure practices, are insufficient. They imply only that each defendant had a similar motive to obfuscate the structure of the brokers' compensation, and that they sought the most effective means to achieve this obfuscation.⁵⁴ They do not provide a "reason to infer that

the [defendants] had agreed among themselves to do what was only natural anyway.” *Twombly*, 550 U.S. at 566, 127 S.Ct. 1955.

54 Plaintiffs do not contend that the exchange of information about reporting techniques was itself unlawful, but argue only that this communication evinces a horizontal agreement to report the brokers' compensation improperly on Form 5500. Notably, some of the particular exchanges detailed by plaintiffs actually appear to undermine the inference of an agreement *not* to disclose. *See, e.g.*, EB RPS ¶ 63 (noting an e mail from one insurer to another expressing “surprise] that the addressee had *not* been reporting its commission payments “given our conversation on this topic earlier this year).

Finally, plaintiffs point to the similar nature of each broker-centered conspiracy, as well as the allegedly similar confidentiality *351 agreements the brokers inserted into the vertical contracts with each of their partner insurers. But these allegations of parallel conduct do not qualify under *Twombly* as a basis for a plausible inference of horizontal agreement among the brokers or insurers. Having reviewed the entirety of the Global Conspiracy pleadings, we concur with the District Court's conclusion: “While Plaintiffs present facts to support the possibility of inadequate disclosures by the brokers to the insureds, the Complaints are bereft of allegations to demonstrate that this was more than brokers adopting sub-par disclosure methods to protect their own, lucrative agreements.” 2007 WL 2533989, at *19. Plaintiffs' attack on the pervasive use of contingent commissions to exploit insurance brokers' power over their clients and the use of similar techniques to disguise this activity may allege a “pernicious industry practice,” but they do not plausibly imply an industry-wide conspiracy.

2. The McCarran–Ferguson Act

Defendants argue that whether or not plaintiffs have adequately pled the elements of their Sherman Act claims under the Federal Rules of Civil Procedure, the conduct alleged in the complaints is exempt from federal antitrust regulation under the McCarran–Ferguson Act, 15 U.S.C. §§ 1011–1015. Section 2(b) of the McCarran–Ferguson Act provides:

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That ... the Sherman Act ... shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

15 U.S.C. § 1012(b). Section 3(b) of the Act provides that “[n]othing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.” 15 U.S.C. § 1013(b).

[23] [24] The second, proviso clause of Section 2(b) which is the clause relevant to this appeal “provides a statutory antitrust exemption for activities that (1) constitute the ‘business of insurance,’ (2) are regulated pursuant to state law, and (3) do not constitute acts of ‘boycott, coercion or intimidation.’ ” *Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129, 1133 (3d Cir.1993) (quoting *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 219–20, 99 S.Ct. 1067, 59 L.Ed.2d 261 (1979)). Rejecting defendants' arguments, the District Court concluded that the conduct alleged by plaintiffs is not part of the “business of insurance” and is thus not exempt from plaintiffs' antitrust claims. *See Royal Drug*, 440 U.S. at 210, 99 S.Ct. 1067 (noting that if the challenged agreements “are not the ‘business of insurance’ within the meaning of § 2(b) of the McCarran–Ferguson Act ... then the Agreements are not exempt from examination under the antitrust laws”). We agree.

The Supreme Court observed in *Royal Drug* that “the [Act] does not define the ‘business of insurance.’ ” 440 U.S. at 211, 99 S.Ct. 1067. But the Court noted that, insofar as the Act limits the scope of federal antitrust statutes, its interpretation is subject to the “well settled” rule “that exemptions from the antitrust laws are to be narrowly construed.” *Id.* at 231, 99 S.Ct. 1067. Furthermore, the

Court thought it significant “that the statutory language in question here does not exempt the business of insurance companies from the scope of the antitrust laws. The exemption *352 is for the ‘business of insurance,’ not the ‘business of insurers’....” *Id.* at 210 11, 99 S.Ct. 1067. The mere fact that it is the conduct of insurance companies that is challenged here is, therefore, not dispositive.

In *Royal Drug* itself, the plaintiffs, independent pharmacies, challenged agreements between Blue Shield, a health insurer, and three “participating pharmacies.” Under the agreements, Blue Shield's policyholders could purchase prescription drugs from the participating pharmacies at a price of \$2 per prescription, and Blue Cross would reimburse the pharmacy for the cost of acquiring the drug prescribed. By contrast, policyholders who selected a non-participating pharmacy were required to pay the full retail price charged by the pharmacy and could then seek reimbursement from Blue Shield for 75% of the difference between that price and \$2. The independent pharmacies asserted these agreements violated § 1 of the Sherman Act, while Blue Shield contended it was exempt from the antitrust laws under the McCarran Ferguson Act.

The Court held that the agreements did not constitute the “business of insurance.” “The fallacy of the [defendants] position,” the Court explained, “is that they confuse the obligations of Blue Shield under its insurance policies, which insure against the risk that policyholders will be unable to pay for prescription drugs during the period of coverage, and the agreements between Blue Shield and the participating pharmacies, which serve only to minimize the costs Blue Shield incurs in fulfilling its underwriting obligations.... The Pharmacy Agreements ... do not involve any underwriting or spreading of risk, but are merely arrangements for the purchase of goods and services by Blue Shield.” *Id.* at 213 14, 99 S.Ct. 1067. It is true, the Court conceded, that these business arrangements with third-party providers could affect Blue Shield's costs, which could in turn affect the premiums it charges. *Id.* at 214, 99 S.Ct. 1067. But this relationship to the “business of insurance” was too attenuated. Defendants may have been able to demonstrate that the Pharmacy Agreements lowered Blue Shield's expenses, and that these savings might be passed on to policyholders in the form of lower premiums. “But, in that sense, every business decision made by an insurance company has some impact on its reliability, its ratemaking, and its status

as a reliable insurer.” *Id.* at 216 17, 99 S.Ct. 1067. If the “business of insurance” were interpreted so expansively, “almost every business decision of an insurance company could be included in the [term]. Such a result would be plainly contrary to the statutory language, which exempts the ‘business of insurance’ and not the ‘business of insurance companies.’ ” *Id.* at 217, 99 S.Ct. 1067. Another factor that influenced the Court's conclusion was that “[t]he Pharmacy Agreements are not ‘between insurer and insured.’ They are separate contractual arrangements between Blue Shield and pharmacies engaged in the sale and distribution of goods and services other than insurance.” *Id.* at 216, 99 S.Ct. 1067.

Looking back on its decision in *Royal Drug*, the Court later distilled three criteria for determining whether particular conduct constitutes the “business of insurance”: “*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.” *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 129, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982). The Court added, *353 however, that “[n]one of these criteria is necessarily determinative in itself.” *Id.*

In *Pireno*, the challenged conduct was a health insurer's use of a professional association's peer review committee to examine chiropractors' statements and charges and render an opinion on the necessity of treatments and the reasonableness of charges paid for them. The Court held that the use of the association did not implicate the transfer of risk because “[p]eer review takes place only after the risk has been transferred by means of the policy, and then it functions only to determine ... whether the insured's loss falls within the policy limits,” that is, whether the insured's loss is, under the terms of the policy, among the risks that has been transferred to the insurer. *Id.* at 130, 102 S.Ct. 3002 (internal quotation marks omitted). Furthermore, the Court found that the insurer's relationship with the peer review committee “is not an integral part of the policy relationship between insurer and insured” because “the challenged arrangement ... is obviously distinct from [the insurer's] contracts with its policyholders.” *Id.* at 131, 102 S.Ct. 3002. “Finally, as respects the third ... criterion,” the Court concluded “it is plain that the challenged peer review practices are not limited to entities within the insurance industry.” *Id.* at

132, 102 S.Ct. 3002. Accordingly, the challenged practice was not the “business of insurance” under the McCarran Ferguson Act and so was not entitled to exemption from federal antitrust law. *Id.* at 134, 102 S.Ct. 3002.

The Supreme Court's analysis in *Royal Drug* and *Pireno* was informed by an extensive inquiry into the Act's legislative history. “The law was enacted in 1945 in response to [the Supreme Court's] decision in *United States v. South Eastern Underwriters Assn.*, 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944).” *Royal Drug*, 440 U.S. at 217, 99 S.Ct. 1067. The defendants in *South Eastern Underwriters* had been charged with, inter alia, conspiring to fix insurance rates and commissions, but the district court had dismissed the indictment on the strength of a long line of jurisprudence suggesting “that the insurance industry was not a part of interstate commerce subject to [federal] regulation under the Commerce Clause.” *Royal Drug*, 440 U.S. at 217, 99 S.Ct. 1067; see, e.g., *Paul v. Virginia*, 75 U.S. (8 Wall.) 168, 183, 19 L.Ed. 357 (1868) (“Issuing a policy of insurance is not a transaction of commerce.”). The Supreme Court reversed, “holding that the business of insurance is interstate commerce, and that the Congress which enacted the Sherman Act had not intended to exempt the insurance industry from its coverage.” *Royal Drug*, 440 U.S. at 217, 99 S.Ct. 1067.

As the Court has explained, the primary purpose of the McCarran Ferguson Act was “to preserve state regulation of the activities of insurance companies, as it existed before the *South Eastern Underwriters* case.” *Id.* at 218 n. 18, 99 S.Ct. 1067; see *Stephens v. Nat'l Distillers & Chem. Corp.*, 69 F.3d 1226, 1231 n. 5 (2d Cir.1995) (“[S]tate insurance legislation is exempt from the restrictions of the Dormant Commerce Clause as a result of the McCarran Ferguson Act.”). This purpose is embodied in the first clause of section 2(b). “[T]he applicability of the antitrust laws to the insurance industry” was only “[a] secondary concern.” *Royal Drug*, 440 U.S. at 218, 99 S.Ct. 1067. Although the House of Representatives initially approved a bill that would have entirely exempted the insurance industry from federal antitrust laws, the Act as passed created only a “partial exemption from those laws. Perhaps more significantly, however, [the Act] embod[ies] a legislative rejection of the concept that the insurance industry is outside the scope of the antitrust laws a *354 concept that had prevailed before the *South Eastern Underwriters* decision.” *Id.* at 220, 99 S.Ct. 1067.

The Court also found that the legislative history sheds some light on the scope of that exemption that is, on which particular activities within the insurance industry Congress intended to exempt. This history, the Court concluded, “strongly suggest[s] that Congress understood the business of insurance to be the underwriting and spreading of risk.” *Id.* at 221, 99 S.Ct. 1067. More specifically, the “primary concern” of Congress “was that cooperative ratemaking efforts be exempt from the antitrust laws” because such concerted efforts were understood to be necessary to ensure the adequate capitalization of insurance companies. *Id.* The Court quoted a report by the National Association of Insurance Commissioners (NAIC):⁵⁵ “[I]t would be a mistake to permit or require the unrestricted competition contemplated by the antitrust laws to apply to the insurance business. To prohibit combined efforts for statistical and rate-making purposes would be a backward step in the development of a progressive business.” *Id.* at 221 22, 99 S.Ct. 1067 (quoting 90 Cong. Rec. A4405 (1944)) (emphasis omitted). During the floor debates, Senator Ferguson explained the purpose of the bill in a similar manner:

55 “The views of the NAIC are particularly significant, because the Act ultimately passed was based in large part on the NAIC 's proposed] bill. *Id.*

This bill would permit and I think it is fair to say that it is intended to permit rating bureaus, because in the last session we passed a bill for the District of Columbia allowing rating. What we saw as wrong was the fixing of rates without statutory authority in the States; but we believe that State rights should permit a State to say that it believes in a rating bureau. I think the insurance companies have convinced many members of the legislature that we cannot have open competition in fixing rates on insurance. If we do, we shall have chaos. There will be failures, and failures always follow losses. *Id.* at 223, 99 S.Ct. 1067 (quoting 91 Cong. Rec. 1481 (1945)); see also *id.* (noting that “[t]he consistent theme of the remarks of other Senators also indicated a primary concern that cooperative ratemaking would be protected from the antitrust laws”). The Court also found instructive President Roosevelt's statement when signing the bill: “Congress did not intend to permit private rate fixing, which the Antitrust Act forbids, but was willing to permit actual regulation of rates by

affirmative action of the States.” *Id.* at 224, 99 S.Ct. 1067 (quoting [1944 45 Volume] *The Public Papers and Addresses of Franklin D. Roosevelt* 587 (Samuel I. Rosenman ed., 1950)).

On the basis of this history, one might narrowly construe the “business of insurance” to encompass only public ratemaking efforts, not purely private collaboration unauthorized or unsupervised by state agencies. Dicta in *Royal Drug* suggest otherwise, however. The Court observed that the Act’s legislative history does not indicate exactly “which of the various practices alleged in the *South Eastern Underwriters* indictment Congress intended to be covered by the phrase ‘business of insurance’ ”; nonetheless, it noted that the indictment had charged “that the defendants had fixed their ... premium rates,” and it concluded that the legislative history *did* make clear “that the fixing of rates is the ‘business of insurance.’ ” *Id.* at 224 n. 32, 99 S.Ct. 1067. Since the *South Eastern Underwriters* defendants appear to have been charged with private rate-fixing, see *355 *South Eastern Underwriters*, 322 U.S. at 535 36, 64 S.Ct. 1162, the implication is that such activity falls within the scope of the Act’s antitrust exemption.

Relying in part on this reasoning, the United States Court of Appeals for the Eighth Circuit has explicitly rejected the claim that private agreements among insurance companies to fix rates do not fall within the “business of insurance.” *In re Workers’ Comp. Ins. Antitrust Litig.*, 867 F.2d 1552, 1555 57 (8th Cir.1989). The court agreed with the defendants that if joint rate setting is the business of insurance when authorized by the state, “it makes little sense to say that cooperative rate setting, without state involvement, is not within the business of insurance. It is the setting of the rates which constitutes the business of insurance. This characterization is not dependent upon the identity of the rate setters.” *Id.* at 1556 n. 7; cf. *Proctor v. State Farm Mut. Auto. Ins. Co.*, 675 F.2d 308, 318 25 (D.C.Cir.1982) (finding that an alleged horizontal conspiracy by five automobile insurance companies to fix the price of automobile body damage repair work was the “business of insurance” for purposes of the McCarran Ferguson Act’s antitrust exemption).⁵⁶

⁵⁶ Furthermore, as commentators have observed, a construction of the “business of insurance” that limited the concept to state authorized collaboration would arguably “be so narrow as not to go beyond the state action antitrust exemption set forth in

Parker v. Brown, 317 U.S. 341, 350 52, 63 S.Ct. 307, 87 L.Ed. 315 (1943), thus rendering the Act’s antitrust exemption superfluous. Jonathan R. Macey & Geoffrey P. Miller, *The McCarran Ferguson Act of 1945: Reconceiving the Federal Role in Insurance Regulation*, 68 N.Y.U. L.Rev. 13, 28 n. 58 (1993).

Our Court has also had occasion to interpret the scope of the “business of insurance.” In *Owens v. Aetna Life & Casualty Co.*, decided after *Royal Drug* but before *Pireno*, we held that alleged cooperation between two insurers “in the decision to file in New Jersey only a single mass market rating-schedule, and perhaps a very high individual policy rate ... would fall within even the narrowest reading” of the “business of insurance” for purposes of the Act’s antitrust exemption. 654 F.2d 218, 232 (3d Cir.1981). Analyzing Supreme Court precedent, we stated that “[t]he earmark of insurance is the underwriting and spreading of risks in exchange for a premium.” *Id.* at 224; see *Royal Drug*, 440 U.S. at 211 n. 7, 99 S.Ct. 1067. At the same time, however, we noted that the “business of insurance” “encompasses ... more than making contracts between an insurer and an insured.” *Owens*, 654 F.2d at 224. Specifically, we found

it is clear that at least the following activities are the business of insurance, either because they pertain to risk-spreading or to the contract between the insurer and the insured:

1. preparing and filing a rating-schedule, either on behalf of an individual company or jointly through a rating bureau;
2. deciding upon rating classification differences between individual policies and group marketing plans, either individually or jointly through a rating bureau;
3. authorizing agents to solicit individual or group policies;
4. accepting or rejecting coverages tendered by brokers.

Id. at 225 26 (footnote omitted).

The dissenting opinion in *Owens* did not dispute the majority’s conclusions about the scope of the “business of insurance.” Instead, it argued that the majority had mischaracterized the alleged activity before it. The dissent believed the proper *356 McCarran Ferguson Act question concerned not ratemaking, as the majority had concluded, but rather “whether a conspiracy by insurance companies to divide markets can be construed as a matter

of law to constitute ‘the business of insurance’ within the meaning of the McCarran Ferguson Act.” *Id.* at 236 37 (Sloviter, J., dissenting). In the dissent's view, the Act “was enacted to protect the arrangements necessary to preserve the writing of insurance within and under regulation of the respective states.... [T]he scope of the statute can be no broader than protection of insurance company activities that can rationally be claimed to need anticompetitive regulation.” *Id.* at 242 (internal quotation marks omitted). Accordingly, the dissent believed it was “unlikely that Congress thought it was protecting agreements whereby an insurance company would completely withdraw from writing one type of insurance within the state.” *Id.* Nonetheless, the dissent was “reluctant to suggest that no agreement between insurance companies which may result in withdrawal from a market can ever be the business of insurance, because we do not know enough of the economic and business stuff out of which these arrangements emerge to be certain.” *Id.* at 244 (internal quotation marks omitted). What could be said for certain, the dissent concluded, was that the District Court had erred in finding “that the alleged division of markets constitutes ‘the business of insurance’ as a matter of law.” *Id.* at 245; see also *Maryland v. Blue Cross & Blue Shield Ass'n.*, 620 F.Supp. 907, 917 (D.Md.1985) (“[I]n order to meet the first *Pireno* requirement the defendants must show the challenged territorial allocation is related positively to underwriting and ratemaking; that is, that exclusive geographic territories directly facilitate risk spreading and transfer through the provision of insurance.” Because “[t]he parties have submitted affidavits which raise material factual issues” as to this question, summary judgment is inappropriate.).

With this precedent in mind, we turn to the case before us. As the disagreement between the majority and dissent in *Owens* illustrates, the precise characterization of the defendants' conduct can be dispositive. Here, having dismissed several antitrust claims for failure to satisfy *Twombly's* pleading standard, we are left with plaintiffs' allegations that Marsh's insurer-partners agreed with one another not to compete for incumbent business. Applying the *Pireno* criteria to this alleged conduct, we agree with defendants (as did the District Court) that the third criterion is met because the parties to this alleged agreement are all entities within the insurance industry. See *Pireno*, 458 U.S. at 129, 102 S.Ct. 3002 (asking “whether the practice is limited to entities within the insurance industry”). There is also a strong argument that

the agreement would be “an integral part of the policy relationship between the insurer and the insured,” *id.* (describing the second criterion), insofar as it would affect the insurers from which a prospective purchaser could obtain coverage.

On the basis of the complaint before us, however, we cannot conclude that the alleged agreement “has the effect of transferring or spreading a policyholder's risk.” *Id.* (describing the first criterion). Given the Supreme Court's declaration that “underwriting or spreading of risk [is] an indispensable characteristic of insurance,” *Royal Drug*, 440 U.S. at 212, 99 S.Ct. 1067, we think the failure to satisfy this first criterion is decisive. See *id.* at 220 21, 99 S.Ct. 1067 (“References to the meaning of the ‘business of insurance’ in the legislative history of the McCarran Ferguson Act strongly suggest that Congress understood the business of insurance to be the underwriting and spreading of risk.”).

*357 Our conclusion as to the first criterion rests on the fact that plaintiffs do not allege that defendants' agreement involved who could receive insurance coverage, or the type of coverage they could obtain. Cf., e.g., *In re Ins. Antitrust Litig.*, 938 F.2d 919, 927 (9th Cir.1991) (holding that an alleged conspiracy among members of the insurance industry to restrict the terms of coverage of commercial general liability insurance qualified as the “business of insurance”), *aff'd in part, rev'd in part on other grounds sub nom. Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993). Plaintiffs allege only that defendants colluded in order to influence with which of them a given policy could be placed. In other words, the complaint asserts conduct affecting not *whether* or *to what extent* a prospective insurance purchaser would transfer its risk to an insurer, but merely to *which* insurer that risk would be transferred. See Comm. SAC ¶ 100 (stating that under the Marsh-centered commercial conspiracy, “the incumbent [insurer] who hits a [premium] target *and provides the coverages requested* is protected” (internal quotation marks omitted) (emphasis added)); *id.* ¶ 106 (relating a statement by a Marsh employee that “if the incumbent [insurers] meet their target price *and does [sic] the coverage we want*, [Marsh Global Broking] will protect them and make sure they get the business” (internal quotation marks omitted) (emphasis added)). While discovery may reveal facts warranting a reassessment, we cannot say that defendants' challenged agreement, as alleged in the complaint, affected

the spreading of risk within the meaning of the “business of insurance.”

Royal Drug's examination of the purpose of the McCarran Ferguson Act bolsters this conclusion. As the Supreme Court explained, in carving out only the “business of insurance” from federal antitrust regulation and not the “business of insurance companies” Congress had in mind “[t]he relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement,” as well as “other activities of insurance companies [that] relate so closely to their status as reliable insurers that they too must be placed in the same class.” *Royal Drug*, at 215-16, 99 S.Ct. 1067 (quoting *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 460, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969)). We think it noteworthy that in this passage the Court twice referred to the reliability of insurers—the second time in defining the open-ended class of unenumerated activities that would fall within the “business of insurance.” Indeed, a focus on reliability was at the heart of what the Court described as “the primary concern of both representatives of the insurance industry and the Congress,” namely “that cooperative ratemaking efforts be exempt from the antitrust laws.” *Id.* at 221, 99 S.Ct. 1067 (explaining “the widespread view” at the time of the McCarran Ferguson Act’s passage “that it is very difficult to underwrite risks in an informed and responsible way without intra-industry cooperation”).

Here, not only is defendants’ alleged agreement not to compete for incumbent business different than the cooperative ratemaking efforts described in *Royal Drug*, but it also appears to have been unrelated to reliability; it does not involve any restriction on the type of coverage offered or the risk profile of insurable entities. *Royal Drug* emphasized that Congress understood the “business of insurance” as bound up with actuarial considerations intrinsic to the underwriting process, but the collusion alleged by the complaint is not addressed to these considerations. Defendants’ alleged agreement was designed to ensure only that, once an insurer had won a client’s business by providing the client with an acceptable coverage package at an acceptable premium another insurer would not attempt to poach that business by offering a more attractive price when it came up for renewal.

Nor does this alleged conduct fall into any of the categories of the “business of insurance” we set forth in *Owens*, each of which also implicated reliability issues. See *Owens*, 654 F.2d at 225-26 (majority opinion). The alleged agreement does not involve rating schedules or rating classification differences. Nor does it involve authorizing agents to solicit particular types of policies. The final category, “accepting or rejecting coverages tendered by brokers,” *id.* at 226, may seem at first blush to describe defendants’ alleged behavior, in which non-incumbent insurers refused to compete for the incumbent’s renewal business. But in the context of *Owens*, “accepting or rejecting coverages tendered by brokers” is best understood as referring to attempts by insurers to discriminate among brokers based on the type of policy tendered. See *id.* at 233 (noting plaintiff’s “claim that there was a conspiracy to drive him out of business”). The majority did not address whether a bare agreement to divide the market (either geographically or by customer) would constitute the business of insurance. See *id.* at 234-37 (Sloviter, J., dissenting). Examining *Royal Drug*, we believe a horizontal agreement not to compete for renewal business, at least as alleged here, is not within the scope of activity exempted by the McCarran Ferguson Act. Such an agreement is incidental to the processes of risk assessment and underwriting deemed integral to the “business of insurance” by the Supreme Court.

Defendants dispute this analysis. Noting that plaintiffs’ theory of injury rests on a claim that insurance customers paid higher prices for insurance as a result of the alleged agreement, defendants argue that the allegations go directly to the heart of the insurance contract. In defendants’ view, to deny that the alleged agreement among the insurers implicates the transfer of risk is to artificially segregate the element of premium price from the element of risk spreading; since premiums are the price paid for transferring risk, conspiracies that have the direct effect (if not necessarily the explicit purpose) of driving up premium prices necessarily affect risk spreading.

We do not deny that premiums are an integral part of the transfer of risk. But as the District Court accurately observed, *Royal Drug* stands for the proposition that “more than a mere impact on the price of premiums must be demonstrated” in order “[t]o establish that a particular practice has a substantial connection to the spreading and the underwriting of risk.” 2006 WL 2850607, at *9. Without question, if defendant insurers agreed not

to compete with one another for renewal business, the premiums charged for renewal policies would presumably be higher than in a competitive market. But we think there is an important difference between an agreement not to compete to sell a given package of insurance coverage and an agreement to fix the rates for such coverage. As noted, exempting cooperative ratemaking from federal antitrust regulation was one of the key purposes of the McCarran Ferguson Act because such joint ratemaking was deemed necessary at times in order to protect insurers from underestimating risk and the attendant threat of insolvency.⁵⁷ The kind of agreement *359 alleged here, however, would not serve such a purpose. Rather than guarantee that every insurer will offer a given coverage package at the same prescribed rate, the alleged agreement here, taken alone, would leave it to each incumbent insurer to assess its risk of loss for itself, and then to determine its own profit margin by setting the price/premium without fear of competition. In short, there is nothing about the alleged agreement that is particular to the business of insurance; it is simply an agreement not to compete to sell a particular product to a particular customer, which would be expected in any industry, see, e.g., *Petruzzi's IGA Supermarkets, Inc. v. Darling Delaware Co.*, 998 F.2d 1224 (3d Cir.1993) (examining alleged agreement among fat and bone rendering companies not to bid on one another's existing accounts) to yield a higher price than would prevail in a competitive market. The mere fact that the product here happens to be insurance is not enough to trigger the McCarran Ferguson Act's exemptions. Cf. *Royal Drug*, 440 U.S. at 213 214 n. 9, 99 S.Ct. 1067 (“[I]t does not follow that because an agreement is necessary to provide insurance, it is also the ‘business of insurance.’”).

⁵⁷ Cf. *Arroyo Melecio v. Puerto Rican Am. Ins. Co.*, 398 F.3d 56 (1st Cir.2005). The plaintiffs in that case alleged a horizontal agreement among private insurers not to provide compulsory automobile insurance, in violation of the Sherman Act. According to the plaintiffs, the insurers had stakes in a publicly created entity providing such insurance and believed they would ultimately reap greater profits if they did not compete with the price set by that entity (which was fixed by Puerto Rican law, although private insurers were allowed to charge a lower premium in order to compete to provide the compulsory insurance). The plaintiffs also alleged that the private insurers had colluded to coerce brokers to refrain from selling compulsory insurance contracts through private companies.

The Court of Appeals for the First Circuit decided that the challenged conduct constituted the “business of insurance” under the second clause of section 2(b) of the McCarran Ferguson Act. The court determined that “horizontal agreements among insurers to fix the price and to issue policies only through the residual market are within the business of insurance. *Id.* at 67. Unlike defendants' alleged agreement here, the insurers' conduct in *Arroyo Melecio* was rate fixing in the classic sense: because of the public scheme of compulsory insurance, it had the effect of ensuring that no one could purchase insurance except at the price prescribed by the public entity. The compulsory insurance scheme and public entity in *Arroyo Melecio* also brought that case much closer to the McCarran Ferguson Act's concern to exempt public ratemaking from federal antitrust regulation.

Defendants do not dispute that *Royal Drug* held that the fact that challenged behavior has an impact on premiums is not enough to make it the “business of insurance” for purposes of the McCarran Ferguson Act's antitrust exemption. Defendants point out, however, that while the agreement found not to be the “business of insurance” in *Royal Drug* was between insurers and third-party benefit providers, here it is between only insurers and directly involves the formation of the insurance contract between insurer and insured (and not merely, as in *Royal Drug*, the specific manner in which the insurer would perform obligations assumed under a preexisting contract). In *Sabo v. Metropolitan Life Insurance Co.*, we stated that “whatever the precise contours of the insurance business phrase may be, there is nothing more basically ‘insurance’ than the sale of an insurance contract.” 137 F.3d 185, 191 (3d Cir.1998). Applying this principle, we found that the McCarran Ferguson Act precluded a RICO claim alleging that the defendant insurance company had, inter alia, engaged in “a ‘churning’ scheme, whereby [the defendant] encouraged and coerced agents to fraudulently trade insurance policies in order to accumulate commissions *360 and decrease the value of outstanding policies.” *Id.* at 187. According to defendants, “*Sabo* could not more clearly dispose of the ‘business of insurance’ question in this case,” as “[t]he ‘sale of an insurance contract’ is at the core of Plaintiffs' antitrust claims here.” Defendants' EB Br. 67.

Defendants overlook, however, an important distinction between *Sabo* and this case. Because *Sabo* involved a

RICO rather than an antitrust claim, it was governed by the first clause of § 2(b) of the McCarran Ferguson Act. That clause provides that “[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance ... unless such Act specifically relates to the business of insurance.” 15 U.S.C. § 1012(b). This “first clause ... impos[es] what is, in effect, a clear-statement rule, a rule that state laws enacted ‘for the purpose of regulating the business of insurance’ do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise.” *U.S. Dep’t of Treasury v. Fabe*, 508 U.S. 491, 507, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993). Both clauses incorporate the phrase “business of insurance,” but as the Supreme Court has emphasized, the respective protections afforded to state law under the two clauses are of different scopes. “The first clause commits laws ‘enacted ... for the purpose of regulating the business of insurance’ to the States, while the second clause exempts only ‘the business of insurance’ itself from the antitrust laws.” *Id.* at 504, 113 S.Ct. 2202. Because “[t]he broad category of laws enacted ‘for the purpose of regulating the business of insurance’ ... necessarily encompasses more than just the business of insurance,” *id.* at 505, 113 S.Ct. 2202, judicial determinations made when applying one clause may not be dispositive when applying the other. As *Sabo* itself explained, “*Fabe* makes clear [that] the *Royal Drug* test is only a starting point in the analysis for non-antitrust cases.” 137 F.3d at 191 n. 3; see also Jonathan R. Macey & Geoffrey P. Miller, *The McCarran Ferguson Act of 1945: Reconceiving the Federal Role in Insurance Regulation*, 68 N.Y.U. L.Rev. 13, 22 (1993) (“[I]t appears that the meaning of [the ‘business of insurance’] varies depending upon whether the case involves antitrust [i.e., clause two] or other regulatory [i.e., clause one] matters.”). Accordingly, we cannot reflexively transplant *Sabo’s* holding into our analysis under the second clause of § 2(b).

In fact, a close reading of the Supreme Court’s cases may counsel against indiscriminately classifying all conduct involving the “sale of an insurance contract” as the “business of insurance” for purposes of the Act’s antitrust exemption. *Sabo* relied heavily on *SEC v. National Securities, Inc.*, in particular its statement that “[t]he selling and advertising of policies” falls “within the scope of the [Act’s] preemption of federal law.” 393 U.S. at 460, 89 S.Ct. 564; see *Sabo*, 137 F.3d at 190–92. *National Securities*, like *Sabo*, was a case applying the first clause

of § 2(b). When the Court later attempted in *Royal Drug* to define the “business of insurance” for purposes of clause two, it quoted from the same paragraph of *National Securities* on which *Sabo* drew. See *Royal Drug*, 440 U.S. at 215–16, 99 S.Ct. 1067. Notably, however, the *Royal Drug* Court omitted the passage about “the selling and advertising of policies” and included only the second part of the paragraph, which, as noted, focused on the issue of “reliability.” *Id.* In light of *Fabe*, we interpret this to mean that although any state law that regulates “the selling and advertising of insurance” will qualify as a “law enacted by [a] State for the purpose of regulating *361 the business of insurance” under clause one of the McCarran Ferguson Act, “the selling and advertising of insurance” is not the “business of insurance” under clause two unless it has some effect on “reliability” or underwriting issues.⁵⁸ As noted, based on the face of the complaint, we cannot say that defendants’ alleged behavior satisfies this standard.

⁵⁸ Cf. *Blue Cross*, 620 F.Supp. at 917 (qualifying the proposition “that the selling and advertising of policies is part of the business of insurance” by noting that the Supreme Court “decided the *National Securities* case many years before *Royal Drug* and *Pireno*, cases purporting to narrow the ‘business of insurance’ definition”).

Furthermore, even if *Sabo’s* holding were directly applicable to this case, plaintiffs’ allegations here are distinguishable. Whereas the *Sabo* plaintiff challenged a scheme by which defendants allegedly churned insurance policies—that is, bought and sold them with excessive frequency—plaintiffs here complain that defendants agreed *not* to sell them insurance. Cf. *Owens*, 654 F.2d at 242 (Sloviter, J., dissenting) (“It appears ... unlikely that Congress thought it was protecting [from antitrust regulation] agreements whereby an insurance company would completely withdraw from writing one type of insurance within the state. Aetna’s argument [to the contrary] seems to turn protection of the ‘business of insurance’ into the ‘business of non-insurance.’”). And unlike the agreement alleged here, the alleged churning of policies in *Sabo* arguably did affect the coverage terms of the policies themselves, as they “decrease[d] the value of outstanding [life insurance] policies.” *Sabo*, 137 F.3d at 187.

In sum, although the scope of the agreement alleged by plaintiffs has been refined since the District Court

first passed on the issue of the McCarran Ferguson Act, we agree with the court's conclusion that defendants' alleged conduct does not constitute the "business of insurance" for purposes of the Act's antitrust exemption. Accordingly, the Act does not provide a basis for dismissing plaintiffs' Sherman Act claims.

3. Antitrust Conclusion

Because the McCarran Ferguson Act does not bar plaintiffs' claims (at least, not at this stage of the litigation), our earlier *Twombly* analysis is dispositive. Given the long path our discussion has taken, a brief synopsis of that analysis is in order. The Supreme Court has made clear that courts confronted with a motion to dismiss must assess whether the complaint contains "enough factual matter (taken as true) to suggest that an agreement was made." *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955. "Determining whether a complaint states a plausible claim to relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Iqbal*, 129 S.Ct. at 1950; see also *Arar v. Ashcroft*, 585 F.3d 559, 617 (2d Cir.2009) (Parker, J., dissenting) ("Plausibility ... depends on a host of considerations: The full factual picture presented by the complaint, the particular cause of action and its elements, and the available alternative explanations [for the facts alleged]."), cert. denied, U.S. , 130 S.Ct. 3409, 177 L.Ed.2d 349 (2010). Some claims will demand relatively more factual detail to satisfy this standard, while others require less.

In the context of claims brought under § 1 of the Sherman Act, plausibility is evaluated with reference to well-settled antitrust jurisprudence that "limits the range of permissible inferences from ambiguous evidence." *Matsushita*, 475 U.S. at 588, 106 S.Ct. 1348. In particular, "when allegations *362 of parallel conduct are set out in order to make a § 1 claim," that conduct must be placed in "some setting suggesting the agreement necessary to make out a § 1 claim." *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955. In other words, the complaint must allege some "further circumstance," "something more than merely parallel behavior," "pointing toward a meeting of the minds." *Id.* at 557, 560, 127 S.Ct. 1955. If, in the circumstances alleged, the asserted "parallel conduct ... could just as well be independent action," then the complaint has failed to plead a § 1 claim. *Id.* at 557, 127 S.Ct. 1955.

Here, the bid-rigging allegations supply the requisite "further circumstance." Because they plausibly suggest an unlawful horizontal conspiracy not to compete for incumbent business, plaintiffs have adequately met Rule 8(a)(2)'s requirement for setting forth a § 1 claim against those defendants in the asserted Marsh-centered commercial conspiracy who are alleged to have participated in bid rigging. This agreement to divide the market, if proven, would be a naked restraint of trade subject to per se condemnation. See *Leegin*, 551 U.S. at 886, 127 S.Ct. 2705; *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 310 11 (3d Cir.1983) (observing that "a horizontal agreement to allocate customers" is "ordinarily ... a per se violation" (citing *United States v. Topco Assocs.*, 405 U.S. 596, 606 12, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972))), rev'd on other grounds sub nom. *Matsushita*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).⁵⁹

59 Even if we concluded that a per se rule were inappropriate and instead applied a quick look analysis (as plaintiffs urge in the alternative), we would still condemn the alleged restraint. As noted, defendants have not put forward a plausible justification for a naked horizontal agreement not to compete for renewal customers.

With respect to the remaining antitrust claims, however, plaintiffs have failed to plead facts plausibly supporting their allegations of horizontal conspiracies to unreasonably restrain trade, notwithstanding their conclusory assertions of agreement. Given plaintiffs' exclusive reliance on a per se or quick look analysis, the absence of a horizontal agreement is fatal to their § 1 claims.⁶⁰ Accordingly, these antitrust claims must be dismissed, as the District Court concluded.

60 As noted, see *supra* Section II.A.1.a., plaintiffs who seek to condemn a vertical agreement must proceed under the traditional rule of reason, which requires plaintiffs to demonstrate anticompetitive effects in the relevant market.

B. RICO Claims

Plaintiffs also claim that defendants' alleged conduct violated the Racketeer Influenced and Correct Organizations (RICO) Act, 18 U.S.C. § 1962(c), (d).

Section 1962(c) makes it unlawful “for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity.” Section 1962(d) makes it unlawful “for any person to conspire to violate” § 1962(c).

[25] To plead a RICO claim under § 1962(c), “the plaintiff must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity.” *Lum v. Bank of Am.*, 361 F.3d 217, 223 (3d Cir.2004) (citing *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 105 S.Ct. 3292, 87 L.Ed.2d 346 (1985)). According to the statute, an “enterprise” includes “any individual, partnership, corporation, association, *363 or other legal entity, and any union or group of individuals associated in fact although not a legal entity.” 18 U.S.C. § 1961(4). In the Commercial Case, plaintiffs allege the existence of one legal-entity enterprise, the Council of Insurance Agents and Brokers (CIAB), and six association-in-fact enterprises corresponding to the six broker-centered antitrust conspiracies discussed above. In the Employee Benefits Case, plaintiffs plead five association-in-fact enterprises corresponding to the broker-centered conspiracies alleged in their antitrust claims.

According to the RICO statute, a “pattern of racketeering activity” requires at least two acts of racketeering activity within a ten-year period. 18 U.S.C. § 1961(5). “These predicate acts of racketeering may include, *inter alia*, federal mail fraud under 18 U.S.C. § 1341 or federal wire fraud under 18 U.S.C. § 1343.” *Lum*, 361 F.3d at 223; *see* 18 U.S.C. § 1961(1) (defining “racketeering activity”). Plaintiffs assert that the defendant brokers in both the Commercial Case and Employee Benefits Case committed “numerous acts of mail and wire fraud” in furtherance of the enterprises to which they allegedly belonged. Comm. SAC ¶ 510; *accord* EB SAC ¶ 520. More specifically, plaintiffs allege that defendants “knowingly and intentionally made misrepresentations” in materials disseminated by mail and wire, “wherein they routinely represented that they would act in the best interests of their clients in providing unbiased advice and assistance in the selection of insurance products and services relating thereto and that they would act as fiduciaries of their clients in placing insurance on the best terms possible and at the best price available.” Comm. SAC ¶ 535; EB

SAC ¶ 539. At the same time, plaintiffs charge, defendants “knowingly and intentionally ... concealed material facts,” such as “the steering of insurance placements from the Broker Defendants to the Insurer Defendants,” and the fact “that the Broker Defendants were not acting in the best interest of their clients but were instead acting on behalf of themselves and the Insurer Defendants who were associated with the Broker's enterprise to further their financial interests at the expense of their clients.” Comm. SAC ¶ 535; EB SAC ¶¶ 539-40. In the Employee Benefits case, plaintiffs also allege that defendants violated 18 U.S.C. § 1954;⁶ *see* 18 U.S.C. § 1961(1) (including *364 violations of 18 U.S.C. § 1954 among the enumerated racketeering activities). Plaintiffs assert that “[e]ach payment of a Contingent Commission ... is a violation of Section 1954 and ... is intended to influence the advice that the Defendant Brokers give to the plan sponsors, plan administrators and/or plan participants.” EB SAC ¶ 535.

61 Section 1954 provides:

Whoever being

- (1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or
- (2) an officer, counsel, agent, or employee of an employer or an employer any of whose employees are covered by such plan; or
- (3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or
- (4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to such plan

receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of the actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall be fined under this title or imprisoned not more than three years, or both: *Provided*, That this section shall not prohibit the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for

services actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent, or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

In their motion to dismiss the RICO claims, defendants argued that plaintiffs had failed adequately to plead the enterprise and conduct elements of their § 1962(c) claims, and that they had failed adequately to plead predicate acts of racketeering. The District Court granted the motion, finding that plaintiffs had insufficiently pled both the enterprise and conduct elements of the § 1962(c) claims based on the alleged broker-centered enterprises, and had insufficiently pled that defendants conducted CIAB “through a pattern of racketeering activity.” Having determined that plaintiffs had failed to allege adequately that any defendant had violated § 1962(c), the court also dismissed the claims of conspiracy under § 1962(d). 2007 WL 2892700, at *33; see *id.* at *13 (holding that “in the event all substantive RICO claims in the action are dismissed, a plaintiff cannot bring a § 1962(d) claim”).

1. Legal Standards

a. Section 1962(c)

i. The Enterprise Element

The RICO statute “describes two categories of associations that come within the purview of the ‘enterprise’ definition. The first encompasses organizations such as corporations and partnerships, and other ‘legal entities.’ The second covers ‘any union or group of individuals associated in fact although not a legal entity.’” *United States v. Turkette*, 452 U.S. 576, 581 82, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981) (quoting 18 U.S.C. § 1961(4)). As the District Court here explained, when the enterprise asserted is a legal identity, such as “a legitimate business or organization ..., the need to allege and prove the existence of enterprise structure can be met without great difficulty, since all aspects of the enterprise element ... are satisfied by the mere proof that the entity does in fact have a legal existence.” 2007 WL 2892700, at *9; see, e.g., *Webster v. Omnitrition Int'l, Inc.*, 79 F.3d 776, 786 (9th Cir.1996) (“[C]orporate entities ha[ve] a legal existence ..., and the very existence

of a corporation meets the requirement for a separate [enterprise] structure.” (internal quotation marks omitted) (alteration in original)); see also *Boyle v. United States*, 556 U.S. 938, 129 S.Ct. 2237, 2249, 173 L.Ed.2d 1265 (2009) (Stevens, J., dissenting) (“In cases involving a legal entity, the matter of proving the enterprise element is straightforward....”).

The statutory language does not, however, specify the essential features of an association-in-fact enterprise. The Supreme Court attempted to explicate this concept in *Turkette*, where it reviewed a First Circuit decision limiting the definition of “enterprise” to legitimate organizations. The Supreme Court reversed, stating that “[t]here is no restriction upon the associations embraced by [§ 1961(4)]’s definition [of enterprise]: an enterprise includes any union or group of individuals associated in fact. On its face, the definition appears to include both legitimate and illegitimate enterprises within its scope....” *Turkette*, 452 U.S. at 580, 101 S.Ct. 2524.

The First Circuit had expressed concern that including criminal organizations within the definition of “enterprise” would effectively *365 collapse the distinction between the “enterprise” and “pattern of racketeering” elements of a § 1962(c) violation. *Id.* at 582, 101 S.Ct. 2524. The Supreme Court agreed that the “enterprise” and the “pattern of racketeering activity” were distinct elements of a § 1962(c) claim. But the Court rejected the argument that preserving this distinction required the exclusion of illegitimate organizations from the definition of “enterprise.” *Id.* at 583, 101 S.Ct. 2524. In setting forth its own understanding of this distinction, the Court suggested several features defining an association-in-fact enterprise:

The enterprise is an entity, for present purposes a group of persons associated together for a common purpose of engaging in a course of conduct. The pattern of racketeering activity is, on the other hand, a series of criminal acts as defined by the statute. The former is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing

unit. The latter is proved by evidence of the requisite number of acts of racketeering committed by the participants in the enterprise. While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The “enterprise” is not the “pattern of racketeering activity”; it is an entity separate and apart from the pattern of activity in which it engages.

Id. (internal citation omitted).

Interpreting this language from *Turkette*, we identified three elements essential to an association-in-fact enterprise. *United States v. Riccobene*, 709 F.2d 214, 221 24 (3d Cir.1983). We stated that, first, such an enterprise must have “some sort of structure ... within the group for the making of decisions, whether it be hierarchical or consensual. There must be some mechanism for controlling and directing the affairs of the group on an on-going, rather than ad hoc, basis.” *Id.* at 222. Second, “the various associates [must] function as a continuing unit. This does not mean that individuals cannot leave the group or that new members cannot join at a later time. It does require, however, that each person perform a role in the group consistent with the organizational structure established by the first element and which furthers the activities of the organization.” *Id.* at 223 (internal quotation marks and citation omitted). Finally, we reiterated *Turkette’s* requirement that the association-in-fact be “an entity separate and apart from the pattern of activity in which it engages.” *Id.* (quoting *Turkette*, 452 U.S. at 583, 101 S.Ct. 2524). As we understood this last requirement,

it is not necessary to show that the enterprise has some function wholly unrelated to the racketeering activity, but rather that it has an existence beyond that which is necessary merely to commit each of the acts charged as predicate racketeering offenses. The function of overseeing and

coordinating the commission of several different predicate offenses and other activities on an on-going basis is adequate to satisfy the separate existence requirement.

Id. at 223 24.

In evaluating the sufficiency of plaintiffs' pleadings here, the District Court understandably relied heavily on *Riccobene*. See 2007 WL 2892700, at *9 11. After the District Court had dismissed plaintiffs' claims, and after we had heard argument in this appeal, the Supreme Court decided *Boyle v. United States*, 556 U.S. 938, 129 S.Ct. 2237, 173 L.Ed.2d 1265 (2009). *Boyle* sought to clarify the required attributes of an association-in-fact enterprise in order to resolve conflicts that had developed *366 among the courts of appeals over the proper interpretation of the *Turkette* factors. *Id.* at 2243. Rejecting several proposed ways of cabining the definition of an “enterprise,” the *Boyle* Court highlighted several elements of the RICO statute that pointed toward a capacious construction of the term. Most significant was the statute's specific description of possible enterprises. See 18 U.S.C. § 1961(4) (stating that an “ ‘enterprise’ includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity”). “This enumeration of included enterprises is obviously broad, encompassing ‘any ... group of individuals associated in fact.’ The term ‘any’ ensures that the definition has a wide reach, and the very concept of an association in fact is expansive.” *Boyle*, 129 S.Ct. at 2243 (quoting 18 U.S.C. § 1961(4)) (emphasis in *Boyle*) (internal citation omitted).⁶² In addition, “the RICO statute provides that its terms are to be ‘liberally construed to effectuate its remedial purposes.’ ” *Id.* (quoting Organized Crime Control Act of 1970, Pub.L. No. 91 452, § 904(a), 84 Stat. 922, 947).

⁶² The Court noted that § 1961(4), which lists entities “include d] in the term “enterprise, “does not purport to set out an exhaustive definition of the term, and that, “ accordingly, this provision does not foreclose the possibility that the term might include, in addition to the specifically enumerated entities, others that fall within the ordinary meaning of the term ‘enterprise.’ *Boyle*, 129 S.Ct. at 2243 n. 2.

[26] Informed by these background principles, the Court expounded the necessary elements of an association-in-fact enterprise. Such an enterprise must have a structure. Specifically, it “must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose.” *Id.* at 2244.⁶³ But the Court saw “no basis in the language of RICO” for requiring a particular type of organizational structure. *Id.* at 2245. An association-in-fact enterprise, it explained,

63 *Boyle* thus sees what we described in *Riccobene* as the second element, i.e., continuity, as an inherent component of the structure requirement. See *Boyle*, 129 S.Ct. at 2244 (“Section 1962(c) ... shows that an ‘enterprise must have some longevity, since the offense proscribed by that provision demands proof that the enterprise had ‘affairs’ of sufficient duration to permit an associate to ‘participate in those affairs through ‘a pattern of racketeering activity.’”). In other words, while *Riccobene* used the term “structure to describe one of several necessary features of an “enterprise, *Boyle* appears to use “structure as an overarching term encompassing all of the requisite elements: common purpose, relationships among those associated with the enterprise, and the continuity necessary to allow the associates to pursue the enterprise's purpose.

need not have a hierarchical structure or a “chain of command”; decisions may be made on an ad hoc basis and by any number of methods by majority vote, consensus, a show of strength, etc. Members of the group need not have fixed roles; different members may perform different roles at different times. The group need not have a name, regular meetings, dues, established rules and regulations, disciplinary procedures, or induction or initiation ceremonies. While the group must function as a continuing unit and remain in existence long enough to pursue a course of conduct, nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence. Nor is the statute limited to groups whose crimes are sophisticated, diverse, complex, or unique; for example, a group that does nothing but engage *367 in extortion through old-fashioned, unsophisticated, and brutal means may fall squarely within the statute's reach.

Id. at 2245 46; see also *id.* at 2243 & n. 3 (rejecting, as “extratextual,” the dissent's argument “that the definition of a RICO enterprise is limited to ‘business-like entities’ ” (citing *id.* at 2247 50 (Stevens, J., dissenting))). *Boyle* makes clear, in other words, that although the structure requirement demands that “the parts” of the association in fact must be “arranged or put together to form a whole,” the statute does not prescribe any particular arrangement, as long as it is “sufficient to permit [the enterprise's] associates to pursue the enterprise's purpose.” *Id.* at 2244 (internal quotation marks omitted).

Boyle also clarified the relationship between the “enterprise” and “pattern of racketeering activity” elements of a § 1962(c) claim. The petitioner in *Boyle* had objected to the trial judge's jury instructions, which had stated that “the existence of an association-in-fact [enterprise] is sometimes more readily proven by what it does, rather than by abstract analysis of its structure.” *Id.* at 2247. In the petitioner's view, the judge should have specified that, to qualify as a RICO enterprise, the association's structure must go “beyond that inherent in the pattern of racketeering activity.” *Id.* at 2244. The Supreme Court found the petitioner's proffered language unnecessary. If the language “is interpreted to mean that the existence of an enterprise is a separate element that must be proved,” the Court explained, “it is of course correct.... [T]he existence of an enterprise is an element distinct from the pattern of racketeering activity and ‘proof of one does not necessarily establish the other.’ ” *Id.* at 2245 (quoting *Turkette*, 452 U.S. at 583, 101 S.Ct. 2524). Indeed, the Court thought it was “easy to envision situations in which proof that individuals engaged in a pattern of racketeering activity would not establish the existence of an enterprise.” *Id.* at 2245 n. 4. If, for example, “several individuals, *independently and without coordination*, engaged in a pattern of crimes listed as RICO predicates [...] ... [p]roof of these patterns would not be enough to show that the individuals were members of an enterprise.” *Id.* (emphasis added). Nor would proof of a conspiracy to commit a RICO predicate offense “necessarily establish that the defendant[s] participated in the affairs of an ... enterprise through a pattern of ... crimes.” *Id.* at 2246. While “a conspiracy is an inchoate crime that may be completed in the brief period needed for the formation of the agreement and the commission of a single overt act in furtherance of the conspiracy,” § 1962(c) “demands much more: the creation of an ‘enterprise’ a group with a common purpose and course of conduct

and the actual commission of a pattern of predicate offenses.” *Id.* The Court did not believe, however, that the petitioner's suggested language was necessary in order to avoid a merger of the crime proscribed by § 1962(c) and simple conspiracy to commit a predicate offense. Instead, the Court found that the statute's requirement of a pattern of predicate acts, plus the requirement of an enterprise structure—liberally defined as “a group with a common purpose and course of conduct”—was sufficient to preserve the distinction.

[27] Not only was it unnecessary to require proof of a structure “beyond that inherent in the pattern of racketeering activity,” but the phrase was also potentially misleading. For “if the phrase is used to mean that the existence of an enterprise may never be inferred from the evidence showing that persons associated with the enterprise engaged in a pattern of *368 racketeering activity, it is incorrect.” *Id.* at 2245. As the Court had observed in *Turkette*, “the evidence used to prove the pattern of racketeering activity and the evidence establishing an enterprise ‘may in particular cases coalesce.’ ” *Id.* (quoting *Turkette*, 452 U.S. at 583, 101 S.Ct. 2524); see also *id.* at 2246 n. 5 (“Even if the same evidence may prove two separate elements, this does not mean that the two elements collapse into one.”). In other words, “proof of a pattern of racketeering activity may be sufficient in a particular case to permit a jury to infer the existence of an association-in-fact enterprise.” *Id.* at 2247.⁶⁴ For this reason, the trial judge's instructions to the jury, which explained that a RICO enterprise could be “form[ed] solely for the purpose of carrying out a pattern of racketeering acts,” and that “the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure,” were “correct and adequate.” *Id.* at 2242, 2247 (internal quotation marks omitted).

⁶⁴ Writing in dissent, Justice Stevens agreed with the majority that “[t]here may be cases in which a jury can infer the existence of an enterprise] from the evidence used to establish the pattern of racketeering activity.” *Id.* at 2249 (Stevens, J., dissenting). But he believed that should “be true only when the pattern of activity is so complex that it could not be performed in the absence of structures or processes for planning or concealing the illegal conduct beyond those inherent in performing the predicate acts.” *Id.* By that standard, Justice Stevens found the jury instructions approved by the majority to be “plainly

deficient.” *Id.* at 2251. In allowing the jury to “‘find an enterprise where an association of individuals, without structural hierarchy, forms solely for the purpose of carrying out a pattern of racketeering acts, the instructions failed, he argued, to “require the Government to prove that the alleged enterprise had an existence apart from the pattern of predicate acts.” *Id.*; see also *id.* at 2250 (“By permitting the Government to prove the ‘enterprise and [pattern of racketeering activity] elements with the same evidence, the majority] renders the enterprise requirement essentially meaningless in association in fact cases.”). By contrast, the majority held that an association in fact enterprise need not *do* anything other than engage in the pattern of racketeering activity, so long as it has the requisite structural features (common purpose, interrelationships among its associates, and longevity). Cf. *Odom v. Microsoft Corp.*, 486 F.3d 541, 551 (9th Cir.2007) (en banc) (concluding that “the Supreme Court's statement in *Turkette* that an ‘enterprise is ‘an entity separate and apart from the pattern of activity in which it engages’ is not a requirement “that an associated in fact enterprise have a structure beyond that necessary to carry out its pattern of illegal racketeering activities, but rather “merely a statement of the obvious: The enterprise and its activity are two separate things. One is the enterprise. The other is its activity.”).

In short, *Boyle* holds that the RICO statute defines an “enterprise” broadly, such that the “enterprise” element of a § 1962(c) claim can be satisfied by showing a “structure,” that is, a common “purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose.” *Id.* at 2244; see *id.* at 2245 (“[A]n association-in-fact enterprise is simply a continuing unity that functions with a common purpose.”). “[A]fter *Boyle*, an association-in-fact enterprise need have no formal hierarchy or means for decision-making, and no purpose or economic significance beyond or independent of the group's pattern of racketeering activity.” *United States v. Hutchinson*, 573 F.3d 1011, 1021 (10th Cir.), cert. denied, U.S. , 130 S.Ct. 656, 175 L.Ed.2d 500 (2009). To the extent our cases have interpolated additional requirements into the statute, they are abrogated by *Boyle*.

Neither *Turkette* nor *Boyle* (nor *Riccobene*, for that matter) specifically addressed requirements for pleading civil *369 RICO claims.⁶⁵ Plaintiffs contend these cases speak only to which “attributes of an enterprise must ultimately be proven”; they do not define what must be

plead in the complaint. Plaintiffs' EB Br. 70.⁶⁶ Citing our opinion in *Seville Industrial Machinery Corp. v. Southmost Machinery Corp.*, 742 F.2d 786 (3d Cir.1984), plaintiffs argue that it is sufficient at the pleading stage simply to identify the entities of which the alleged association-in-fact enterprise is composed. If that were the standard, plaintiffs would have satisfied it, as they have named the defendant broker and defendant insurers within each alleged broker-centered enterprise. See Comm. SAC ¶ 502; EB SAC ¶ 523.

⁶⁵ *Turkette* evaluated a challenge to the validity of a criminal indictment; *Boyle* reviewed jury instructions in a criminal case; and *Riccobene* evaluated a challenge to the sufficiency of the evidence supporting a criminal RICO conviction.

⁶⁶ *Boyle* was decided after the parties filed their briefs in this appeal. Although plaintiffs' argument distinguishing burdens of proof from pleading burdens thus does not explicitly refer to *Boyle*, its logic would seem to call for interpreting that decision, like *Turkette* and *Riccobene*, as addressed only to burdens of proof.

Plaintiffs also argue, in the alternative, that their allegations adequately plead the enterprise features set forth in the *Turkette/Boyle* line of cases. See *infra*.

Plaintiffs, however, misconceive the pleading standard. To begin with, *Seville* was decided before the Supreme Court held in *Bell Atlantic Corp. v. Twombly* that Federal Rule of Procedure 8 requires plaintiffs to plead "enough factual matter" to state "a claim to relief that is plausible on its face." 550 U.S. at 556, 570, 127 S.Ct. 1955. But putting *Twombly* aside for the moment, we are skeptical that *Seville*, read purely on its own terms, deems it sufficient merely to identify the members of an alleged association-in-fact enterprise. It is true that *Seville* found neither *Turkette* nor *Riccobene* "speaks to what must be pleaded in order to state a cause of action." *Seville*, 742 F.2d at 790. It is also true that *Seville* concluded the complaint before it was adequately pled because the plaintiff had "identified the four entities it believed were the enterprises that had been marshalled against it." *Id.* (stating that "[t]he rules of pleading require nothing more at this early juncture than that bare allegation"). We find it significant, however, that *Seville* involved legal-entity enterprises, not associations in fact. See *id.* at 789-90. Each of the four enterprises alleged there consisted solely of a named defendant—either a corporation or a

natural person. Simply identifying these legal entities was sufficient to "put the defendant[s] on notice," *id.* at 790, of the nature of the enterprises alleged (and, for that matter, to indicate the existence of the features set forth in *Turkette*).

When the asserted enterprise, however, is not itself a legal entity, but rather an association of legal entities, simply identifying the allegedly associated components does not serve to put defendants on notice of the RICO claim alleged against them—just as merely listing the names of alleged conspirators would not give defendants adequate notice of an alleged conspiracy. For that reason, even before *Twombly*, some courts required plaintiffs to provide more detail in pleading the existence of an association-in-fact enterprise. See, e.g., *Richmond v. Nationwide Cassel L.P.*, 52 F.3d 640, 646 (7th Cir.1995) (agreeing "with the district court that plaintiff's naming of a string of entities does not allege adequately an enterprise").

In any case, it is clear after *Twombly* that a RICO claim must plead facts plausibly implying the existence of an enterprise *370 with the structural attributes identified in *Boyle*: a shared "purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose." *Boyle*, 129 S.Ct. at 2244; see *Rao v. BP Prods. N. Am., Inc.*, 589 F.3d 389, 400 (7th Cir.2009) (upholding dismissal of RICO claims because, inter alia, the plaintiff's allegations of an association-in-fact enterprise "do not indicate how the different actors are associated and do not suggest a group of persons acting together for a common purpose or course of conduct"); *Elsevier Inc. v. W.H.P.R., Inc.*, 692 F.Supp.2d 297, 307 (S.D.N.Y.2010) (finding that the complaint "fail[s] to plead the existence of ... the so-called association in fact enterprise" because it does not plausibly "tie[] together the various defendants allegedly comprising the association in fact into a single entity that was formed for the purpose of working together," that is, "acting in concert"); see also *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir.2008) (stating generally that *Twombly* "'requires a complaint with enough factual matter (taken as true) to suggest' [each] required element" of the claim alleged). To require less would ignore *Twombly's* interest in "insist[ing] upon some specificity in pleading before allowing a potentially massive factual controversy to proceed" to an "inevitably costly and protracted discovery phase." *Twombly*, 550

U.S. at 558, 127 S.Ct. 1955 (internal quotation marks omitted); see *id.* at 557-58, 127 S.Ct. 1955 (quoting *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347, 125 S.Ct. 1627, 161 L.Ed.2d 577 (2005)) (noting that the potential cost of such cases may have an “in terrorem” effect on defendants, coercing settlement of even groundless claims). As other courts have recognized, the concern expressed in *Twombly* is just “as applicable to a RICO case, which resembles an antitrust case in point of complexity and the availability of punitive damages and of attorneys’ fees to the successful plaintiff. RICO cases, like antitrust cases, are ‘big’ cases and the defendant should not be put to the expense of big-case discovery on the basis of a threadbare claim.” *Limestone Dev. Corp. v. Vill. of Lemont*, 520 F.3d 797, 803 (7th Cir.2008).⁶⁷

⁶⁷ We do not imply that *Twombly*’s pleading standard is applicable only to “big” cases, but we note that the “practical reasons for this standard, see *Twombly*, 550 U.S. at 557-58, 127 S.Ct. 1955, are particularly evident in such cases.

In *Twombly*, this concern focused on the agreement element of § 1 of the Sherman Act. Because § 1 allows plaintiffs to bring suit against conspiracies, it has the potential to impose liability on a large number of defendants. To prevail, however, a § 1 plaintiff must show not simply that the defendants all engaged in similar wrongdoing, but that they agreed to undertake concerted action in restraint of trade.

The enterprise element of RICO claims is a close analogue of § 1’s agreement element. Unless a plaintiff is required at the pleading stage to suggest plausibly the existence of an enterprise structure—unless a plaintiff must “allege something more than the fact that individuals were all engaged in the same type of illicit conduct during the same time period,” *Elsevier*, 692 F.Supp.2d at 307—the RICO statute’s allowance for association-in-fact enterprises becomes an open gateway to the imposition of potentially massive costs on numerous defendants, regardless of whether there is even a hint of the collaboration necessary to trigger liability.

ii. The “Conduct” Element

[28] [29] [30] Mere association with an enterprise does not violate § 1962(c). To be liable under this provision, a defendant must “conduct or participate, directly or

indirectly, in the conduct of such enterprise’s *371 affairs through a pattern of racketeering activity.” 18 U.S.C. § 1962(c). The Supreme Court has held that the “conduct or participate” element requires a defendant to “have some part in directing those affairs.” *Reves v. Ernst & Young*, 507 U.S. 170, 179, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993). More precisely, “one is not liable under [§ 1962(c)] unless one has participated in the operation or management of the enterprise itself.” *Id.* at 183, 113 S.Ct. 1163. “An enterprise is ‘operated’ not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management.” *Id.* at 184, 113 S.Ct. 1163. “Outsiders” may also meet the statutory requirement if they “exert control over” the enterprise, but such outsider defendants must have “conducted or participated in the conduct of the ‘enterprise’s affairs,’ not just their *own* affairs.” *Id.* at 184-85, 113 S.Ct. 1163. Accordingly, the Supreme Court found that an outside accounting firm did not “conduct or participate, directly or indirectly, in the conduct” of a farmer cooperative’s affairs when it prepared and presented audit reports to the cooperative’s board, reports that allegedly failed to disclose all of the information necessary to assess the solvency of the cooperative. *Id.* at 185-86, 113 S.Ct. 1163; see also *Univ. of Md. at Baltimore v. Peat, Marwick, Main & Co.*, 996 F.2d 1534, 1539-40 (3d Cir.1993) (“It cannot be said that by merely performing what are generic financial and related services to an insurance company, even if they are later found to be deficient, an accounting firm has opened itself to liability under the federal racketeering statute.”).

iii. The Requisite Nexus

[31] Simply pleading that a defendant “participated in the operation or management” of an enterprise, however, is not enough to make out a violation of § 1962(c). The defendant must have done so “through a pattern of racketeering activity.” In other words, there must be not only a “nexus between the [defendant] and the conduct [of] the affairs of an enterprise,” *Univ. of Md.*, 996 F.2d at 1539, but also a nexus between the conduct of those affairs and the pattern of racketeering activity, see *Banks v. Wolk*, 918 F.2d 418, 424 (3d Cir.1990). The plain language of the statute requires that the “pattern of racketeering activity” be a means by which the defendant “participate[s], directly or indirectly, in the conduct of [the] enterprise’s affairs.” In *United States v. Provenzano*,

we adopted the Second Circuit's test for determining when a defendant "conducts the activities of an enterprise through a pattern of racketeering." 688 F.2d 194, 200 (3d Cir.1982) (citing *United States v. Scotto*, 641 F.2d 47 (2d Cir.1980)). The test is satisfied if (1) the defendant "is enabled to commit the predicate offenses solely by virtue of his position in the enterprise or involvement in or control over the affairs of the enterprise; or (2) the predicate offenses are related to the activities of that enterprise." *Id.* (quoting *Scotto*, 641 F.2d at 54).

The Second Circuit has repudiated this standard, however, finding it inconsistent with the definition of "conduct" subsequently set forth by the Supreme Court in *Reves*. *United States v. Wong*, 40 F.3d 1347, 1372 (2d Cir.1994) ("Although *Reves* does not mention *Scotto*, 'we have recently recognized that the Supreme Court's holding in *Reves* ... is irreconcilable with the relevant portion of our decision in *Scotto*.'" (quoting *United States v. Viola*, 35 F.3d 37, 40 (2d Cir.1994))); see also *Bldg. Indus. Fund v. Local Union No. 3*, 992 F.Supp. 162, 179 n. 10 (E.D.N.Y.1996) ("To the extent that *Scotto* held that a person may be liable under RICO simply because the requisite nexus exists between his activity and the affairs of the enterprise, it was overruled by the Supreme Court's decision in *Reves* [], holding that a person *372 must be involved in the 'operation or management' of an enterprise to be liable under RICO.").

We agree with the Second Circuit that the *Provenzano/Scotto* standard is no longer good law.⁶⁸ Given *Reves*, the inquiry must be whether the defendant participated in the "operation or management" of an enterprise's affairs, and if so, whether he did so "through a pattern of racketeering activity." As the plain language of the statute indicates, the nexus element requires a plaintiff to show that the defendant participated in the conduct of the enterprise's affairs (per *Reves*) through that is, "by means of, by consequence of, by reason of, by the agency of, or by the instrumentality of," *United States v. Brandao*, 539 F.3d 44, 53 (1st Cir.2008) (internal quotation marks omitted) a pattern of racketeering activity.⁶⁹

⁶⁸ We recited the *Provenzano* standard post *Reves* in *United States v. Irizarry*, 341 F.3d 273, 304 (3d Cir.2003), without addressing the potential tension with *Reves* or acknowledging that the Second Circuit had recognized the standard's abrogation. *Irizarry's* invocation of the standard appears to be dicta, as

our opinion noted that the argument to which it was addressed had been waived. *Id.* In any case, the issue in *Irizarry* was whether the judge should have instructed the jury that it could not convict under § 1962(c) unless the government showed "that the defendant's motive in committing the predicate act was to further the affairs of the enterprise." *Id.* In finding, correctly, that "a defendant can commit a predicate act that is detrimental to the enterprise so long as the evidence establishes the requisite nexus between the predicate act and the enterprise, *id.*, we had no occasion to address any other aspects of the *Provenzano* standard.

⁶⁹ Although we adopt *Brandao's* definition of the statutory term "through, we believe the decision inverts the relationship specified by § 1962(c). *Brandao* states that "a] sufficient nexus ... exists ... if the defendant was able to commit the predicate acts by means of, by consequence of, by reason of, by the agency of, or by the instrumentality of i.e., 'through] his association with the enterprise. 539 F.3d at 53 (internal quotation marks omitted). But the statute provides that a defendant must participate in the conduct of an enterprise's affairs through the racketeering activity. See 18 U.S.C. § 1962(c). This language dictates that it is the predicate acts of racketeering that must be the "means.

b. Section 1962(d)

Under § 1962(d), it is unlawful to conspire to violate any of the substantive provisions of RICO. 18 U.S.C. § 1962(d); see 18 U.S.C. § 1962(a)-(c) (substantive provisions).⁷⁰ In certain circumstances, a defendant may be held liable under § 1962(d) even where its own actions would not amount to a substantive RICO violation. *Salinas v. United States*, 522 U.S. 52, 65, 118 S.Ct. 469, 139 L.Ed.2d 352 (1997) (stating that a conspirator can violate § 1962(d) "in any number of ways short of agreeing to undertake all of the acts necessary for the crime's completion")⁷¹; see *Smith v. Berg*, 247 F.3d 532, 537 (3d Cir.2001) (stating that, under *Salinas*, a defendant "who opts into or participates in a conspiracy" to violate § 1962(c) may be liable "even if the defendant did not personally agree to do *373 ... any particular element" of the § 1962(c) violation); see, e.g., *Salinas*, 522 U.S. at 65, 118 S.Ct. 469 (holding that the RICO statute "does not permit us to excuse from the reach of [§ 1962(d)]'s conspiracy provision an actor who does not himself commit or agree to commit the two or more predicate acts requisite to the

underlying [§ 1962(c)] offense”). But a § 1962(d) claim must be dismissed if the complaint does not adequately allege “an endeavor which, if completed, would satisfy all of the elements of a substantive [RICO] offense,” *Salinas*, 522 U.S. at 65, 118 S.Ct. 469. See *Efron v. Embassy Suites (Puerto Rico), Inc.*, 223 F.3d 12, 21 (1st Cir.2000); *Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1191 (3d Cir.1993); see, e.g., *Edwards v. First Nat. Bank*, 872 F.2d 347, 352 (10th Cir.1989) (finding that “the conspiracy claim falls when the substantive claim based on 1962(c) is deficient” because the alleged racketeering acts do not compose a “pattern”); cf. *Berg*, 247 F.3d at 538 (holding a defendant may be held liable for conspiring to violate § 1962(c), even if he did not operate or manage a RICO enterprise, as long as “he knowingly agree[d] to facilitate a scheme which includes the operation or management of a RICO enterprise”).⁷²

70 Here, § 1962(c) is the only substantive provision invoked by plaintiffs' complaints.

71 In *Salinas*, the Supreme Court explained § 1962(d)'s relationship to general conspiracy doctrine:

The relevant statutory phrase in § 1962(d) is “to conspire. We presume Congress intended to use the term in its conventional sense, and certain well established principles follow.... When Congress passed RICO in 1970, the American Law Institute's Model Penal Code permitted a person to be convicted of conspiracy so long as he “agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime. As the drafters emphasized, “so long as the purpose of the agreement is to facilitate commission of a crime, the actor need not agree ‘to commit the crime. ... A conspirator must intend to further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor.... It is elementary that a conspiracy may exist and be punished whether or not the substantive crime ensues, for the conspiracy is a distinct evil, dangerous to the public, and so punishable in itself.

522 U.S. at 63 65, 118 S.Ct. 469 (internal citations omitted).

72 *Salinas* appears to hold that a violation of § 1962(d) does not require a consummated violation of a substantive RICO provision; it is sufficient that the

conspiracy have as its object acts which, if completed, would constitute a substantive violation. Whether a plaintiff who had not been injured by a substantive violation would have standing to bring a civil action for violation of § 1962(d), however, is a different question. See 18 U.S.C. § 1964(c) (creating a civil cause of action for “any person injured in his business or property by reason of a violation of section 1962 and providing for triple damages); *Beck v. Prupis*, 529 U.S. 494, 501 n. 6, 120 S.Ct. 1608, 146 L.Ed.2d 561 (2000) (distinguishing “the question of what constitutes a violation of § 1962(d) from “the meaning of a civil cause of action for private injury by reason of such a violation). In *Beck*, the Supreme Court explained that “a civil conspiracy plaintiff cannot bring suit under RICO based on injury caused by any act in furtherance of a conspiracy that might have caused the plaintiff injury. Rather ... a RICO conspiracy plaintiff must] allege injury from ... an act that is independently wrongful under RICO.

Id. at 505 06, 120 S.Ct. 1608 (abrogating *Shearin v. E.F. Hutton Group, Inc.*, 885 F.2d 1162, 1168 69 (3d Cir.1989)). Accordingly, the Court held that the petitioner, who had been terminated by his employer for blowing the whistle on RICO activities, did not have standing to allege a § 1962(d) violation, since his injury was not “caused by an overt act that is ... an act of racketeering or otherwise wrongful under RICO. *Id.* at 505, 120 S.Ct. 1608. At the very least, then, *Beck* stands for the proposition that a plaintiff bringing a § 1962(d) claim for conspiracy to violate § 1962(c) must allege injury from a racketeering act enumerated in § 1961(1). But *Beck* did not make clear whether that requisite racketeering act must be part of a consummated § 1962(c) violation. Indeed, the Court explicitly reserved the question “whether a plaintiff suing under § 1964(c) for a RICO conspiracy must allege an actionable violation under §§ 1962(a) (c), or whether it is sufficient for the plaintiff to allege an agreement to complete a substantive violation and the commission of at least one act of racketeering that caused him injury. *Id.* at 506 n. 10, 120 S.Ct. 1608.

2. Application to This Case

a. Section 1962(c) Claims

i. The Broker-Centered Enterprises

Plaintiffs contend they have pled facts plausibly suggesting that each defendant *374 broker and

its insurer-partners composed an association-in-fact enterprise. The District Court disagreed. Central to its conclusion was its finding that although plaintiffs had adequately alleged bilateral agreements (regarding the steering of business and the payment of contingent commissions) between each broker and its insurer-partners, plaintiffs had failed to plead facts plausibly suggesting collaboration among the insurers. The asserted hub-and-spoke structures therefore lacked a “unifying ‘rim.’ ” 2007 WL 2892700, at *20. In the absence of a plausible “rim” or “wheel” connecting the alleged insurer “spokes,” the District Court determined that while plaintiffs may have alleged parallel, bilateral structures connecting a broker to *each* of its insurer-partners, they had failed to plead “broker-centered enterprises” encompassing each broker “hub” and *all* of its strategic partners.

[32] With respect to all but the Marsh-centered enterprise alleged in the Commercial complaint, we agree with the District Court that plaintiffs’ allegations of broker-centered enterprises are fatally defective. In our analysis of the antitrust claims, we determined that, with the exception of the alleged Marsh-centered commercial conspiracy, the facts alleged in the complaints do not plausibly imply a horizontal agreement among the insurer-partners. In seeking to establish a “rim” enclosing the insurer-partners in the alleged RICO enterprises, plaintiffs rely on the same factual allegations we found deficient in the antitrust context: that each insurer entered into a similar contingent-commission agreement in order to become a “strategic partner”; that each insurer knew the identity of the broker’s other insurer-partners and the details of their contingent-commission agreements; that each insurer entered into an agreement with the broker not to disclose the details of its contingent-commission agreements; that the brokers utilized certain devices, such as affording “first” and “last looks,” to steer business to the designated insurer; and that, in the Employee Benefits Case, insurers adopted similar reporting strategies with regard to Form 5500. As noted, these allegations do not plausibly imply concerted action—as opposed to merely parallel conduct—by the insurers, and therefore cannot provide a “rim” enclosing the “spokes” of these alleged “hub-and-spoke” enterprises.

Even under the relatively undemanding standard of *Boyle*, these allegations do not adequately plead an association-in-fact enterprise. They fail the basic requirement that

the components function as a unit, that they be “put together to form a whole.” *Boyle*, 129 S.Ct. at 2244 (internal quotation marks omitted). Because plaintiffs’ factual allegations do not plausibly imply anything more than parallel conduct by the insurers, they cannot support the inference that the insurers “associated together for a common purpose of engaging in a course of conduct.” *Id.* (quoting *Turkette*, 452 U.S. at 583, 101 S.Ct. 2524); see *id.* at 2245 n. 4 (stating that “several individuals” who “engaged in a pattern of crimes listed as RICO predicates” “independently and without coordination” “would not establish the existence of an enterprise”); *Elsevier*, 692 F.Supp.2d at 307 (stating that, as with a § 1 Sherman Act claim, a RICO claim pleading “nothing more than parallel conduct by separate actors” is insufficient: “there has to be something that ties together the various defendants allegedly comprising the association in fact into a single entity that was formed for the purpose of working together acting in concert by means of” racketeering acts); Gregory P. Joseph, *Civil RICO: A Definitive Guide* 106 (3d ed. 2010) (stating that a “rimless hub-and-spoke configuration would not satisfy the *375 ‘relationships’ prong of *Boyle’s* structure requirement”); see also *Rao*, 589 F.3d at 400 (finding the plaintiff had failed to plead an association-in-fact enterprise because the “allegations do not indicate how the different actors are associated and do not suggest a group of persons acting together for a common purpose or course of conduct”). Were the rule otherwise, competitors who independently engaged in similar types of transactions with the same firm could be considered associates in a common enterprise. Such a result would contravene *Boyle’s* definition of “enterprise.”⁷³

⁷³ We do not address the other grounds relied on by the District Court to support its conclusion that these “broker centered enterprises” were inadequately pled.

As the District Court acknowledged, although the complaints do not adequately plead these asserted broker-centered enterprises, it is possible that plaintiffs’ factual allegations would provide a plausible basis for the assertion of a number of bilateral enterprises, each encompassing a broker and one of its insurer-partners, or even the assertion that individual brokers or insurers each constituted an enterprise. But the District Court determined that “Plaintiffs’ three previous rounds of pleadings unambiguously indicate that Plaintiffs have no interest in asserting” such smaller-scale enterprises.

2007 WL 2892700, at *34 n. 32. We agree. While plaintiffs strenuously insist they have adequately pled the existence of “broker-centered enterprises,” they have conspicuously refrained, throughout the district-court proceedings and on appeal, from asserting alternative bilateral or single-entity enterprises. Accordingly, the District Court properly dismissed the claims based on these broker-centered enterprises with prejudice.

[33] As with the antitrust claims, we reach a different conclusion with respect to the claims alleging bid rigging the bid-rigging allegations in the Commercial complaint suffice to plead a “Marsh-centered enterprise.”⁷⁴ As *Boyle* clarified, a RICO “enterprise” must have a structure, but it need not have any particular structural features beyond “a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise’s purpose.” *Boyle*, 129 S.Ct. at 2244. We think the allegations of bid rigging provide the “rim” to the Marsh-centered enterprise’s hub-and-spoke configuration, satisfying *Boyle*’s requirements. The Commercial complaint alleges that Marsh prepared “broking plans” governing the placement of insurance contracts that came up for renewal. According to plaintiffs, “[t]he broking plans assigned the business to a specific insurer at a target price and outlined the coverage. The broking plans also included instructions as to which preferred Insurers would be asked to provide alternative [i.e., intentionally uncompetitive, or sham] quotes. If the incumbent Insurer hit the ‘target,’ it would get the business and then [Marsh employees] would solicit ‘alternative’ ... quotes from other members of the conspiracy.” Comm. SAC ¶ 117. The complaint also alleges the reasons why the insurers agreed to provide sham bids. For example, it relates a statement by a former employee of a defendant insurer that his employer had agreed to “provide[] losing *376 quotes” to Marsh in exchange for, among other things, Marsh’s “getting ‘quotes from other [insurance] carriers that would support the [employer, at least when it was the incumbent carrier] as being the best price.’” Comm. SAC ¶ 109. This statement plausibly evinces an expectation of reciprocity and cooperation among the insurers.

⁷⁴ Plaintiffs also allege a “Marsh centered enterprise in the Employee Benefits complaint, but they do not allege that the associates of this “enterprise engaged in bid rigging. For the reasons given above, we

agree with the District Court that plaintiffs have not adequately pled the existence of such an enterprise.

In at least one sense, plaintiffs’ allegations regarding the “Marsh-centered enterprise” exceed *Boyle*’s requirements. *Boyle* explicitly disavowed the need for any particular organizational structure. *Boyle*, 129 S.Ct. at 2245 46. It upheld the conviction of a “loosely and informally organized” group of bank robbers that neither “had a leader [n]or hierarchy,” nor “ever formulated any long-term master plan or agreement”; the group would meet before each robbery to “assign the roles that each participant would play (such as lookout and driver).” *Id.* at 2241. Here, by contrast, plaintiffs allege a hierarchical structure according to which Marsh, in accordance with its “broking plan,” decided from which insurer each sham bid would be requested. Plaintiffs adequately allege a “common interest” or “purpose,” *id.* at 2244, namely to increase profits by deceiving insurance purchasers about the circumstances surrounding their purchase. *See* Comm. ARCS 66. The alleged reciprocal bid rigging also adequately suggests “relationships among” the insurers “associated with the enterprise[s]”; if proved, it would plausibly demonstrate the insurers “joined together” in pursuit of the aforementioned common purpose. *Boyle*, 129 S.Ct. at 2244 (internal quotation marks omitted).⁷⁵ Finally, the complaint alleges that the bid rigging occurred over a period of several years, plausibly alleging “that the enterprise had ‘affairs’ of sufficient duration to permit an associate to ‘participate’ in those affairs through ‘a pattern of racketeering activity.’” *Id.* (quoting § 1962(c)). Accordingly, plaintiffs have adequately pled the enterprise element of the RICO claims based on the alleged Marsh-centered commercial enterprise.⁷⁶

⁷⁵ Defendants do not dispute that the complaint sufficiently alleges the requisite relationships between each insurer and Marsh.

⁷⁶ The number of defendants alleged to have engaged in bid rigging appears to be slightly smaller than the number of defendants alleged to be associates of the Marsh centered enterprise. *See supra* note 44. *Compare* Comm. SAC ¶ 502 (naming alleged members of an association in fact Marsh centered commercial enterprise), *with* Plaintiffs’ Comm. Br. 78 n. 17 (claiming that the defendant insurers that engaged in bid rigging are “AIG, ACE, Axis, Chubb, XL, Munich/AmRe, Liberty Mutual, St. Paul Travelers, Fireman’s Fund and Zurich), *and* Comm. RPS ¶¶ 27 56 (detailing bid rigging allegations).

While, as noted, plaintiffs have declined to plead alternative enterprises consisting of only individual defendants or bilateral relationships, they urge us to permit them “to proceed with their RICO claims as to Marsh and the insurers explicitly alleged to have been involved in bid rigging. Plaintiffs’ Comm. Br. 78 n. 17. Such a “downscaled Marsh centered enterprise has been adequately pled.

It may also be worth reiterating that membership in an enterprise is not the touchstone of § 1962(c) liability. Rather, it is the operation of that enterprise’s affairs through a pattern of racketeering that constitutes a violation. Accordingly, although the Commercial complaint here appears to allege that each defendant was a member of the enterprise it “conducted, as a general matter defendants who are outside an enterprise may in certain circumstances be held liable under § 1962(c), as the Supreme Court has acknowledged. See *Reves*, 507 U.S. at 184 85, 113 S.Ct. 1163.

The District Court, proceeding without the benefit of *Boyle*, found that the bid-rigging allegations were not sufficient to plead a Marsh-centered enterprise. The court believed that the defendant insurers’ participation in each bid-rigging transaction was “ad hoc.” See *377 2007 WL 2892700, at *22 (stating that “in the picture painted by Plaintiffs[,] a refusal by Insurer Defendant ‘X’ to provide ‘B’ quotes to the requesting Broker Defendant was of little substantive consequence to consummation of [each] transaction because alternative ‘B’ quotes were readily available to the Broker Defendant from a range of other Insurer Defendants”). Given the alleged existence of Marsh’s “broking plan,” which designated, for each renewal contract, the insurer from which a sham bid would be solicited, we cannot say that insurer participation in bid rigging was completely “ad hoc.”⁷⁷ In any case, *Boyle* makes clear that there is no need for a systematic plan ordaining in advance who is to provide a sham bid for a particular transaction; “decisions may be made on an ad hoc basis and by any number of methods.” *Boyle*, 129 S.Ct. at 2245. Nor do “[m]embers of the group need [to] have fixed roles; different members may perform different roles at different times.” *Id.*; cf. *id.* at 2241 (upholding RICO conviction predicated on an enterprise in which the participants never “formulated any long-term master plan or agreement” but instead assigned roles to each associate on a robbery-by-robbery basis). Furthermore, we see no indication that a RICO enterprise

requires participants to have non-interchangeable, non-substitutable functions.

⁷⁷ The District Court suggested that defendant insurers may have sometimes refused Marsh’s request for a false bid. But even if there were occasional refusals, we do not believe they would prove fatal to plaintiffs’ enterprise allegations. Cf. *Boyle*, 129 S.Ct. at 2245 (“[N]othing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence.).

The District Court also appeared to believe that the bid-rigging allegations did not adequately plead interrelationships among the insurers, as opposed to simply bilateral relationships between Marsh and each insurer. As the District Court read the complaint, “an Insurer Defendant ‘X’ cared little which other Insurer Defendant would be ‘accommodated’ by its ‘B’ quotes and whether these ‘B’ quotes would actually be used at all by the requesting Broker Defendant; the sole point of ‘X’s’ interest was to ensure that ‘X’ would be rewarded” by the Broker, in some form, in exchange for its willingness to generate sham bids. 2007 WL 2892700, at *21. In other words, the insurers provided sham bids to the broker, at the request of the broker, in exchange for benefits provided by the broker. We agree that the complaint does not allege that the bid rigging took the form of quid pro quo transactions between insurers; Insurer “X” did not promise to provide a sham bid facilitating the renewal of Insurer “Y’s” account in exchange for Insurer “Y’s” providing a sham bid facilitating the renewal of Insurer “X’s” account. But, as noted, the complaint does allege that one reason the insurers were willing to furnish sham bids was so that they would be the beneficiaries of sham bids in the future. To be sure, an insurer might not need a sham bid to win the renewal of any particular account. It stands to reason, however, that sometimes a sham bid would be necessary for example, when Marsh’s client insisted on seeing multiple bids. In our view, the alleged agreement by insurers to provide sham bids plausibly suggests an interrelationship among the insurers mediated through Marsh in pursuit of achieving greater business and profits by means of deceiving insurance purchasers. Through this interrelationship, the insurers were allegedly able to advance this common interest to a greater extent than would have been possible on the strength of the bilateral relationships between Marsh and each broker alone. Under *Boyle*, this (plus

the *378 requisite longevity) is enough to plead an enterprise.

The District Court believed plaintiffs had also failed to plead the “conduct” element of their claims regarding the Marsh-centered enterprise, that is, failed to plead that defendants “conduct[ed], or participate[d], directly or indirectly, in the conduct of such enterprise's affairs.” 18 U.S.C. § 1962(c). To some extent, the District Court's conclusion appears to derive from its determination regarding the “enterprise” element of these claims.⁷⁸ At least one of its findings, however, appears particular to the “conduct” element. In an implicit reference to the Supreme Court's *Reves* decision, the District Court stated that it was “not convinced” that “Defendants operated” the alleged Marsh-centered enterprise's affairs “rather than Defendants' own affairs.” 2007 WL 2892700, at *31. *Reves* explained that liability under § 1962(c) “depends on showing that the defendants conducted or participated in the conduct of the ‘enterprise's affairs,’ not just their own affairs.” 507 U.S. at 185, 113 S.Ct. 1163. In *Reves*, the Court found that an outside accounting firm hired to audit an enterprise's books did not participate in the conduct of the enterprise's affairs simply by doing its job (even if its job performance was deficient). *Id.* at 185 86, 113 S.Ct. 1163; see *United States v. Oretto*, 37 F.3d 739, 750 (1st Cir.1994) (stating that “the reason the accountants were not liable in *Reves* is that, while they were undeniably involved in the enterprise's decisions, they neither made those decisions nor carried them out”).

⁷⁸ The overlap between the District Court's analyses of these two elements is understandable. A defendant cannot participate in conducting the affairs of a non-existent enterprise.

Here, however, the defendants are alleged to be members of the enterprise. It will often be the case that the interests of the enterprise are congruent with those of its members; such congruence presumably provides the incentive for members to participate in the enterprise. We think, therefore, that “if defendants band together to commit [violations] they cannot accomplish alone ... then they cumulatively are conducting the association-in-fact enterprise's affairs, and not [simply] their own affairs.” Joseph, *supra*, at 332; see *Brandao*, 539 F.3d at 54. Here, defendants' alleged collaboration in the Marsh-centered enterprise, most notably the bid rigging, allowed them to deceive insurance purchasers in a way not likely without such collusion.

[34] Moreover, we believe that, based on the complaint's allegations, plaintiffs have adequately pled that defendants engaged in activities constituting participation in the conduct of the enterprise. The allegations that defendant broker Marsh directed the placement of insurance contracts and solicited rigged bids from insurers plausibly imply that Marsh “participated in the operation or management of the enterprise itself.” *Reves*, 507 U.S. at 183, 113 S.Ct. 1163. And by allegedly supplying the sham bids, Marsh's insurer-partners are also adequately alleged to have “operated” the enterprise within the meaning of *Reves*. Cf. *id.* at 184, 113 S.Ct. 1163 (stating that “[a]n enterprise is ‘operated’ not just by upper management but also by lower rung participants in the enterprise who are under the direction of upper management”); e.g., *MCM Partners, Inc. v. Andrews Bartlett & Assocs.*, 62 F.3d 967, 978 79 (7th Cir.1995) (finding that two businesses participated in the conduct of an association-in-fact enterprise “by knowingly implementing decisions” by the enterprise's managers to commit crimes). We thus find plaintiffs have sufficiently *379 pled that defendants in the Marsh-centered enterprise satisfied the “conduct” requirement set forth in *Reves*.⁷⁹

⁷⁹ Whether plaintiffs have adequately alleged that defendants participated in the conduct of the Marsh centered enterprise's affairs “though a pattern of racketeering activity is, of course, another matter. This question necessarily turns in part on whether plaintiffs have sufficiently pled a “pattern of racketeering activity. See *infra* note 80.

In summary, we find that plaintiffs have adequately pled both the “enterprise” and “conduct” elements of the § 1962(c) claims based on the alleged Marsh-centered commercial enterprise. Accordingly, we will vacate the District Court's judgments insofar as they dismissed those claims, and we will remand to allow the District Court an opportunity to evaluate the remaining elements of those claims.⁸⁰

⁸⁰ In their motion to dismiss, defendants also contended that plaintiffs had failed to plead adequately a pattern of predicate offenses. In a footnote, the District Court suggested this challenge might have merit but did not conclusively adjudicate it, instead granting the motion on the ground that “Plaintiffs' pleading of the ‘enterprise and ‘conduct elements warrant dismissal

without granting Plaintiffs leave to amend. 2007 WL 2892700, at *33 n. 29.

ii. The CIAB Enterprise

In the Commercial Case, plaintiffs also bring § 1962(c) claims naming the Council of Insurance Agents and Brokers (CIAB), a trade organization, as a RICO enterprise. According to the complaint, the CIAB “represents the largest, most profitable of all commercial insurance agencies and brokerage firms. The Council’s primary audience is CEOs and their management teams. The Council partners with its members and provides not only vital intelligence on current market conditions and trends, but also solutions to the next challenge before the need arises.” Comm. SAC ¶ 513 (internal quotation marks omitted). Plaintiffs aver that defendant insurers’ and brokers’ association with the CIAB violated the RICO statute insofar as defendants “used vital intelligence gained through communications and meetings facilitated by CIAB and otherwise, including information about decreased profits and demand to devise [their customer allocation] scheme[s] ... to replace competition. The [defendants] operating through the CIAB Enterprise reached consensus on how they would change the market and regarding non-disclosure” of the details of their allegedly unlawful contingent-commissions-for-guaranteed-premium-volume schemes. *Id.* ¶ 523.

The District Court acknowledged the complaint had adequately pled that the CIAB, a legal entity, was an enterprise, but it concluded the complaint failed to allege adequately that defendants had participated in the conduct of the CIAB “through” the acts of fraud pled as the requisite pattern of racketeering activity.⁸ In the District Court’s view, the complaint’s allegations “merely indicate that CIAB provided an internal and external communication tool for the members of the insurance industry. No *fact* stated in Plaintiffs’ submissions indicates that Defendants’ alleged predicate acts of mail and wire fraud (aimed at Defendants’ clients) were related in any way to the activities of CIAB, or that Defendants committed the *380 alleged predicate offenses through the means of CIAB, or that CIAB was somehow indispensable to Defendants in their alleged goal to commit the underlying predicate offenses.” 2007 WL 1062980, at *17. Although the court believed that plaintiffs had adequately alleged that the CIAB afforded defendants an opportunity to meet and communicate

about their challenged schemes, it found that simply making use of the forum provided by the Council did not plausibly imply the requisite nexus: “[W]ere Plaintiffs to allege that Defendants habitually met with each other ... in a chain of coffee houses or through an Internet portal[,] such allegations would not render the corporation owning such chain of coffee houses or the online portal a RICO enterprise for the purposes of the inquiry at bar. Neither the CIAB-based [allegations], nor the coffee house or Internet portal-based alternative provides this Court with a fact drawing ‘a nexus between [Defendants’ alleged offenses] and the conduct in the affairs’ of [the alleged enterprise].” *Id.* (quoting *United States v. Parise*, 159 F.3d 790, 796 (3d Cir.1998)) (first alteration in District Court opinion).

81 Plaintiffs conclusorily allege that “Defendants have conducted or participated in the conduct of the affairs of the CIAB Enterprise through a pattern of racketeering activity, Comm. SAC ¶ 527, but as *Twombly* observed, “a plaintiff’s obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955 (internal quotation marks omitted).

As the District Court observed, plaintiffs’ nexus theory appears to rest primarily on the alleged fact that the CIAB provided an “opportunity” or “forum” for defendants to discuss and advance their schemes.⁸² We agree with the District Court that the allegation that defendants took advantage of an opportunity to meet provided by a legitimate enterprise in the normal course of its business does not mean or plausibly imply that defendants were participating in the conduct of the enterprise. By extension, the allegation that defendants utilized such an opportunity to plot or discuss or otherwise facilitate a pattern of racketeering activity does not, without more, plausibly imply that defendants conducted the enterprise’s affairs through a pattern of racketeering activity. If it did, any coffee house or hotel with conference facilities could, as the District Court rightly recognized, be made into a RICO enterprise merely by dint of the fact that racketeers used the facility as a meeting place. In our view, such an expansive interpretation of § 1962(c) liability would not comport with the text or purpose of the RICO statute, nor with the cases interpreting it. As we have observed in interpreting the Supreme Court’s decision in *Reves*, “[s]imply because one provides goods or services

that ultimately benefit the enterprise does not mean that one becomes liable under RICO as a result.” *Univ. of Md.*, 996 F.2d at 1539. Similarly, we do not think a RICO violation occurs simply because an enterprise provides *381 goods or services that ultimately benefit a defendant's racketeering efforts; in order to constitute a § 1962(c) violation, it is necessary that the defendant, in utilizing these goods or services, “participate ... in the conduct of [the] enterprise's affairs.” § 1962(c). Availing oneself of a forum provided by an enterprise does not, without more, plausibly imply that one has participated in the conduct of that enterprise's affairs.

82 *See, e.g.*, Comm. SAC ¶ 513 (“CIAB provides Defendants with numerous opportunities to communicate, meet, use vital intelligence on market conditions that is shared with its partner members, and reach agreement on how they will address challenges in the marketplace); *id.* ¶ 518 (“CIAB provides the Broker Defendants a forum to discuss and reach agreement with each other and with the Insurer Defendants regarding, among other things, compensation arrangements and other aspects of their relationships, what each wants and needs from the relationship, the market and market conditions, consolidation and disclosure.); *id.* ¶ 519 (“CIAB hosts ‘Executive Forums’ ... which] allow members the opportunity to ‘discuss common problems and solutions.); *id.* ¶ 521 (“CIAB has also provided Defendants the opportunity to discuss and reach agreement on joint action in response to the regulatory investigations and regarding disclosure issues.); *id.* ¶ 522 (“CIAB provides Defendants with numerous opportunities to communicate, meet, use vital intelligence on market conditions that is shared with its partner members, and reach agreement on how they will address challenges in the marketplace....).

In an apparent attempt to supply this “something more,” plaintiffs allege that “[t]he purpose of the CIAB Enterprise is to further the interests of larger brokers generally and to further the Defendants' scheme specifically.” Comm. SAC ¶ 524. But to claim that the purpose of the CIAB was to further the defendants' scheme is simply to assert what must be shown through well-pled factual allegations. *See Twombly*, 550 U.S. at 555, 127 S.Ct. 1955; *cf. supra* note 81. And the alleged fact that the CIAB worked to further the interests of larger brokers generally does not plausibly imply the necessary nexus between defendants' racketeering activity and the conduct of the CIAB's

affairs. The Chamber of Commerce exists to promote the interests of its member businesses, but this does not mean that if some of its members plot their racketeering activities at a Chamber meeting, they have participated in the conduct of the Chamber's affairs. In short, plaintiffs cannot distinguish trade unions like the CIAB from the District Court's hypothetical coffee house simply by invoking trade unions' “general” mission to advance their members' interests.

Our analysis thus confirms the District Court's conclusion that the allegations it recited were inadequate to plead the nexus element of plaintiffs' CIAB-based RICO claims. We believe, however, that the complaint might reasonably be construed as asserting additional facts that present a closer question. Specifically, the complaint appears to allege that defendant brokers did not merely make use of the CIAB as a forum, but actually utilized its institutional machinery to formulate strategy and issue public statements in aid of their fraudulent acts. The complaint avers that the defendant brokers effectively operated and controlled the CIAB; the brokers sat on its Board of Directors. CIAB allegedly formulated a “position statement that was intended to stave off any meaningful regulatory disclosure requirements and reassure insurance purchasers that their brokers were acting in their best interests.” Comm. SAC ¶ 445. “The CIAB position statement was made available for review and editing by its members before being finally approved by CIAB's Executive Committee, which included executives from Marsh, Aon, and HRH.... Further, one or more representatives of all of the Broker Defendants, or their predecessors, were on CIAB's Board of Directors at the time the CIAB position statement was issued.” *Id.* ¶ 446. The Brokers then allegedly incorporated language from this position statement into their allegedly fraudulent disclosures. *See id.* ¶ 458 (“The [Broker] disclosures were modeled after the CIAB position statement in order to create the impression of transparency, by stating that the brokers ‘may’ have contingent commission agreements that might result in some additional revenue, while failing to disclose any information regarding the strategic partnerships that the Broker Defendants had entered into with the Insurer Defendants or the significance of these partnerships and the contingent payments arrangements [for] the insurance placement process and the premiums charged.”)

Assuming the truth of these allegations, one might arguably make a plausible inference that defendant

brokers participated *382 in the conduct of the CIAB enterprise, and furthermore, that one way they operated the enterprise was to have it craft the allegedly misleading disclosure statements incorporated by defendants into their allegedly fraudulent communications with clients (and perhaps others).⁸³ This inference, however, would raise additional questions that would have to be resolved before we could conclude that plaintiffs have adequately pled their CIAB-based RICO claims. First, under § 1962(c), which is the only substantive RICO provision invoked by plaintiffs, the defendants must be distinct from the enterprise they conduct. See *Gasoline Sales, Inc. v. Aero Oil Co.*, 39 F.3d 70, 72 (3d Cir.1994); see also *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161, 121 S.Ct. 2087, 150 L.Ed.2d 198 (2001) (“We do not quarrel with the basic principle that to establish liability under § 1962(c) one must allege and prove the existence of two distinct entities: (1) a ‘person’; and (2) an ‘enterprise’ that is not simply the same ‘person’ referred to by a different name. The statute’s language, read as ordinary English, suggests that principle.”). Here, plaintiffs appear to allege that the CIAB crafted fraudulent statements released directly to the public and incorporated into defendants’ own disclosures. Defendants are alleged to have sat on the board of directors of CIAB. Although the Supreme Court has held that a corporate owner may successfully be pled as a defendant distinct from the corporate enterprise it owns, *Cedric Kushner*, 533 U.S. at 163 66, 121 S.Ct. 2087, the Court’s decision examined a complaint clearly alleging the defendant owner’s role in the acts supposedly constituting both a “pattern of racketeering activity” and participation in the conduct of the enterprise. See *Cedric Kushner*, No. 98 Civ. 6859, 1999 WL 771366, at *1 2 (S.D.N.Y. Sept. 28, 1999), *aff’d*, 219 F.3d 115 (2d Cir.2000), *rev’d*, 533 U.S. 158, 121 S.Ct. 2087, 150 L.Ed.2d 198. The complaint here, by contrast, appears to say little about defendant brokers’ involvement in CIAB’s crafting of the allegedly fraudulent statements other than that defendants sat on CIAB’s board at the time. There may therefore be a question about whether plaintiffs have adequately pled not only a connection between the CIAB and the alleged pattern of racketeering activity, but also the requisite connection between that pattern and *defendants’ conduct* of the CIAB.⁸⁴

⁸³ This possible inference pertains only to the defendant brokers. The complaint does not contain well pled factual allegations plausibly implicating the

defendant insurers in the creation of the disclosure statements.

⁸⁴ As noted, the requisite nexus element would not be satisfied by the mere allegation that the defendants’ alleged racketeering activity benefitted from goods or services provided by the CIAB.

Second, there is a question about whether plaintiffs have adequately pled that defendant brokers’ allegedly misleading disclosure statements constitute a “pattern of racketeering activity.” In other words, even assuming plaintiffs have adequately alleged a connection between defendants’ conduct of the CIAB and the statements alleged to be fraudulent, it remains to be determined whether the fraudulent nature of these statements has itself been adequately alleged. Cf. *Am. Dental Ass’n v. Cigna Corp.*, 605 F.3d 1283, 1290 93 (11th Cir.2010) (holding that the district court properly dismissed plaintiffs’ § 1962(c) claims because plaintiffs had not sufficiently pled the acts of mail and wire fraud alleged to form a pattern of racketeering activity). Although the District Court expressed significant skepticism about plaintiffs’ allegations of fraud, its dismissal of *383 the CIAB-based RICO claims does not appear to be based on this issue.⁸⁵

⁸⁵ See *supra* note 80 and accompanying text.

In light of these significant questions, as well as our discussion of the nexus standard, see *supra* Section II.B.1.a.iii., we will vacate the dismissal of the CIAB-based claims. None of these questions was squarely addressed by the parties on appeal, and we believe the District Court is best positioned to decide them in the first instance. On remand, the District Court may proceed in any way consistent with our opinion.⁸⁶

⁸⁶ The court may choose in its discretion, for instance, to address the adequacy of plaintiffs’ fraud allegations before returning to the question of the nexus between that alleged fraud and defendants’ alleged conduct of the CIAB.

b. Section 1962(d) Claims

The District Court dismissed the § 1962(d) RICO conspiracy claims on the ground that plaintiffs had failed to plead any viable § 1962(c) claims. Because we will vacate the dismissal of the § 1962(c) claims relating to

the alleged Marsh-centered commercial enterprise and the CIAB enterprise, we will also vacate the § 1962(d) claims based on those two enterprises. We will affirm the District Court's dismissal of the remaining § 1962(d) claims because with respect to these claims, plaintiffs have failed to allege adequately “an endeavor which, if completed, would satisfy all of the elements of a substantive [RICO] offense.” *Salinas*, 522 U.S. at 65, 118 S.Ct. 469.

C. State–Law Claims

A district court “may decline to exercise supplemental jurisdiction” over state-law claims if it “has dismissed all claims over which it has original jurisdiction.” 28 U.S.C. § 1367(c)(3). Having dismissed all federal-law claims, the District Court here exercised this statutory grant of discretion and dismissed plaintiffs' state-law claims. Because we will vacate in part the judgment dismissing the federal claims, we will also vacate the dismissal of the state-law claims. See *Shaev v. Saper*, 320 F.3d 373, 384 (3d Cir.2003).


III. Conclusion

For the forgoing reasons, we will vacate the dismissal of the Sherman Act claims with respect to defendants alleged to have engaged in bid rigging in the Marsh-centered commercial conspiracy; the dismissal of the RICO claims based on the alleged Marsh-centered commercial enterprise, with respect to those same defendants; the dismissal of the RICO claims based on the alleged CIAB enterprise, with respect to the defendant brokers; and the dismissal of the state-law claims. We will affirm the District Court's judgment in all other respects and remand for further proceedings consistent with this opinion.

All Citations

618 F.3d 300, 2010-2 Trade Cases P 77,135, RICO Bus.Disp.Guide 11,896

EXHIBIT 301

 KeyCite to Yeow Fag Negative Treatment
 Dismissed by *Northshore Sheet Metal, Inc. v. Sheet Metal Workers
 International Association*, Local 66, W.D.Wash., September 24, 2018

798 F.3d 1186

United States Court of Appeals,
 Ninth Circuit.

In re MUSICAL INSTRUMENTS AND
 EQUIPMENT ANTITRUST LITIGATION.

Joshua Ramsey; David Giambusso; [Dwayne
 Wiggins](#); Jason Paradise; Kate Macwilliamson;
 Niranjana Parikh; Paula Jennings; Ryan J. Bigg;
[Mark O'leary](#); Cynthia Sepulveda; Russell D. Melton;
 Jerry Jost; Kevin Gagnepain; Josh Pearson; John
 Pearson; Mary Pearson; Colby Giles; David Keel;
 William S. Poff; [Allen Hale](#); Daniel T. Smith; Gerald
 Logsdon; Augustin Cervantes; Benn Feltheimer;
[Bryan Roach](#); Brandon Armstrong; [Richard
 Tabas](#); [Allen Hale](#); Kenneth Manyin; Russell D.
 Melton; Jon Bandish; [Mark O'leary](#); Alex Teller;
 Scott Cook; Joshua Seiler; Johan Edward Rigor;
 Walter Witherspoon; Robert Lesko; Suzanne
 Ondre; Lisa Pritchett, Plaintiffs–Appellants,
 v.

National Association Of Music Merchants,
 Inc.; Guitar Center, Inc.; Guitar Center Stores,
 Inc.; Fender Musical Instruments Corp.;
 Yamaha Corporation of America; Gibson Guitar
 Corporation; [Hoshino, U.S.A., Inc.](#); Kaman
 Music Corporation, Defendants–Appellees.

No. 12–56674.

Argued and Submitted Oct. 6, 2014.

Filed Aug. 25, 2015.

Synopsis

Background: Putative class of purchasers of guitars and guitar amplifiers sued the largest retail seller of musical instruments in the United States, guitar and amplifier manufacturers, and trade association, alleging “hub and spoke” antitrust conspiracy to implement and enforce minimum advertised price policies (MAP) policies that fixed minimum price at which any retailer could advertise manufacturers' guitars and guitar amplifiers, in violation of Sherman Act restraint of trade provision and antitrust

laws of Massachusetts and California. Defendants moved to dismiss. The United States District Court for the Southern District of California, [Larry A. Burns, J.](#), 2012 WL 3637291, granted motion. Plaintiffs appealed.

[Holding:] The Court of Appeals, [Bea](#), Circuit Judge, held that plaintiffs' allegations of parallel conduct, in conjunction with several “plus” factors, were insufficient to prove plausible basis from which to infer the existence of alleged horizontal agreements between manufacturers.

Affirmed.

[Pregerson](#), Circuit Judge, filed dissenting opinion.

West Headnotes (12)

[1] **Federal Courts**

 Pleading

Federal Courts

 Dismissal for failure to state a claim

Court of Appeals reviews de novo the district court's dismissal of a complaint for failure to state a claim, and when conducting that review, it accepts as true all nonconclusory factual allegations in the complaint. *Fed.Rules Civ.Proc.Rule 12(b)(6)*, 28 U.S.C.A.

1 Cases that cite this headnote

[2] **Antitrust and Trade Regulation**

 Illegal Restraints or Other Misconduct

Sherman Act prohibits agreements that unreasonably restrain trade by restricting production, raising prices, or otherwise manipulating markets to the detriment of consumers. Sherman Act, § 1, 15 U.S.C.A. § 1.

4 Cases that cite this headnote

[3] **Antitrust and Trade Regulation**

 Horizontal

Antitrust and Trade Regulation

🔑 **Vertical**

In analyzing the reasonableness of an agreement under Sherman Act restraint of trade provision, Supreme Court has distinguished between “vertical agreements” made up and down supply chain, such as between manufacturer and retailer, and “horizontal agreements” made among competitors. Sherman Act, § 1, 15 U.S.C.A. § 1.

7 Cases that cite this headnote

[4] **Antitrust and Trade Regulation**

🔑 **Per se**

Antitrust and Trade Regulation

🔑 **Horizontal**

Certain horizontal agreements among competitors always or almost always tend to restrict competition and decrease output, with classic examples including agreements among competitors to fix prices, divide markets, and refuse to deal; such inherently anticompetitive horizontal agreements violate the Sherman Act per se, and once the agreement's existence is established, no further inquiry into the practice's actual effect on the market or the parties' intentions is necessary to establish unreasonable restraint of trade. Sherman Act, § 1, 15 U.S.C.A. § 1.

6 Cases that cite this headnote

[5] **Antitrust and Trade Regulation**

🔑 **Rule of reason**

Antitrust and Trade Regulation

🔑 **Vertical**

Vertical agreements up and down supply chain are analyzed under the rule of reason, whereby courts examine the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed, to determine the effect on competition in the relevant product market; that analysis takes into account the fact that some vertical restraints may have procompetitive justifications that benefit consumers. Sherman Act, § 1, 15 U.S.C.A. § 1.

1 Cases that cite this headnote

[6] **Antitrust and Trade Regulation**

🔑 **Forms of Combinations**

Traditional “hub-and-spoke” conspiracy to restrain trade has three elements: (1) a hub, such as a dominant purchaser, (2) spokes, such as competing manufacturers or distributors that enter into vertical agreements with the hub, and (3) the rim of the wheel, which consists of horizontal agreements among the spokes. Sherman Act, § 1, 15 U.S.C.A. § 1.

8 Cases that cite this headnote

[7] **Antitrust and Trade Regulation**

🔑 **Conspiracy or combination**

While parallel conduct, such as competitors adopting similar policies around the same time in response to similar market conditions, may constitute circumstantial evidence of anticompetitive behavior, mere allegations of parallel conduct, even consciously parallel conduct, are insufficient to state a claim under Sherman Act restraint of trade provision; plaintiffs must plead something more, some further factual enhancement, a further circumstance pointing toward a meeting of the minds of the alleged conspirators. Sherman Act, § 1, 15 U.S.C.A. § 1.

16 Cases that cite this headnote

[8] **Antitrust and Trade Regulation**

🔑 **Conspiracy or combination**

When allegations of parallel conduct are set out to make claim under Sherman Act restraint of trade provision, plaintiffs must plead enough nonconclusory facts to place that parallel conduct in a context that raises a suggestion of a preceding agreement; allegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy are insufficient. Sherman Act, § 1, 15 U.S.C.A. § 1.

[15 Cases that cite this headnote](#)

[9] Antitrust and Trade Regulation

🔑 Cartels, Combinations, Contracts, and Conspiracies in General

Antitrust and Trade Regulation

🔑 Conspiracy or combination

Whereas parallel conduct is as consistent with independent action as with conspiracy, “plus factors” are economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action; if pleaded, they can place parallel conduct in a context that raises a suggestion of preceding agreement. Sherman Act, § 1, 15 U.S.C.A. § 1.

[19 Cases that cite this headnote](#)

[10] Antitrust and Trade Regulation

🔑 Manufacturers

Allegations of parallel conduct, in conjunction with several “plus” factors, were insufficient to prove plausible basis from which to infer the existence of alleged horizontal agreements between guitar and amplifier manufacturers to restraint trade; “plus factors” were that manufacturer defendants shared common motive to conspire, acted against their own individual self-interest, adopted substantially similar Minimum Advertised Price (MAP) policies, and participated in functions of music merchants' trade association, which was also the subject of Federal Tort Claims Act (FTCA) investigation, and that retail prices for guitars and guitar amplifiers climbed despite falling demand. Sherman Act, § 1, 15 U.S.C.A. § 1.

[9 Cases that cite this headnote](#)

[11] Antitrust and Trade Regulation

🔑 Cartels, Combinations, Contracts, and Conspiracies in General

Market interdependence does not entail collusion, as interdependent firms may engage

in consciously parallel conduct through observation of their competitors' decisions, even absent an agreement. Sherman Act, § 1, 15 U.S.C.A. § 1.

[10 Cases that cite this headnote](#)

[12] Antitrust and Trade Regulation

🔑 In general;unfairness

Antitrust and Trade Regulation

🔑 Source of prohibition or obligation; lawfulness

Unlike Sherman Act restraint of trade provision, violation of Federal Trade Commission (FTC) Act section prohibiting unfair methods of competition does not require allegation and proof of a contract, combination, or conspiracy; organization may violate FTC Act without violating Sherman Act. Sherman Act, § 1, 15 U.S.C.A. § 1; Federal Trade Commission Act, § 5, 15 U.S.C.A. § 45.

[Cases that cite this headnote](#)

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Appeal from the United States District Court for the Southern District of California, Larry A. Burns, District Judge, Presiding, D.C. No. 3:09 md 02121 LAB DHB.

Before: HARRY PREGERSON, RICHARD C. TALLMAN, and CARLOS T. BEA, Circuit Judges.

Opinion by Judge BEA; Dissent by Judge PREGERSON.

OPINION

BEA, Circuit Judge:

Where a large musical-instrument retailer pressures individual guitar manufacturers to set the lowest prices at which the manufacturers will permit any retailer to advertise the manufacturers' products and each manufacturer acquiesces can we infer the manufacturers conspired among themselves to fix prices?

Plaintiffs ask us to answer this question in the affirmative. They claim it is plausible to infer a price-fixing conspiracy based only on allegations that certain guitar manufacturers each adopted similar advertising policies (“parallel conduct”) under circumstances that suggest the manufacturers agreed among themselves to adopt those policies (“plus factors”). But plaintiffs' plus factors are no more consistent with an illegal agreement than with rational and competitive business strategies, independently adopted by firms acting within an interdependent market. Plaintiffs' allegations of “merely parallel conduct that could just as well be independent action” are insufficient to state a claim under § 1 of the Sherman Act, 15 U.S.C. § 1. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). And because plaintiffs' plus factors

add nothing, we affirm the judgment of the district court dismissing plaintiffs' § 1 claim.

I

Plaintiffs, a putative class, purchased guitars and guitar amplifiers from defendant Guitar Center, Inc. (“Guitar Center”), the largest retail seller of musical instruments in the United States. The guitars and amplifiers were manufactured by five major manufacturers, defendants Fender Music Instruments Corp., Gibson Guitar Corp., Yamaha Corp. of America, Hoshino U.S.A., Inc., and Kaman Music Corp. (“manufacturer defendants”). In their present complaint, plaintiffs allege that between 2004 and 2009, Guitar Center and the manufacturer defendants along with defendant trade association National Association of Music Merchants (NAMM) conspired to implement and enforce minimum-advertised-price policies (“MAP policies”) that fixed the minimum price at which any retailer could advertise the manufacturers' guitars and guitar amplifiers. According to plaintiffs, these MAP policies tended to raise retail prices and restrain competition. Plaintiffs allege that each manufacturer agreed with Guitar Center to adopt MAP policies and that the manufacturers agreed among themselves *1190 to adopt the MAP policies proposed by Guitar Center. Plaintiffs claim this collection of agreements violates § 1 of the Sherman Act and the antitrust laws of Massachusetts and California.

¹ Plaintiffs allege that Guitar Center exercises considerable market power in the musical instruments industry especially the market for guitars and guitar amplifiers controlling nearly one third of all retail sales in the United States; Guitar Center also serves as the largest retailer customer of many of its instrument manufacturers.

Prior Federal Trade Commission Investigation and Settlement

In 2007, before plaintiffs filed any of the cases that now constitute this consolidated litigation, the Federal Trade Commission (FTC) initiated a nonpublic investigation into price fixing in the music-products industry. The FTC alleged that

[b]etween 2005 and 2007, NAMM organized various meetings and programs at which competing retailers of musical instruments were permitted and encouraged to discuss strategies for implementing minimum advertised price policies, the restriction of retail price competition, and the need for higher retail prices.... At these NAMM-sponsored events, competitors discussed the adoption, implementation, and enforcement of minimum advertised price policies; the details and workings of such policies; appropriate and optimal retail prices and margins; and other competitively sensitive issues.

Complaint, *In re National Association of Music Merchants, Inc.*, No. C 4255, at ¶ 5. The FTC further alleged that the exchange of information among NAMM members (which include Guitar Center and the manufacturer defendants) “served no legitimate business purpose” and “had the purpose, tendency, and capacity to facilitate collusion and to restrain competition unreasonably.” *Id.* at ¶¶ 6-7. Neither Guitar Center nor the manufacturer defendants were parties to this FTC proceeding.

The FTC and NAMM resolved the dispute through a consent decree. In the consent decree, the FTC ordered NAMM to cease and desist from “urging, encouraging, advocating, suggesting, coordinating, participating in, or facilitating in any manner the exchange of information between or among Musical Product Manufacturers or Musical Product Dealers relating to ... Price Terms, margins, profits, or pricing policies, including but not limited to Minimum Advertised Price Policies.” Decision and Order, *In re National Association of Music Merchants, Inc.*, No. C 4255, at *4. NAMM must also file periodic compliance reports and make a statement before each NAMM trade show informing members of the organization's and members' obligations under the antitrust laws. *Id.* at *5-7. NAMM neither admitted nor

denied the FTC's allegations, and the FTC did not levy any monetary fine.

Proceedings Below

After the FTC issued its consent decree, numerous plaintiffs filed complaints alleging that defendants agreed to fix the retail prices of musical instruments in violation of § 1 of the Sherman Act and state antitrust laws. The Judicial Panel on Multidistrict Litigation centralized twenty-eight of these cases in the Southern District of California.

Defendants moved to dismiss plaintiffs' first consolidated class-action complaint under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#). Defendants argued that plaintiffs' allegations were insufficiently detailed to satisfy the requirements of specificity and plausibility that the Supreme Court had recently outlined in *Twombly*. The district court granted the motion to dismiss in part but permitted plaintiffs to amend their complaint. The district court found that plaintiffs failed to identify in their complaint “who is alleged to have conspired with whom, what exactly they agreed to, and how the alleged conspiracy was organized and carried out.” Nor did plaintiffs “plead enough of the [MAP policies'] terms to show how they restrained competition.” The district court gave plaintiffs a chance to remedy these problems by permitting some discovery. But *1191 because the district court agreed with defendants that “remarks at open panel discussions attended by many people at trade shows cannot reasonably constitute the terms of an illegal agreement in these circumstances,” the court “limited [discovery] to who attended or participated in meetings alleged in the amended consolidated complaint and what was said or agreed to there.”²

² Discovery consisted of document requests and interrogatories served on each defendant; plaintiffs also deposed NAMM's CEO and seven employees or former employees of the manufacturer defendants and Guitar Center.

Following this limited discovery, plaintiffs filed the operative complaint. Defendants again moved to dismiss the complaint for its failure to state a claim. The district court granted defendants' motion and dismissed plaintiffs' § 1 claim with prejudice for failure to satisfy the pleading standard set forth in *Twombly*. Plaintiffs timely appealed.

II

[1] We exercise appellate jurisdiction under 28 U.S.C. § 1291. We review de novo the district court's dismissal of a complaint for failure to state a claim. *See Ecological Rights Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 507 (9th Cir.2013). When conducting this review, we accept as true all nonconclusory factual allegations in the complaint. *Id.* (citing *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1029 30 (9th Cir.2009)).

III

A

[2] The antitrust laws of the United States aim to protect consumers by maintaining competitive markets. To that end, § 1 of the Sherman Act prohibits agreements that unreasonably restrain trade by restricting production, raising prices, or otherwise manipulating markets to the detriment of consumers. *See* 15 U.S.C. § 1; *State Oil Co. v. Khan*, 522 U.S. 3, 10, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493, 60 S.Ct. 982, 84 L.Ed. 1311 (1940).

[3] [4] [5] In analyzing the reasonableness of an agreement under § 1, the Supreme Court has distinguished between agreements made up and down a supply chain, such as between a manufacturer and a retailer (“vertical agreements”), and agreements made among competitors (“horizontal agreements”). The Supreme Court has recognized that certain horizontal agreements “always or almost always tend to restrict competition and decrease output.” *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19 20, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979). Classic examples include agreements among competitors to fix prices, divide markets, and refuse to deal. *See, e.g., United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 98, 47 S.Ct. 377, 71 L.Ed. 700 (1927) (horizontal price fixing); *United States v. Topco Assocs.*, 405 U.S. 596, 608, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972) (horizontal market division); *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 293 94, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985) (concerted refusal to deal). Such inherently anticompetitive horizontal agreements violate the Sherman Act per se. Once the agreement's existence

is established, no further inquiry into the practice's actual effect on the market or the parties' intentions is necessary to establish a § 1 violation. *See N. Pac. Ry. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 2 L.Ed.2d 545 (1958). Vertical agreements, on the other hand, are analyzed under the rule of reason, whereby courts examine “the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed,” to determine the effect on competition in the *1192 relevant product market. *Nat'l Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978). That analysis takes into account the fact that some vertical restraints may have procompetitive justifications that benefit consumers. *See Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 889 92, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007) (noting that vertical price restraints can have the procompetitive effect of increasing interbrand competition).

But the line between horizontal and vertical restraints can blur. One conspiracy can involve both direct competitors and actors up and down the supply chain, and hence consist of both horizontal and vertical agreements. Plaintiffs here allege one such hybrid form of conspiracy, sometimes called a “hub-and-spoke” conspiracy. Although other circuits have recognized the existence of “hub-and-spoke” conspiracies in the antitrust context, *see, e.g., Howard Hess Dental Labs. Inc. v. Dentsply Int'l, Inc.*, 602 F.3d 237, 255 (3d Cir.2010) (explaining the configuration of a hub-and-spoke conspiracy); *Toys 'R' Us, Inc. v. FTC*, 221 F.3d 928, 934 (7th Cir.2000) (describing a hub-and-spoke conspiracy without calling it such), we have not. We write to clarify the analysis of such conspiracies under § 1.

[6] A traditional hub-and-spoke conspiracy has three elements: (1) a hub, such as a dominant purchaser; (2) spokes, such as competing manufacturers or distributors that enter into vertical agreements with the hub; and (3) the rim of the wheel, which consists of horizontal agreements among the spokes. *See Howard Hess*, 602 F.3d at 255. According to plaintiffs, Guitar Center (the hub) pressured each of the manufacturer defendants (the spokes) to adopt MAP policies, and the manufacturer defendants, in turn, each agreed among themselves to adopt the policies (the rim). NAMM acted to facilitate these illegal agreements by encouraging adoption of MAP policies a role that may be illegal but lacks an obvious wheel analogue (might we suggest “lug nuts”?).

Of course, homespun metaphors for complex economic activities go only so far. [Section 1](#) prohibits agreements that unreasonably restrain trade, no matter the configuration they take or the labels we give them. A hub-and-spoke conspiracy is simply a collection of vertical and horizontal agreements. And once the conspiracy is broken into its constituent parts, the respective vertical and horizontal agreements can be analyzed either under the rule of reason or as violations per se.³ See *Toys ‘R’ Us*, 221 F.3d at 933, 940 (endorsing *1193 the FTC’s analysis of the vertical components of a hub-and-spoke conspiracy under the rule of reason while treating the horizontal agreements as violations per se).

³ Some courts have distinguished between “rimmed and “rimless hub and spoke conspiracies. See, e.g., *Dickson v. Microsoft Corp.*, 309 F.3d 193, 203 04 & n. 13 (4th Cir.2002). In *Dickson*, the Fourth Circuit characterized a rimless hub and spoke conspiracy as one in which “various defendants enter into separate agreements with a common defendant, but where the defendants have no connection with one another other than the common defendant’s involvement in each transaction. *Id.* at 203. The extension of the wheel metaphor here may mislead: a rimless hub and spoke conspiracy is not a hub and spoke conspiracy at all (for what is a wheel without a rim?); it is a collection of purely vertical agreements. But such a conspiracy may yet unreasonably restrain trade. See, e.g., *Leegin*, 551 U.S. at 898 99, 127 S.Ct. 2705 (recognizing that purely vertical restraints may unreasonably restrain trade in violation of § 1).

We note, however, one key difference between a rimless hub and spoke conspiracy (*i.e.*, a collection of purely vertical agreements) and a rimmed hub and spoke conspiracy (*i.e.*, a collection of vertical agreements joined by horizontal agreements): courts analyze vertical agreements under the rule of reason, see *id.*, whereas horizontal agreements are violations per se, see *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 223 24, 60 S.Ct. 811, 84 L.Ed. 1129 (1940). This distinction provides strong incentives for plaintiffs to plead a horizontal conspiracy (either alone or as part of a rimmed hub and spoke conspiracy). The prospect of establishing a violation per se is much more appealing to plaintiffs than the potential difficulty and costliness of proving a § 1 claim under the rule of reason.

Here, the key agreements are those among the defendant manufacturers. Plaintiffs made it clear both before the district court and on appeal that their theory of the case depends on establishing those horizontal agreements.⁴ The question before us is whether plaintiffs have pleaded sufficient facts to provide a plausible basis from which we can infer the alleged agreements’ existence. See *Twombly*, 550 U.S. at 556 57, 560, 127 S.Ct. 1955.

⁴ Plaintiffs stated at oral argument that they did not claim the vertical agreements between the manufacturers and Guitar Center to adopt MAP policies to be unreasonable vertical restraints under § 1, nor do they challenge the MAP policies themselves. Plaintiffs’ other allegations (*e.g.*, that Guitar Center and NAMM conspired to facilitate and keep in place the agreements among the manufacturers) are predicated on the existence of the horizontal agreements among the manufacturers.

B

Because plaintiffs lack direct evidence of horizontal agreements among the manufacturers,⁵ they plead that the defendant manufacturers’ parallel conduct in adopting MAP policies, in conjunction with several “plus factors,” plausibly suggests the existence of horizontal agreements. They argue that the plus factors “nudge[]” their allegations of horizontal agreements “across the line from conceivable to plausible.” *Id.* at 570, 127 S.Ct. 1955.

⁵ Even after the limited discovery permitted by the district court, plaintiffs still do not plead facts in answer to the district court’s questions: “who is alleged to have conspired with whom, what exactly they agreed to, and how the alleged conspiracy was organized and carried out.

[7] Under *Twombly*, parallel conduct, such as competitors adopting similar policies around the same time in response to similar market conditions, may constitute circumstantial evidence of anticompetitive behavior. 550 U.S. at 553 54, 127 S.Ct. 1955. But mere allegations of parallel conduct even consciously parallel conduct are insufficient to state a claim under § 1. Plaintiffs must plead “something more,” “some further factual enhancement,” a “further circumstance pointing toward a meeting of the minds” of the alleged conspirators. *Id.* at 557, 560, 127 S.Ct. 1955.

[8] In this way, *Twombly* takes into account the economic reality that mere parallel conduct is as consistent with agreement among competitors as it is with independent conduct in an interdependent market. See *id.* at 554, 127 S.Ct. 1955 (“The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.”). In an interdependent market, companies base their actions in part on the anticipated reactions of their competitors. And because of this mutual awareness, two firms may arrive at identical decisions independently, as they are cognizant of and reacting to similar market pressures. In other words, competitors’ behavior may be consciously parallel. Recognizing that parallel conduct may arise on account of independent business decisions rather than an illegal agreement, *Twombly* requires that when allegations of parallel conduct are set out to *1194 make a § 1 claim, plaintiffs must plead enough nonconclusory facts to place that parallel conduct “in a context that raises a suggestion of a preceding agreement.” *Id.* at 557, 127 S.Ct. 1955. “Allegations of facts that could just as easily suggest rational, legal business behavior by the defendants as they could suggest an illegal conspiracy” are insufficient to plead a § 1 violation. *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1049 (9th Cir.2008) (citing *Twombly*, 550 U.S. at 553 58 & n. 5, 127 S.Ct. 1955); see also *Ashcroft v. Iqbal*, 556 U.S. 662, 668, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (“Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief.” (quoting *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955) (internal quotation marks omitted)).⁶

⁶ The requirement that plaintiffs allege nonconclusory facts means that plaintiffs cannot plead merely parallel conduct and allege conspiracy. Conspiracy is a legal conclusion. See *Kendall*, 518 F.3d at 1047. Rather, plaintiffs must plead evidentiary facts: “who, did what, to whom (or with whom), where, and when. *Id.* at 1048.

[9] This court has distinguished permissible parallel conduct from impermissible conspiracy by looking for certain “plus factors.” See, e.g., *In re Citric Acid Litig.*, 191 F.3d 1090, 1102 (9th Cir.1999) (“Parallel pricing is a relevant factor to be considered along with the evidence

as a whole; if there are sufficient other ‘plus’ factors, an inference of conspiracy can be reasonable.”). Whereas parallel conduct is as consistent with independent action as with conspiracy, plus factors are economic actions and outcomes that are largely inconsistent with unilateral conduct but largely consistent with explicitly coordinated action. See *Twombly*, 550 U.S. at 557 n. 4, 127 S.Ct. 1955. If pleaded, they can place parallel conduct “in a context that raises a suggestion of preceding agreement.” *Id.* at 557, 127 S.Ct. 1955; cf. *In re Citric Acid Litig.*, 191 F.3d at 1102.⁷

⁷ In *In re Citric Acid Litigation*, we recognized that circumstantial evidence in the form of plus factors could support the reasonable inference of an agreement and thus raise a genuine issue of material fact to defeat a defendant’s motion for summary judgment. 191 F.3d at 1102, 1108 (affirming the district court’s grant of defendant’s motion for summary judgment, in part because of a lack of plus factors). The same principle obtains in the context of a motion to dismiss. Plus factors coupled with parallel conduct can take a complaint from merely possible to plausible.

Plaintiffs in their briefs and at oral argument identified the following six plus factors alleged in the operative complaint: (1) defendants shared a common motive to conspire; (2) the manufacturer defendants acted against their self-interest; (3) the manufacturer defendants simultaneously adopted substantially similar MAP policies; (4) the FTC’s investigation and consent decree; (5) the defendants’ participation in NAMM; and (6) retail prices for guitars and guitar amplifiers rose during the class period as the number of units sold fell.

[10] We consider each purported plus factor in turn and cumulatively to determine whether plaintiffs have alleged nonconclusory facts sufficient to state a claim under § 1.

Common Motive

[11] Plaintiffs allege that the manufacturer defendants shared a similar motive to collude. But common motive does not suggest an agreement. Any firm that believes that it could increase profits by raising prices has a motive to reach an advance agreement with its competitors.⁸ *1195 Thus, alleging “common motive to conspire” simply restates that a market is interdependent (*i.e.*, that the profitability of a firm’s decisions regarding pricing

depends on competitors' reactions). Interdependence, however, does not entail collusion, as interdependent firms may engage in consciously parallel conduct through observation of their competitors' decisions, even absent an agreement. And allegations of parallel conduct though recast as common motive is insufficient to plead a § 1 violation. See *Twombly*, 550 U.S. at 556 57, 127 S.Ct. 1955.

8 We note that there are (at least) two ways for firms to increase profit. They can compete to capture greater market share, carving out a bigger piece of the existing pie. Or they can keep their market share the same while increasing prices. If all firms increase prices, they have managed to grow the pie, though their individual slices remain proportionally the same. In a competitive market, attempts to grow the pie by charging supracompetitive prices will be tempered by price competition as individual firms attempt to capture greater market share. But common motive for increased profits always exists.

Action Against Self Interest

Plaintiffs allege that defendant manufacturers acted against self-interest by adopting MAP policies with Guitar Center. Again, plaintiffs fail to account for conscious parallelism and the pressures of an interdependent market. An action that would seem against self-interest in a competitive market may just as well reflect market interdependence giving rise to conscious parallelism. For example, each firm in an interdependent market expects that a widely unfollowed price increase will be rescinded. But so long as prices can be easily readjusted without persistent negative consequences, one firm can risk being the first to raise prices, confident that if its price is followed, all firms will benefit. By that process (“follow the leader”), supracompetitive prices and other anticompetitive practices, once initiated, can spread through a market without any prior agreement.

More extreme action against self-interest, however, may suggest prior agreement for example, where individual action would be so perilous in the absence of advance agreement that no reasonable firm would make the challenged move without such an agreement. Here, if no reasonable manufacturer would have entered into a MAP policy without assurances that all other manufacturers would enter into similar agreements, that would suggest collusion. But the complaint itself, perhaps maladroitly, provides ample independent business reasons

why each of the manufacturers adopted and enforced MAP policies even absent an agreement among the defendant manufacturers. Plaintiffs allege that each manufacturer was “pressured by Guitar Center” to adopt MAP policies that were advantageous to Guitar Center, and the complaint concedes that each manufacturer “responded to Guitar Center's pressure and coercion” by adopting MAP policies “in exchange for Guitar Center's agreement to purchase large volumes of the manufacturer's product stock.” Manufacturers' decisions to heed similar demands made by a common, important customer do not suggest conspiracy or collusion. They support a different conclusion: self-interested independent parallel conduct in an interdependent market. See *id.*

Simultaneous Adoption of MAP Policies

Plaintiffs allege that the manufacturer defendants simultaneously implemented and enforced MAP policies with similar terms. Cf. *id.* at 557 n. 4, 127 S.Ct. 1955 (“[C]omplex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors and made for no other discernible reason would support a plausible inference of conspiracy.”). But according to the *1196 complaint, the manufacturer defendants adopted the policies over a period of several years, not simultaneously. Allegations of such slow adoption of similar policies does not raise the specter of collusion. Cf. *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 628 (7th Cir.2010) (finding persuasive plaintiffs' allegation of parallel conduct “all at once”).

Even assuming that the progressive adoption of similar policies across an industry constitutes simultaneity, that fact does not reveal anything more than similar reaction to similar pressures within an interdependent market, or conscious parallelism. All of the manufacturer defendants were dealing with the same important customer, Guitar Center, which ostensibly exercised its considerable market power to demand similar terms from each manufacturer for its own benefit.⁹ The manufacturers' similar response to this market pressure is a hallmark of independent parallel conduct not collusion.

9 The operative complaint does not allege Guitar Center violated § 2 of the Sherman Act (or any provisions of the Federal Trade Commission Act) in any attempted monopolization of the retail guitar and amplifier market; nor do plaintiffs allege that

the MAP policies themselves are illegal vertical agreements in restraint of trade under § 1.

The FTC's Investigation of NAMM

[12] Plaintiffs argue that the FTC's investigation of NAMM suggests an agreement was made. The FTC alleged violations of § 5 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. § 45, which prohibits “unfair methods of competition.” But unlike § 1 of the Sherman Act, a violation of § 5 of the FTC Act does not require allegation and proof of a contract, combination, or conspiracy. An organization may violate § 5 of the FTC Act without violating § 1 of the Sherman Act. *See FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 44, 92 S.Ct. 898, 31 L.Ed.2d 170 (1972).⁰ And neither the FTC complaint nor the consent decree alleged that any company or group actually conspired or agreed to adopt MAP policies, nor do they suggest such an agreement was made.

10 The cases plaintiffs cite as supporting their assertion that government investigations “bolster the plausibility analysis, all involved ongoing criminal investigations into alleged conspiratorial price fixing under § 1 of the Sherman Act. *See, e.g., In re Packaged Ice Antitrust Litig.*, 723 F.Supp.2d 987, 1009 (E.D.Mich.2010). Those cases are inapposite here, where the FTC complaint was based on § 5 of the FTC Act, 15 U.S.C. § 45, which does not require allegation of an agreement or conspiracy.

Defendants' Attendance of NAMM Meetings

Plaintiffs allege that Guitar Center advocated for the concerted adoption of anticompetitive MAP policies at NAMM meetings. But mere participation in trade-organization meetings where information is exchanged and strategies are advocated does not suggest an illegal agreement. As we recognized in *In re Citric Acid Litigation*:

Gathering information about pricing and competition in the industry is standard fare for trade associations. If we allowed conspiracy to be inferred from such activities alone, we would have to allow an inference of conspiracy whenever a trade association

took almost any action. As the Supreme Court has recognized, however, trade associations often serve legitimate functions, such as providing information to industry members, conducting research to further the goals of the industry, and promoting demand for products and services.

191 F.3d at 1098.

11 In this our law differs from the suspicions of Adam Smith, written at a time before the enactment of the Sherman Act: “People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations*, vol. 1, bk. 1, ch. 10 (1776).

*1197 Moreover, plaintiffs allege that the industry had encouraged the adoption of MAP policies as in each manufacturer's self-interest for years before the class period. Such an allegation does not suggest agreement; it provides a context for “merely parallel conduct that could just as well be independent action.” *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955.

Rising Prices

Plaintiffs allege that the average retail price of guitars and guitar amplifiers rose during the class period as the total number of units sold fell. The dissent asserts that these “allegations that prices rose despite falling demand” are “perhaps most suggestive of collusion.” Dissent at 1199 1200. We are not convinced.

First, plaintiffs do not allege that the average retail price of guitars and amplifiers manufactured by *defendants* rose during the class period. They allege an increase in the average retail price of *all* guitars and guitar amplifiers sold, including products outside the relevant product market, like low-cost imports. The same can be said of the alleged drop in sales.² But even if plaintiffs had alleged that retail prices of defendants' guitars and amplifiers rose in tandem as sales dropped, such a price increase is no more suggestive of collusion than it is of any other potential cause.³ Plaintiffs do not allege

any facts connecting the purported price increase to an illegal agreement among competitors. And without such a connection, there is simply no basis from which we can infer an agreement. In this regard, parallel price increases, without more, are no different from other forms of parallel conduct. They are “merely consistent with a defendant's liability” but “stop[] short of the line between possibility and plausibility of entitlement to relief.” *Iqbal*, 556 U.S. at 668, 129 S.Ct. 1937 (quoting *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955) (internal quotation marks omitted).⁴

12 Plaintiffs admitted in their initial complaint that the data recited by the dissent is to put it mildly “over inclusive. Whereas the complaint defines the relevant product market as the market for “High end Guitars and Guitar Amplifiers, plaintiffs' data “include] products outside of the relevant product market(s), such as low cost imports. As far as we can tell from the complaint, retail prices of defendants' products actually might have fallen during the class period as the average retail price for all guitars and guitar amplifiers rose. Plaintiffs make no allegation either way.

13 Plaintiffs make no allegation as to the cause of the increase in price or the decrease in units sold, aside from noting the data recited are “consistent with the formation of the alleged conspiracy. But allegations that are merely consistent with conspiracy are not enough. See *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955. Any manner of economic variables may have contributed to these fluctuations in prices and sales, from external market pressures to permissible conscious parallelism. For example, if the cost of materials or labor rose, prices could rise irrespective of a decrease in units sold. Indeed, in such a scenario, we would expect a price hike to be accompanied by a drop in sales.

14 We find plaintiffs' allegations here to be readily distinguishable from those considered by the Seventh Circuit in *In re Text Messaging Antitrust Litigation*. There, the four defendants operated in an extremely concentrated market, in which they controlled 90% of text messaging services in the United States. 630 F.3d at 628. Plaintiffs in that case alleged not merely that prices had risen; they alleged that “all at once the defendants changed their pricing structures, which were heterogeneous and complex, to a uniform pricing structure, and then simultaneously jacked up their prices by a third. *Id.* Such uniformity and simultaneity are lacking here. Plaintiffs do not allege

that defendants' prices rose (in concert or otherwise); they allege the average price of all guitars and guitar amplifiers rose. And plaintiffs do not allege these changes occurred “all at once ; they allege defendants adopted MAP policies over the course of three years.

* * *

*1198 The dissent urges that, “when analyzed together,” plaintiffs' purported plus factors provide a context that plausibly suggests that “an illicit horizontal agreement was made between the manufacturer defendants.” Dissent at 1200. We disagree. Plaintiffs have indeed provided a context for the manufacturers' adoption of MAP policies, but not one that plausibly suggests they entered into illegal horizontal agreements. Instead, the complaint tells a different story, one in which Guitar Center used its substantial market power to pressure each manufacturer to adopt similar policies, and each manufacturer adopted those policies as in its own interest. Such conduct may be anticompetitive and perhaps even violate the antitrust laws but it does not suggest the manufacturers illegally agreed among themselves to restrain competition.

IV

Plaintiffs have failed to allege enough nonconclusory facts to support the plausible inference that any agreement among the manufacturers was made. For that reason, their § 1 claim must be dismissed.

AFFIRMED.

PREGERSON, Circuit Judge, dissenting:

I respectfully dissent. *Bell Atlantic Corp. v. Twombly* requires plaintiffs in an antitrust action to plead “enough factual matter (taken as true) to suggest that an agreement was made.” 550 U.S. 544, 556, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (emphasis added). In the “hub-and-spoke” conspiracy alleged here, plaintiffs pleaded enough factual matter (taken as true) to suggest that a horizontal agreement existed between defendants Fender Musical Instruments Corp.; Gibson Guitar Corp.; Hoshino U.S.A., Inc.; Kaman Music Corp.; and Yamaha Corporation of America (“manufacturer defendants”).

Plaintiffs point to six different “plus factors” to support their claim of an agreement among the manufacturer defendants: (1) the manufacturer defendants shared

a common motive to conspire; (2) the manufacturer defendants acted against their own individual self-interest; (3) the manufacturer defendants adopted substantially similar Minimum Advertised Price (“MAP”) policies; (4) the Federal Trade Commission (“FTC”) investigation of the National Association of Music Merchants, Inc. (“NAMM”) for price fixing; (5) the manufacturer defendants participated in NAMM functions; and (6) the retail prices for guitars and guitar amplifiers climbed despite falling demand.

“[W]hen allegations of parallel conduct are set out in order to make a [Sherman Act] § 1 claim, they must be placed in a context that raises a suggestion of a preceding argument.” *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955. Although the majority opinion purports to address the six plus factors as a whole, it actually focuses on each factor individually. Maj. Op. 1194-98. After dissecting each factor individually, the majority opinion summarily concludes that, though the plaintiffs “provided a context for the manufacturers’ adoption of MAP policies,” that context does not “plausibly [suggest that the manufacturer defendants] entered into illegal horizontal agreements.” Maj. Op. 1198.

When truly analyzed together, the six plus factors strongly suggest that the manufacturer defendants reached an illegal horizontal agreement, which “nudge” plaintiffs’ allegations “from conceivable to *1199 plausible.” *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955.

First, although a common motive to conspire does not by itself suggest an agreement, this motive combined with the other plus factors suggests the manufacturer defendants made an illegal agreement.

Second, the manufacturer defendants adopted policies such as limiting online advertisement of prices and discounts, all while increasing prices and conditioning dealer authorizations upon strict compliance with the MAP terms. These policies increased prices even though demand for their products decreased, which went against each company’s individual self-interest. Although this factor alone may be insufficient to plead a violation, when viewed together with the other plus factors, this suggests an agreement was made between the manufacturer defendants.

Third, the manufacturer defendants adopted substantially similar MAP policies. The majority opinion correctly notes that the manufacturer defendants adopted MAP policies over the course of several years, but the majority opinion fails to appreciate that the manufacturer defendants adopted substantially similar MAP policies over the course of this relatively short three-year period. Both the district court and the majority opinion fault plaintiffs for being unable to show agreement between the manufacturer defendants by pinpointing the exact terms of the MAP policies and the exact timing of their adoption. Because plaintiffs have not been afforded an opportunity to discover these confidential and proprietary policies, it is unfair to require this level of specificity at the pleading stage. While the specific terms and exact timing of the MAP policies may be an issue at the summary judgment stage, a plaintiff at the pleading stage is not required to “allege ‘specific facts’ beyond those necessary to state his claim and the grounds showing entitlement to relief.” *Id.*

1 While plaintiffs were allowed limited discovery on the “closed door” meetings at NAMM sponsored events, they were explicitly barred from inquiring about specific terms of the MAP policies.

Fourth, the FTC investigation and settlement regarding alleged price fixing in the music-products industry, specifically at NAMM-sponsored events, during the time period at issue here, tends to suggest that an illegal agreement was made between the manufacturer defendants. The FTC complaint stated that “[t]he exchange of information between NAMM members [including the manufacturer defendants], as alleged herein, had the purpose, tendency, and capacity to facilitate collusion and to restrain competition unreasonably.” *In the Matter of National Association of Music Merchants, Inc.*, No. C 4255, at ¶ 7. Although the FTC investigation and settlement concerned violations of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, which does not require allegations of an illegal agreement, the FTC investigation and settlement make it more plausible that there was an illegal agreement between the manufacturer defendants. In general, mere involvement with a trade organization does not necessarily suggest the existence of illegal activity; however, allegations by the FTC that a certain trade association’s meetings “had the purpose, tendency, and capacity to facilitate collusion” makes it more plausible—especially when considering all six plus factors—that an illegal agreement was made.

Fifth, representatives of the manufacturer defendants attended NAMM-sponsored events where they discussed and promoted specific MAP pricing structures. In *In Re Text Messaging Antitrust Litigation*, 630 F.3d 622, 628 (7th Cir.2010), the *1200 Seventh Circuit held that the defendants four United States telecommunications companies accounting for 90% of the text messaging services in the United States participated in trade association meetings where specific pricing structures were discussed, which, among other allegations, suggested collusion. Similarly here, discussions at NAMM-sponsored events of specific mutually agreeable terms are a “circumstance pointing toward a meeting of the minds[.]” *Twombly*, 550 U.S. at 557, 127 S.Ct. 1955.

Sixth and perhaps most suggestive of collusion despite falling demand for guitars and guitar amplifiers, the average retail price of these items increased substantially from 2005 to 2007. In 2006, for example, the number of electric and acoustic guitars sold decreased 9.62% from the year before. Yet, despite the decline in demand, the average retail price for each unit rose 6.13% from the year before. Similarly, despite a decline of 12% in the number of amplifier units sold in 2006 from the previous year, the average retail price of each unit increased 3.13%. The majority opinion attributes these statistics to “[a]ny manner of economic variables.” Maj. Op. at 1197 n. 13. Nevertheless, the allegations that prices rose despite falling demand demonstrates that it is plausible that something outside normal market conditions was at work: in this case, collusion. See *In Re Text Messaging*, 630 F.3d at 628 29 (finding the allegations that defendant communications companies' anomalous behavior of rapidly increasing prices despite falling costs, among other things, suggested collusion was plausible).

The majority opinion found that each of these plus factors can be attributed to permissible parallel conduct and that, in “context,” they do not plausibly suggest that an illegal horizontal agreement was made. Maj. Op. at 1198. Yet the standard under *Twombly* requires that the plaintiffs' allegations must only raise “*plausible* grounds to infer an agreement,” which “simply calls for enough facts to raise a

reasonable expectation that discovery will reveal evidence of illegal agreement.” 550 U.S. at 556, 127 S.Ct. 1955 (emphasis added). I simply cannot agree with the majority opinion that the plaintiffs' inference of an agreement is *implausible*, especially where the litigation is at the motion to dismiss stage, not the summary judgment stage.

Moreover, the majority opinion is based on numerous assumptions of the guitar and guitar amplifier retail market. For example, the majority opinion states that “so long as prices can be easily readjusted without persistent negative consequences, one firm can risk being the first to raise prices, confident that if its price *is* followed, all firms will benefit. By that process (‘follow the leader’), supracompetitive prices and other anticompetitive practices, once initiated, can spread through a market without any prior agreement.” Maj. Op. at 1194 95. This assumes that (1) retail prices in the guitar and guitar amplifier business can be easily readjusted, (2) competent business firms are willing to place their products at a competitive disadvantage in a highly competitive market, (3) competitive business firms are independently confident that price increases will be followed by competitors, and (4) no agreement (either tacit or express) was ever reached between the manufacturer defendants. These are a lot of assumptions to make without providing plaintiffs the opportunity to conduct full discovery.

Here, plaintiffs' allegations of parallel conduct raise plausible grounds to infer that an illicit horizontal agreement was made between the manufacturer defendants. Plaintiffs allege six plus factors which, when analyzed together, “nudge[] their [allegations of a horizontal agreement] *1201 across the line from conceivable to plausible [.]” *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955. Therefore, I would reverse the district court's dismissal of plaintiffs' Sherman Act claim and remand for further proceedings.

All Citations

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