

EXHIBIT PC-1



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UNIVERSITY OF
MARYLAND

Professor Peter Cramton

Contact Information Redacted

25 July 2022

Peter Cramton is Professor of Economics at the University of Cologne and the University of Maryland (Emeritus since 2018). Since 1983, he has conducted research on auctions and market design, with a focus on the design of complex markets to best achieve goals. Applications include electricity markets, financial markets, and auctions for radio spectrum. He has introduced innovative market designs in many industries. Cramton has advised numerous governments on market design and dozens of bidders in major auctions. He is chief economist and advisor for startups in finance, insurance, and communications. From 2015-2021, he was an independent director of the board of the Electric Reliability Council of Texas (ERCOT). He received his B.S. in Engineering from Cornell University and his Ph.D. in Business from Stanford University.

Academic Positions

Professor of Economics—Department of Economics, University of Cologne, January 2018 to present.

Professor of Economics—Department of Economics, University of Maryland, August 1996 to present, Emeritus since July 2018.

Research Affiliate—Reinhard Selten Institute, January 2017 to present.

International Faculty—Department of Economics, University of Cologne, July 2015 to December 2017.

Part-time Professor of Economics—Department of Economics, European University Institute, September 2015 to August 2017.

Associate Professor of Economics—Department of Economics, University of Maryland, August 1993 to June 1996.

National Fellow—Hoover Institution, Stanford University, September 1992 to August 1993.

Associate Professor of Economics and Management—Yale School of Management, Yale University, July 1988 to August 1993.

Assistant Professor of Decision Theory—Yale School of Management, Yale University, July 1984 to June 1988.

Education

Stanford University, Doctor of Philosophy, June 1984, Graduate School of Business.

Dissertation: *The Role of Time and Information in Bargaining*.

Cornell University, Bachelor of Science with distinction, May 1980, School of Operations Research and Industrial Engineering. Graduated first in class.

Recent Courses

[Auctions and Market Design](#). Master/Doctoral course on auctions and market design.

[Economic Engineering](#). Master/Doctoral introductory course on auctions, matching, and behavioral economics applied to market design.

[Advanced Microeconomics](#). Doctoral course in game theory with emphasis on auctions and market design.

[Methods and Tools of Economic Analysis](#). Undergraduate introduction to the mathematical tools used in economics.

[Game Theory](#). Undergraduate introduction to modern game theory.

[Market Design](#). An advanced undergraduate course on auction and market design.

Research Interests

Market design, auction theory and practice, bargaining theory, industrial organization, experimental economics, contract theory, game theory, decision theory, labor economics, information economics, and law and economics.

Honors

Fellow of the [Econometric Society](#), 2021.

Winner of the [Utah Winter Finance Conference Best Paper Award](#), 2015.

Winner of the [AQR Insight Award](#) for most insightful unpublished paper in finance, 2014.

Distinguished Service Award, American Association for Homecare, 2012.

Resident Scholar, Rockefeller Foundation, Villa Serbelloni, Bellagio, Italy, Spring 2007.

Departmental Undergraduate Teaching Award, Spring 1996 (2), Spring 1997 and Spring 2002.

Departmental Graduate Teaching Award, Fall 1994, Fall 1998, and Fall 2007.

Hoover National Fellow, Hoover Institution, Stanford University, 1992-93.

Winner of the *1984 Leonard J. Savage Thesis Award* for an outstanding dissertation in Bayesian Economics.

American Assembly of Collegiate Schools of Business Doctoral Fellowship, 1983-84.

National Association of Purchasing Management Scholarship, 1983-84.

Dean's Award for Service to Stanford University, 1983-84.

Two-time recipient of *Stanford Merit Fellowship*, 1981-83.

Elected by the Operations Research faculty as outstanding senior, 1980.

Affiliations

Econometric Society, American Economic Association, Society for Economic Analysis, and Society for the Promotion of Economic Theory.

Research on Auction and Market Design

Highlights

[Global Carbon Pricing—The Path to Climate Cooperation](#) (with David JC MacKay, Axel Ockenfels and Steven Stoft), *MIT Press*, 2017.

[“The High-Frequency Trading Arms Race: Frequent Batch Auctions as a Market Design Response,”](#) (with Eric Budish and John Shim), *Quarterly Journal of Economics*, 130:4, 1547–1621, November 2015.

[“Demand Reduction and Inefficiency in Multi-Unit Auctions,”](#) (with Lawrence M. Ausubel, Marek Pycia, Marzena Rostek, and Marek Weretka), *Review of Economic Studies*, 81:4, 1366-1400, 2014.

[Combinatorial Auctions](#), (with Yoav Shoham and Richard Steinberg) [MIT Press](#), 2006.

[“Strikes and Holdouts in Wage Bargaining: Theory and Data,”](#) (with Joseph S. Tracy) *American Economic Review*, 82, 100–121, 1992. Reprinted in Bengt Holmstrom, Paul Milgrom, and Alvin E. Roth (eds.), *Game Theory in the Tradition of Bob Wilson*, Berkeley Electronic Press, May 2002.

[“Strategic Delay in Bargaining with Two-Sided Uncertainty,”](#) *Review of Economic Studies*, 59, 205–225, 1992.

[“Dissolving a Partnership Efficiently,”](#) (with Robert Gibbons and Paul Klemperer) *Econometrica*, 55, 615–632, 1987. Reprinted in Paul Klemperer (ed.), *The Economic Theory of Auctions*, Volume 2, Cheltenham, UK: Edward Elgar, 2000.

Market design

[“Market Design, Human Behavior and Management,”](#) (with Yan Chen, John A. List, and Axel Ockenfels) *Management Science*, 67, 5317-5348, 2021.

[“Improving the Cost-Effectiveness of the Conservation Reserve Program: A Laboratory Study,”](#) (with Daniel Hellerstein, Nathaniel Higgins, Richard Iovanna, Kristian López-Vargas, Steven Wallander) *Journal of Environmental Economics and Management*, 108, 2021.

[“It is Time to Auction Slots at Congested Airports,”](#) (with Martin Bichler, Peter Gritzmann, and Axel Ockenfels) *Vox-CEPR Policy Portal*, 10 January 2021.

“How Softening an Auction Reserve Price Not Only Increases Efficiency But Also Revenues,” (with Kevin Breuer and Axel Ockenfels) Working Paper, University of Cologne, February 2020.

[“Using Technology to Eliminate Traffic Congestion,”](#) (with R. Richard Geddes and Axel Ockenfels) *Journal of Institutional and Theoretical Economics*, 175:1, 126-139, 2019.

[“Set Road Charges in Real Time to Ease Traffic,”](#) (with R. Richard Geddes and Axel Ockenfels) *Nature*, 23-25, 2 August 2018.

[“Markets for Road Use: Eliminating Congestion through Scheduling, Routing, and Real-time Road Pricing,”](#) (with R. Richard Geddes and Axel Ockenfels) Working Paper, University of Cologne, January 2018.

[“Market Design in Energy and Communications,”](#) Working Paper, University of Maryland, April 2015

[“Demand Reduction and Inefficiency in Multi-Unit Auctions,”](#) (with Lawrence M. Ausubel, Marek Pycia, Marzena Rostek, and Marek Weretka) *Review of Economic Studies*, 81:4, 1366-1400, 2014.

[“Applicant Auctions for Internet Top-Level Domains: Resolving Conflicts Efficiently”](#) (with Ulrich Gall, Pacharasut Sujarittanonta, and Robert Wilson), Working Paper, University of Maryland, January 2013.

[“Fear of Losing in a Clock Auction”](#) (with Emel Filiz-Ozbay, Erkut Y. Ozbay, and Pacharasut Sujarittanonta), *Review of Economic Design*, 16:2-3, 119-134, 2012.

US Patent No. 8,224,743, [“System and Method for a Hybrid Clock and Proxy Auction”](#) (with Lawrence M. Ausubel and Paul Milgrom) issued July 17, 2012.

US Patent No. 8,145,555, [“System and Method for the Efficient Clearing of Spectrum Encumbrances”](#) (with Lawrence M. Ausubel and Paul Milgrom) issued March 27, 2012.

[“Comparison of Auction Formats for Auctioning Wind Rights”](#) (with Lawrence M. Ausubel) Power Auctions Report for the Bureau of Ocean Energy Management, September 2011.

[“Multiple Factor Auction Design for Wind Rights”](#) (with Lawrence M. Ausubel) Power Auctions Report for the Bureau of Ocean Energy Management, September 2011.

[“Auction Design for Wind Rights”](#) (with Lawrence M. Ausubel) Power Auctions Report for the Bureau of Ocean Energy Management, August 2011.

- [“Discrete Clock Auctions: An Experimental Study”](#) (with Emel Filiz-Ozbay, Erkut Ozbay, and Pacharasut Sujarittanonta), *Experimental Economics*, 15:2, 309-322, 2012.
- US Patent No. 7,899,734 B2, [“System and Method for an Auction of Multiple Types of Items”](#) (with Lawrence M. Ausubel and Wynne P. Jones) issued March 1, 2011.
- [“Market Design: Harnessing Market Methods to Improve Resource Allocation,”](#) White Paper, University of Maryland, October 2010.
- [“Auctioning Rough Diamonds: A Competitive Sales Process for BHP Billiton’s Ekati Diamonds”](#) (with Samuel Dinkin and Robert Wilson). Forthcoming in the *Handbook of Market Design*, Zvika Neeman, Al Roth, and Nir Vulkan (eds.), Oxford University Press. January 2013.
- US Patent No. 7,729,975, [“System and Method for a Hybrid Clock and Proxy Auction”](#) (with Lawrence M. Ausubel and Paul Milgrom) issued June 1, 2010.
- [“Pricing Rule in a Clock Auction”](#) (with Pacharasut Sujarittanonta), *Decision Analysis*, 7, 40-57, 2010.
- [“How Best to Auction Natural Resources,”](#) in Philip Daniel, Brenton Goldsworthy, Michael Keen, and Charles McPherson (eds.), *Handbook of Oil, Gas And Mineral Taxation*, Chapter 10, forthcoming, Washington, DC: IMF, 2009.
- [“Innovation and Market Design.”](#) In Josh Lerner and Scott Stern (eds.), *Innovation Policy and the Economy*, Volume 9, National Bureau of Economic Research, 113-137, Chicago: University of Chicago Press, 2009.
- [“Market Design: Auctions and Matching.”](#) In John Siegfried (ed.), *Better Living Through Economics*, Harvard University Press, 223-225, 2010.
- [“An Overview of Combinatorial Auctions”](#) (with Yoav Shoham and Richard Steinberg), *ACM SIGecom Exchanges*, 7, 3-14, 2007.
- [“Market-Based Alternatives for Managing Congestion at New York’s LaGuardia Airport,”](#) (with Michael O. Ball, Lawrence M. Ausubel, Frank Berardino, George Donohue, Mark Hansen, and Karla Hoffman), in *Optimal Use of Scarce Airport Capacity*, Proceedings of AirNeth Annual Conference, The Hague, April 2007.
- [“Introduction to Combinatorial Auctions.”](#) (with Yoav Shoham and Richard Steinberg) in Peter Cramton, Yoav Shoham, and Richard Steinberg (eds.), [Combinatorial Auctions](#), 1-13, [MIT Press](#), 2006.
- [“The Clock-Proxy Auction: A Practical Combinatorial Auction Design,”](#) (with Lawrence M. Ausubel and Paul Milgrom) in Peter Cramton, Yoav Shoham, and Richard Steinberg (eds.), [Combinatorial Auctions](#), Chapter 5, 115-138, [MIT Press](#), 2006.
- [“Dynamic Auctions in Procurement,”](#) (with Lawrence M. Ausubel) in Nicola Dimitri, Gustavo Piga, and Giancarlo Spagnolo (eds.) *Handbook of Procurement*, Cambridge, England: Cambridge University Press, 2006.
- [“How Best to Auction Oil Rights,”](#) in Macartan Humphreys, Jeffrey D. Sachs, Joseph E. Stiglitz (eds.), *Escaping the Resource Curse*, Chapter 5, 114-151, New York: Columbia University Press, 2007.
- [“Auctioning Many Divisible Goods,”](#) (with Lawrence M. Ausubel) *Journal of the European Economic Association*, 2, 480-493, April-May 2004.
- [“Vickrey Auctions with Reserve Pricing,”](#) (with Lawrence M. Ausubel) *Economic Theory*, 23, 493-505, April 2004. Reprinted in Charalambos Aliprantis, et al. (eds.), *Assets, Beliefs, and Equilibria in Economic Dynamics*, Berlin: Springer-Verlag, 355-368, 2003.
- [“The Optimality of Being Efficient,”](#) (with Lawrence M. Ausubel) Working Paper, University of Maryland, March 2001. [Maryland Auction Conference](#), May 29-31, 1998.
- [“Ascending Auctions,”](#) *European Economic Review*, 42:3-5, 745-756, May 1998.
- [“Dissolving a Partnership Efficiently,”](#) (with Robert Gibbons and Paul Klemperer) *Econometrica*, 55, 615–632, 1987. Reprinted in Paul Klemperer (ed.), *The Economic Theory of Auctions*, Volume 2, Cheltenham, UK: Edward Elgar, 2000.

Climate policy

[Global Carbon Pricing—The Path to Climate Cooperation](#) (with David JC MacKay, Axel Ockenfels and Steven Stoft), MIT Press, 2017.

[“Translating the Collective Climate Goal into a Common Climate Commitment”](#) (with Axel Ockenfels and Jean Tirole), *Review of Environmental Economics and Policy*, 11:1, 165-171, February 2017.

[“Price Carbon—I will if you will”](#) (with David JC MacKay, Axel Ockenfels and Steven Stoft), *Nature*, 15 October 2015.

[“Symposium on International Climate Negotiations”](#) (with Axel Ockenfels and Steven Stoft), *Economics of Energy & Environmental Policy*, 4:2, 1-64, September 2015.

[“An International Carbon-Price Commitment Promotes Cooperation”](#) (with Axel Ockenfels and Steven Stoft), *Economics of Energy & Environmental Policy*, 4:2, 51-64, September 2015.

[“Solving the Climate Dilemma”](#) (with David MacKay, Axel Ockenfels and Steven Stoft), carbon-price.com, March 2015.

[“How to Negotiate Ambitious Global Emissions Abatement”](#) (with Axel Ockenfels and Steven Stoft), carbon-price.com, May 2013.

[“How to Fix the Inefficiency of Global Cap and Trade”](#) (with Steven Stoft), *The Economists’ Voice*, 9:1, April 2012.

[“Global Climate Games: How Pricing and a Green Fund Foster Cooperation”](#) (with Steven Stoft), *Economics of Energy & Environmental Policy*, 1:2, March 2012. [[Appendix](#), [Spreadsheet](#)]

[“Kyoto’s Climate Game and How to Fix It”](#) (with Steven Stoft), Issue Brief, Global Policy Center, August 2010.

[“International Climate Games: From Caps to Cooperation”](#) (with Steven Stoft), Research Paper, Global Energy Policy Center, July 2010.

[“Price is a Better Climate Commitment”](#) (with Steven Stoft), *The Economists’ Voice*, 7:1, February 2010.

[“Global Carbon Pricing: A Better Climate Commitment”](#) (with Steven Stoft), Research Paper, Global Energy Policy Center, December 2009.

[“Auctioning Greenhouse Gas Emissions Permits in Australia”](#) (with Regina Betz, Stefan Seifert, and Suzi Kerr), *Australian Journal of Agricultural and Resource Economics*, 54, 219-238, 2010.

[“Comments on the RGGI Market Design.”](#) Submitted to RGGI, Inc. by ISO New England and NYISO, 15 November 2007.

[“Tradeable Carbon Permit Auctions: How and Why to Auction Not Grandfather,”](#) (with Suzi Kerr) *Energy Policy*, 30, 333-345, 2002.

[“A Review of Markets for Clean Air: The U.S. Acid Rain Program,”](#) *Journal of Economic Literature*, 38, 627-633, September 2000.

[“The Distributional Effects of Carbon Regulation,”](#) (with Suzi Kerr) in Thomas Sterner (ed.) *The Market and the Environment*, Cheltenham, United Kingdom: Edward Elgar, chapter 12, 1999.

Spectrum auctions

[“The German 4G Spectrum Auction: Design and Behaviour”](#) (with Axel Ockenfels), *Economic Journal*, 127, F305-F324, October 2017.

[“Open Access Wireless Markets”](#) (with Linda Doyle), *Telecommunications Policy*, 41:5-6, 379-390, June 2017.

[“An Open Access Wireless Market”](#) (with Linda Doyle), Working Paper, University of Maryland, March 2016.

[“Design of the Reverse Auction in the Broadcast Incentive Auction”](#) (with Hector Lopez, David Malec and Pacharasut Sujarittanonta), Working Paper, University of Maryland, 12 March 2015; [Appendix](#).

[“Bidding and Prices in the AWS-3 Auction”](#) (with Pacharasut Sujarittanonta), Working Paper, University of Maryland, May 2015.

[“Spectrum Auction Design,”](#) *Review of Industrial Organization*, 42:2, 161-190, March 2013.

[“Quadratic Core-Selecting Payment Rules for Combinatorial Auctions”](#) (with Robert Day), *Operations Research*, 60:3, 588-603, 2012.

[“Activity Rules for the Combinatorial Clock Auction”](#) (with Lawrence M. Ausubel), Working Paper, University of Maryland, November 2011.

[“Incentive Auctions and Spectrum Policy,”](#) Testimony of Peter Cramton before the United States House Committee on Energy and Commerce, 15 July 2011. [[Responses to questions](#)]

[“Incentive Auctions,”](#) Working Paper, University of Maryland, April 2011.

[“Using Spectrum Auctions to Enhance Competition in Wireless Services”](#) (with Evan Kwerel, Gregory Rosston, and Andrzej Skrzypacz), *Journal of Law and Economics*, 54:4, S167-S188, 2011.

[“Auctioning the Digital Dividend,”](#) in Jan Kramer and Stefan Seifert (eds.), *Communications Regulation in the Age of Digital Convergence: Legal and Economic Perspectives*, Karlsruhe, Germany: Karlsruhe Institute of Technology, 2009.

[“A Review of the 10-40 GHz Auction,”](#) [Office of Communications](#), United Kingdom, September 2008.

[“A Review of the L-Band Auction,”](#) [Office of Communications](#), United Kingdom, September 2008.

[“The 700 MHz Spectrum Auction: An Opportunity to Protect Competition In a Consolidating Industry”](#) (with Andrzej Skrzypacz and Robert Wilson), submitted to the U.S. Department of Justice, Antitrust Division, 13 November 2007.

[“Comments on the FCC’s Proposed Competitive Bidding Procedures for Auction 73”](#) (with Gregory Rosston, Andrzej Skrzypacz, and Robert Wilson), 31 August 2007.

[“The Effect of Incumbent Bidding in Set-Aside Auctions: An Analysis of Prices in the Closed and Open Segments of FCC Auction 35”](#) (with Allan T. Ingraham and Hal J. Singer) *Telecommunications Policy*, 32, 273-290, 2008.

[Economist Letter to NTIA on 700 MHz Spectrum Auction](#) (with Andrzej Skrzypacz, Simon Wilkie, and Robert Wilson), 30 July 2007.

[“Essential Entry: Revenues in the 700 MHz Spectrum Auction,”](#) University of Maryland, 13 July 2007.

[“Revenues in the 700 MHz Spectrum Auction”](#) (with Andrzej Skrzypacz and Robert Wilson), Working Paper, University of Maryland, 27 June 2007.

[“Economic Comments on the Design of the 700 MHz Spectrum Auction”](#) (with Andrzej Skrzypacz and Robert Wilson), submitted with [testimony of James L. Barksdale](#) to the U.S. Senate Committee on Commerce, Science, and Transportation, 14 June 2007.

[“Simultaneous Ascending Auctions,”](#) in Peter Cramton, Yoav Shoham, and Richard Steinberg (eds.), [Combinatorial Auctions](#), Chapter 4, 99-114, [MIT Press](#), 2006.

[“Collusive Bidding in the FCC Spectrum Auctions,”](#) (with Jesse Schwartz) *Contributions to Economic Analysis & Policy*, 1:1, 2002.

[“Spectrum Auctions,”](#) in Martin Cave, Sumit Majumdar, and Ingo Vogelsang, eds., *Handbook of Telecommunications Economics*, Amsterdam: Elsevier Science B.V., Chapter 14, 605-639, 2002.

“How Affirmative Action at the FCC Auctions Decreased the Deficit,” (with Ian Ayres) in Ian Ayres, ed., *Pervasive Prejudice? Unconventional Evidence of Race and Gender Discrimination*, Chicago: University of Chicago Press, 315-395, 2001.

[“Lessons Learned from the UK 3G Spectrum Auction.”](#) In U.K. National Audit Office Report, The Auction of Radio Spectrum for the Third Generation of Mobile Telephones, Appendix 3, October 2001.

- [“Collusive Bidding: Lessons from the FCC Spectrum Auctions,”](#) (with Jesse Schwartz) *Journal of Regulatory Economics*, 17, 229-252, May 2000.
- [Simultaneous Ascending Auctions with Package Bidding,](#) (with John McMillan, Paul Milgrom, Bradley Miller, Bridger Mitchell, Daniel Vincent, and Robert Wilson) Report to the Federal Communications Commission, March 1998.
- [“Efficient Relocation of Spectrum Incumbents,”](#) (with Evan Kwerel and John Williams) *Journal of Law and Economics*, 41, 647-675, October 1998.
- [“The Efficiency of the FCC Spectrum Auctions,”](#) *Journal of Law and Economics*, 41, 727-736, October 1998.
- [Package Bidding for Spectrum Licenses,](#) (with John McMillan, Paul Milgrom, Bradley Miller, Bridger Mitchell, Daniel Vincent, and Robert Wilson) Report to the Federal Communications Commission, October 1997.
- [Auction Design Enhancements for Non-Combinatorial Auctions,](#) (with John McMillan, Paul Milgrom, Bradley Miller, Bridger Mitchell, Daniel Vincent, and Robert Wilson) Report to the Federal Communications Commission, September 1997.
- [“Synergies in Wireless Telephony: Evidence from the Broadband PCS Auctions,”](#) (with Lawrence M. Ausubel, R. Preston McAfee, and John McMillan) *Journal of Economics and Management Strategy*, 6:3, 497-527, 1997.
- [“Deficit Reduction Through Diversity: How Affirmative Action at the FCC Increased Auction Competition,”](#) (with Ian Ayres) *Stanford Law Review*, 48:4, 761-815, 1996.
- [“The FCC Spectrum Auctions: An Early Assessment,”](#) *Journal of Economics and Management Strategy*, 6:3, 431-495, 1997. Reprinted in Donald L. Alexander (ed.), *Telecommunications Policy*, Praeger Publishers, 1997.
- [“Money Out of Thin Air: The Nationwide Narrowband PCS Auction,”](#) *Journal of Economics and Management Strategy*, 4, 267–343, 1995.
- [“The Case for Affirmative Auction: From Conscience to Coffers,”](#) (with Ian Ayres) *New York Times*, 21 May 1995, F13.
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Electricity market design

- [“Lessons from the 2021 Texas Electricity Crisis,”](#) *Utility Dive*, 23 March 2021.
- [“Hitting the Jackpot at Texans’ Expense,”](#) *Dallas Morning News*, 8a, 6 Apr 2021.
- [“Commentary: My monthly electric bill in Texas would be \\$250. In California, it is \\$1,000. Here’s why.”](#) *San Diego Union-Tribune*, 1 September 2020.
- [“Electricity Market Design,”](#) *Oxford Review of Economic Policy*, 33:4, 589-612, November 2017.
- [“Capacity Market Fundamentals”](#) (with Axel Ockenfels and Steven Stoft), *Economics of Energy & Environmental Policy*, 2:2, September 2013.
- [“Economics and Design of Capacity Markets for the Power Sector”](#) (with Axel Ockenfels) *Zeitschrift für Energiewirtschaft*, 36:113-134, 2012.
- [“Ökonomik und Design von Kapazitätsmärkten im Stromsektor”](#) (with Axel Ockenfels), *Energiewirtschaftlichen Tagesfragen*, 61:9, 14-15, 2011.
- [Wind Energy in Colombia: A Framework for Market Entry](#) (with Walter Vergara, Alejandro Deeb, Natsuko Toba, and Irene Leino) The World Bank, Washington, DC, July 2010.
- [“Using Forward Markets to Improve Electricity Market Design”](#) (with Lawrence M. Ausubel), *Utilities Policy*, 18, 195-200, 2010.
- [“Virtual Power Plant Auctions”](#) (with Lawrence M. Ausubel), *Utilities Policy*, 18, 201-208, 2010.
- [“Prediction Markets to Forecast Electricity Demand”](#) (with Luciano I. de Castro), Working Paper, University of Maryland, August 2009.

[“Auctioning Long-term Gas Contracts in Colombia,”](#) Working Paper, University of Maryland, September 2008.

[“Forward Reliability Markets: Less Risk, Less Market Power, More Efficiency”](#) (with Steven Stoft) *Utilities Policy*, 16, 194-201, 2008.

[“Colombia’s Forward Energy Market,”](#) Working Paper, University of Maryland, August 2007.

[“Product Design for Colombia’s Regulated Market,”](#) Working Paper, University of Maryland, June 2007.

[“Colombia Firm Energy Market,”](#) (with Steven Stoft), *Proceedings of the Hawaii International Conference on System Sciences*, January 2007.

[“Simulation of the Colombian Firm Energy Market,”](#) (with Steven Stoft and Jeffrey West), Working Paper, University of Maryland, December 2006.

[“Why We Need to Stick with Uniform-Price Auctions in Electricity Markets,”](#) (with Steven Stoft), *Electricity Journal*, 20:1, 26-37, 2007.

[“The Convergence of Market Designs for Adequate Generating Capacity,”](#) (with Steven Stoft), White Paper, California Electricity Oversight Board, April 2006.

[“New England’s Forward Capacity Auction,”](#) University of Maryland, June 2006.

[“A Capacity Market that Makes Sense,”](#) (with Steven Stoft) *Electricity Journal*, 18, 43-54, August/September 2005.

[“Review of the Proposed Reserve Markets in New England,”](#) (with Hung-po Chao and Robert Wilson) White Paper, Market Design Inc., January 2005.

[“Competitive Bidding Behavior in Uniform-Price Auction Markets,”](#) *Proceedings of the Hawaii International Conference on System Sciences*, January 2004.

[“Competitive Bidding Behavior in Uniform-Price Auction Markets,”](#) Report before the Federal Energy Regulatory Commission, March 2003.

[“Rebuttal Addendum: Assessment of Submissions of the California Parties,”](#) Report before the Federal Energy Regulatory Commission, March 2003.

[“Electricity Market Design: The Good, the Bad, and the Ugly,”](#) *Proceedings of the Hawaii International Conference on System Sciences*, January, 2003.

[“Pricing in the California Power Exchange Electricity Market: Should California Switch from Uniform Pricing to Pay-as-Bid Pricing?”](#) (with Alfred E. Kahn, Robert H. Porter, and Richard D. Tabors), Blue Ribbon Panel Report, California Power Exchange, January 2001.

[“Uniform Pricing or Pay-as-Bid Pricing: A Dilemma for California and Beyond,”](#) (with Alfred E. Kahn, Robert H. Porter, and Richard D. Tabors), *Electricity Journal*, 70-79, July 2001.

[“Eliminating the Flaws in New England’s Reserve Markets,”](#) (with Jeffrey Lien) Working Paper, University of Maryland, March 2000.

[“Review of the Reserves and Operable Capability Markets: New England’s Experience in the First Four Months,”](#) White Paper, Market Design Inc., November 1999.

[“The Role of the ISO in U.S. Electricity Markets: A Review of Restructuring in California and PJM,”](#) (with Lisa Cameron) *Electricity Journal*, 71-81, April 1999.

[“A Review of ISO New England’s Proposed Market Rules,”](#) (with Robert Wilson) White Paper, Market Design Inc., September 1998.

[“Auction Design for Standard Offer Service,”](#) (with Andrew Parece and Robert Wilson) Working Paper, University of Maryland, July 1997.

[“Using Auctions to Divest Generation Assets,”](#) (with Lisa J. Cameron and Robert Wilson) *Electricity Journal*, 10:10, 22-31, December 1997.

Financial market design

[“Smart Markets for Financial Securities: From Block to Flow Trading”](#) (with Eric Budish, Albert S. Kyle, Jeongmin Lee, David Malac, and David C. Parkes), University of Cologne, August 2018.

[“The High-Frequency Trading Arms Race: Frequent Batch Auctions as a Market Design Response,”](#) (with Eric Budish and John Shim), *Quarterly Journal of Economics*, 130:4, 1547–1621, November 2015.

[“Implementation Details for Frequent Batch Auctions: Slowing Down Markets to the Blink of an Eye”](#) (with Eric Budish and John Shim), *American Economic Review P&P*, 104:5, 418-424, May 2014.

[“Common-Value Auctions with Liquidity Needs: An Experimental Test of a Troubled Assets Reverse Auction”](#) (with Lawrence M. Ausubel, Emel Filiz-Ozbay, Nathaniel Higgins, Erkut Ozbay, and Andrew Stocking). Forthcoming in the *Handbook of Market Design*, Zvika Neeman, Al Roth, and Nir Vulkan (eds.), Oxford University Press. January 2013.

[“A Two-Sided Auction for Legacy Loans”](#) (with Lawrence M. Ausubel), University of Maryland, March 2009.

[“Making Sense of the Aggregator Bank”](#) (with Lawrence M. Ausubel), *The Economists' Voice*, 6:3, February 2009.

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[“Auction Design Critical for Rescue Plan”](#) (with Lawrence M. Ausubel), *The Economists' Voice*, 5:5, September 2008.

National media on financial rescue plan

Print: [“Gaming the Financial System,”](#) *Newsweek*, 18 November 2008.

[“Economists Look at Ways to Structure Auctions,”](#) *Wall Street Journal*, 25 September 2008.

[“Auctions May Be Only Option for U.S. Bailout,”](#) *Reuters*, 22 September 2008.

Radio: [“How about Taking Bids on Bad Assets?”](#) *National Public Radio Marketplace*, 2 February 2009.

[“Study Suggests Buying Toxic Assets Could Work,”](#) *National Public Radio All Things Considered*, 18 November 2008.

[“Complicated Reverse Auction May Aid In Bailout,”](#) National Public Radio Morning Edition, 10 October 2008.

TV: [“Geithner to Unveil Financial Rescue Plan Monday,”](#) *PBS Nightly Business Report*, 6 February 2009.

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[“Using Auction Theory to Inform Takeover Regulation,”](#) (with Alan Schwartz) *Journal of Law, Economics, and Organization*, 7, 27–53, 1991.

Medicare auctions and how to fix them

[“Designed to Fail: The Medicare Auction for Durable Medical Equipment”](#) (with Sean Ellermeyer and Brett E. Katzman) *Economic Inquiry*, 53:1, 469-485, 2014.

[“Medicare Auction Reform,”](#) Testimony of Peter Cramton before the United States House Committee on Small Business, 11 September 2012. [[Oral Testimony](#), [Transcript of Hearing](#), [Comments of Peter Cramton](#)]

Research on Bargaining

[“Bargaining with a Shared Interest: The Impact of Employee Stock Ownership Plans on Labor Disputes,”](#) (with Hamid Mehran and Joseph Tracy) Working Paper, University of Maryland, March 2015.

[“Unions, Bargaining and Strikes,”](#) (with Joseph S. Tracy) in John T. Addison and Claus Schnabel, eds., *International Handbook of Trade Unions*, Cheltenham, UK: Edward Elgar, Chapter 4, 86-117, 2003.

[“Bargaining with Incomplete Information,”](#) (with Lawrence M. Ausubel and Raymond J. Deneckere), Robert J. Aumann and Sergiu Hart, eds., *Handbook of Game Theory*, Vol. 3, Amsterdam: Elsevier Science B.V., Chapter 50, 1897-1945, 2002.

[“The Effect of Collective Bargaining Legislation on Strikes and Wages,”](#) (with Morley Gunderson and Joseph S. Tracy) *Review of Economics and Statistics*, 81:3, 475-487, 1999.

[“Impacts of Strike Replacement Bans in Canada,”](#) (with Morley Gunderson and Joseph S. Tracy), *Labor Law Journal*, 50:3, 173-179, Fall 1999.

[“The Use of Strike Replacements in Union Contract Negotiations: the U.S. Experience 1980–1989,”](#) (with Joseph S. Tracy) *Journal of Labor Economics*, 16:4, 667-701, 1998.

[“Efficient Relocation of Spectrum Incumbents,”](#) (with Evan Kwerel and John Williams) *Journal of Law and Economics*, 41, 647-675, October 1998.

[“Deception and Mutual Trust: A Reply to Strudler,”](#) (with J. Gregory Dees) *Journal of Business Ethics*, 5, 813–822, 1995. Reprinted in Carrie Menkel-Meadow and Michael Wheeler (eds.), *What's Fair*, John Wiley & Sons, 2004.

[“Wage Bargaining with Time-Varying Threats,”](#) (with [Joseph S. Tracy](#)), *Journal of Labor Economics*, 12, 594–617, 1994.

[“The Determinants of U.S. Labor Disputes,”](#) (with [Joseph S. Tracy](#)), *Journal of Labor Economics*, 12, 180–209, 1994.

[“Promoting Honesty in Negotiation: An Exercise in Practical Ethics,”](#) (with J. Gregory Dees) *Business Ethics Quarterly*, 3, 359-394, 1993. Reprinted in Patricia Werhane and Tom Donalson, *Ethical Issues in Business: A Philosophical Approach*, Prentice-Hall, 1996, and Carrie Menkel-Meadow and Michael Wheeler (eds.), *What's Fair*, John Wiley & Sons, 2004.

[“Strikes and Holdouts in Wage Bargaining: Theory and Data,”](#) (with Joseph S. Tracy) *American Economic Review*, 82, 100–121, 1992. Reprinted in Bengt Holmstrom, Paul Milgrom, and Alvin E. Roth (eds.), *Game Theory in the Tradition of Bob Wilson*, Berkeley Electronic Press, May 2002.

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[“Dynamic Bargaining with Transaction Costs,”](#) *Management Science*, 37, 1221–1233, 1991.

[“Shrewd Bargaining on the Moral Frontier: Toward a Theory of Morality in Practice,”](#) (with J. Gregory Dees) *Business Ethics Quarterly*, 1, 135-167, 1991.

[“Sequential Bargaining Mechanisms,”](#) in *Game-Theoretic Models of Bargaining*, Alvin Roth (ed.), Cambridge University Press, Chapter 8, 149–179, 1985.

[“Bargaining with Incomplete Information: An Infinite-Horizon Model with Two-Sided Uncertainty,”](#) *Review of Economic Studies*, 51, 579–593, 1984.

Other Research

[“Ratifiable Mechanisms: Learning from Disagreement,”](#) (with Thomas R. Palfrey) *Games and Economic Behavior*, 10, 255–283, 1995.

[“Relational Investing and Agency Theory,”](#) (with Ian Ayres) *Cardozo Law Review*, 15, 1033–1066, 1994.

[“Cartel Enforcement with Uncertainty About Costs,”](#) (with Thomas R. Palfrey) *International Economic Review*, 31, 17–47, 1990. Reprinted in Stephen W. Salant and Margaret C. Levenstein (eds.), *Cartels*, Volume 1, Cheltenham, UK: Edward Elgar, 2005.

[“Nonrandom Mixing Models of HIV Transmission,”](#) (with Edward Kaplan, and A. David Paltiel) in *Mathematical and Statistical Approaches to AIDS Epidemiology*, edited by Carlos Castillo-Chávez, *Lecture Notes in Biomathematics Series*, Springer-Verlag, 218–239, 1989.

Research Grants

“Testbed Experiments for CRP Auction Design,” US Department of Agriculture, September 2013 to September 2018, \$191,000.

“Design and Experimental Testing of Land Use Mechanisms: Auctions and Coexistence,” US Department of Agriculture, June 2015 to September 2017, \$52,000.

“Common Value Auctions with Liquidity Needs,” National Science Foundation, September 2009 to August 2013, \$400,000.

“Dynamic Matching Mechanisms,” National Science Foundation, August 2005 to July 2008, \$264,188.

“Slot Auctions for U.S. Airports,” Federal Aviation Administration, Department of Transportation, September 2004 to August 2005, \$309,729.

“Rapid Response Electronic Markets for Time-Sensitive Goods,” National Science Foundation, July 2002 to June 2005, \$2,000,000.

“Multiple-Item Auctions,” National Science Foundation, July 2001 to June 2004, \$313,872.

“Auctions for Multiple Items,” National Science Foundation, April 1998 to March 2001, \$318,175.

“Auctions and Infrastructure Conference,” National Science Foundation, April 1998 to March 1999, \$25,000.

“Auctions and Infrastructure,” World Bank, March-June 1998, \$25,000.

“Applying Strategic Bargaining Models to Union Contract Negotiations,” National Science Foundation, April 1995 to March 1998, \$143,637.

“Applying Strategic Bargaining Models to Union Contract Negotiations,” National Science Foundation, April 1992 to March 1994, \$177,760.

“Strikes and Delays in Wage Bargaining: Theory and Data,” National Science Foundation, April 1990 to March 1992, \$153,407.

“Gaming Exercises in Negotiation and Dispute Resolution,” National Institute of Dispute Resolution, July to August 1988, \$6,000.

“The Role of Time and Information in Bargaining,” National Science Foundation, July 1986 to June 1988, \$40,000.

“Public Sector Cases on Negotiation,” Mellon Foundation, July to August 1985, \$12,000.

Editorial and Public Service

Management Science, Associate Editor, 2018-present.

Games, Editorial Board, 2020-present.

Panelist, National Science Foundation, Enhanced Access to Radio Spectrum, 2012-2013.

Journal of Industrial Economics, Associate Editor, 1998-2007.

Member, RTO Futures (a working group of economists, executives, and government leaders to address critical issues in electricity restructuring), 2000-2007.

Panelist, National Science Foundation, Economics, 1999-2002.

Panelist, National Science Foundation, Electricity Power System Efficiency and Security, 2002.

Program Committee Chair, *North American Econometric Society Summer Meetings*, June 21-24, 2001.

Panelist, National Science Foundation, Knowledge and Distributed Intelligence, 1998.

Referee for

American Economic Review, American Political Science Review, Cambridge University Press, Econometrica, Economic Inquiry, Economic J, Economic Letters, Economic Theory, Energy J, Games & Economic Behavior, Group Decision & Negotiation, International Economic Review, International J of Game Theory, J of Business, J of Business & Economic Statistics, J of Conflict Resolution, J of Economic Theory, J of Economic Surveys, J of Economics & Management Strategy, J of Industrial Economics, J of Labor Economics, J of Law and Economics, J of Law, Economics & Organization, J of Political Economy, J of Public Economics, J of Regulatory Economics, Labour Economics, Management Science, Mathematical Social Sciences, Marketing Science, MIT Press, National Institute for Dispute Resolution, National Science Foundation, Omega, Operations Research, OPSEARCH, Quarterly J of Economics, Rand J of Economics, Research in Experimental Economics, Review of Economic Studies, Scandinavian J of Economics, Science, Social Choice & Welfare, Southern Economic J.

Recent Post-Docs (Initial Placement)

Darrell Hoy, April 2014-June 2017 (Tremor Technologies)

David Malec, June 2013-June 2018 (Tremor Technologies)

Recent PhD Committees Chaired (Initial Placement)

Hector Lopez, July 2015 (Rivada Networks)

Pacharasut Sujarittanonta, July 2010 (Morgan State University)

Nathaniel Higgins, December 2009 (USDA Economic Research Service)

Matias Herrera Dappe, May 2009 (Bates White)

Andrew Stocking, August 2009 (Congressional Budget Office)

Dipam Ghosh, May 2008 (CRA International)

Martin Ranger, May 2005 (Indiana University)

Jeffrey Lien, August 2001 (US Department of Justice)

Allan Ingraham, May 2001 (Criterion Auctions)

Jesse Schwartz, August 1999 (Vanderbilt University)

Laurent Martin, July 1999 (University of Washington)

Entrepreneurship

Founder, [Cramton Associates](#), a consultancy providing expert advice in high-stakes auction markets. 1993 to present.

Director and Chief Economist, [Tremor Technologies](#), a company developing a smart market for reinsurance. 2017 to present.

Chair, [Market Design Inc.](#) (with Lawrence Ausubel, R. Preston McAfee, Paul Milgrom, Alvin Roth, and Robert Wilson), a consulting firm that works with governments and companies in designing and implementing state-of-the-art auction and matching methods, 1995 to 2016 (President since 1999, Chair since 2003). Major projects:

- Design auction market for rough diamonds.
- Design auction and suggest market reforms for British Columbia timber market.
- Design and implement virtual power plant auctions in France and Belgium.
- Design and implement auction to sell gas capacity in Germany and France.
- Design and implement U.K. auction to procure greenhouse gas emission reductions.
- Design and implement of spectrum auctions in U.S., Canada, Mexico, Australia, and the U.K.
- Design and implement electricity auctions in North America and South America.

- Design auctions to divest electricity generation plants and power purchase agreements in U.S. and Canada.

Founder, [Criterion Auctions](#), a consulting firm that provides auction support services to governments and companies in high-stake auctions. December 2000 to June 2007.

Chair and Founder, [Spectrum Exchange](#) (with Lawrence Ausubel, Paul Milgrom, and [Market Design Inc.](#)), a firm to create value for the public by promoting the efficient exchange of spectrum. 1999 to 2009.

Expert Reports, Affidavits, and Testimony

[“Design of the Reverse Auction in the Broadcast Incentive Auction”](#) (with Hector Lopez, David Malec and Pacharasut Sujarittanonta), Working Paper, University of Maryland, 12 March 2015; [Appendix](#). Filed by EOBC at the FCC.

[“Bidding and Prices in the AWS-3 Auction”](#) (with Pacharasut Sujarittanonta), Working Paper, University of Maryland, May 2015. Filed by the Competitive Carriers Association.

ISO New England, Docket Nos. ER14-1050-000, -001, Federal Energy Regulatory Commission, [“Prepared Testimony of Peter Cramton on Behalf of ISO New England,”](#) January 2014. Comments on ISO New England’s proposed Pay For Performance reforms to the Forward Capacity Market.

ISO New England, Docket Nos. ER14-1050-000, -001, Federal Energy Regulatory Commission, “Supplemental Prepared Testimony of Peter Cramton on Behalf of ISO New England,” February 2014. Comments on NEPOOL’s critique of ISO New England’s proposed Pay For Performance reforms to the Forward Capacity Market.

[“The Revenue Impact of Competition Policy in the FCC Incentive Auction,”](#) December 2013. Comments on the revenue impact of spectrum-aggregation limits in the FCC’s incentive auction. On behalf of T-Mobile USA.

[“The Rationale for Spectrum Limits and Their Impact on Auction Outcomes,”](#) August 2013. Argues that well-crafted spectrum aggregation limits can increase competition both in the market for mobile broadband services and in the spectrum auctions in which they apply. On behalf of T-Mobile USA.

ISO New England and New England Power Pool, Docket No. ER12, Federal Energy Regulatory Commission, [“Testimony of Peter Cramton,”](#) April 2012. Examines the New England regulation market and proposes an alternative market design. For ISO New England.

Verizon Wireless spectrum transaction with SpectrumCo and Cox, Federal Communications Commission, WT Docket No. 12-4, [“Supplemental Declaration of Peter Cramton.”](#) March 2012. Supplemental declaration on the FCC’s spectrum screen used to evaluate spectrum transactions. On behalf of T-Mobile US.

Verizon Wireless spectrum transaction with SpectrumCo and Cox, Federal Communications Commission, WT Docket No. 12-4, [“Declaration of Peter Cramton.”](#) February 2012. Declaration on the FCC’s spectrum screen used to evaluate spectrum transactions. On behalf of T-Mobile US.

[“700 MHz Device Flexibility Promotes Competition,”](#) July 2010. Argues that the carrier-specific band plans proposed by AT&T and Verizon Wireless for the 700 MHz paired spectrum will undermine competition. On behalf of the Rural Cellular Association.

[“Foreword to Ross Baldick’s ‘Single Clearing Price in Electricity Markets’”](#) Compete Coalition, www.competecoalition.com, February 2009. Argues that consumers and suppliers are better off with the clearing-price auction in electricity markets.

[“Report on Key Design Elements of Auctions Under Australia’s Carbon Pollution Reduction Scheme,”](#) Tradeslot Report to Australian Department of Climate Change, 26 October 2008.

DC Energy, LLC v. HQ Energy Services (US) Inc., Docket No. EL07-67-000, Federal Energy Regulatory Commission, [“Affidavit of Peter Cramton.”](#) August 2007. Affidavit arguing that HQ manipulated the NYISO TCC and day-ahead energy markets. On behalf of DC Energy, LLC.

The People of the State of Illinois, et al., Docket No. EL07-47-000, Federal Energy Regulatory Commission, "[Affidavit of Peter Cramton.](#)" June 2007. Affidavit arguing that the Illinois auction for energy for small customers was a competitive auction. On behalf of J. Aron & Company and Morgan Stanley Capital Group Inc.

Australia National Emissions Trading Taskforce, "[Possible Design for a Greenhouse Gas Emissions Trading System.](#)" August 2007.

700 MHz Auction, Federal Communications Commission, "[Why Large Licenses are Best for the 700 MHz Spectrum Auction.](#)" April 2007. On behalf of Verizon Wireless.

New York Independent System Operator, Docket No. ER07-360-000, Federal Energy Regulatory Commission, "[Affidavit of Peter Cramton.](#)" February 2007. Affidavit identifying manipulation of New York's capacity market by KeySpan and the need for market monitoring and mitigation. On behalf of Consolidated Edison Company of New York.

United States vs. Mario Gabelli. Expert report showing the damages caused by Gabelli's false claims in FCC spectrum auctions. The case was settled in June 2006. Gabelli paid \$130 million in damages. On behalf of the United States.

Devon Power LLC, et al., Docket No. ER03-563-030, Federal Energy Regulatory Commission, "[Affidavit of Peter Cramton.](#)" March 2006. Affidavit in support of the settlement agreement defining the New England Forward Capacity Market. For ISO New England.

AWS Auction, Federal Communications Commission, "[Declaration of Peter Cramton.](#)" February 2006. Declaration on various auction rules for the AWS auction. On behalf of T-Mobile US.

AWS Auction, Federal Communications Commission, "[Reply Declaration of Peter Cramton.](#)" February 2006. Reply declaration on various auction rules for the AWS auction. On behalf of T-Mobile US.

AWS Auction, Federal Communications Commission, "[Ex Parte of Peter Cramton.](#)" March 2006. Ex parte communication on various auction rules for the AWS auction. On behalf of T-Mobile US.

[MDI retained as Auction Manager](#) for virtual divestiture of 2,600 MW of nuclear energy as part of the proposed merger between Exelon and PSEG. August 2005.

US-Canada Softwood Lumber Trade Dispute, "[Competitive Auction Markets in British Columbia](#)" (with Susan Athey). December 2005. White Paper, Market Design Inc. On behalf of British Columbia Ministry of Forests.

US-Canada Softwood Lumber Trade Dispute, "[Comments on DOC Notice of Preliminary Results of Countervailing Duty Review](#)" (with Susan Athey). July 2005. White Paper, Market Design Inc. On behalf of British Columbia Ministry of Forests.

US-Canada Softwood Lumber Trade Dispute, "[Competitive Auction Markets in British Columbia](#)" (with Susan Athey). February 2004. White Paper, Market Design Inc. On behalf of British Columbia Ministry of Forests.

US-Canada Softwood Lumber Trade Dispute, "[Upset Pricing in Auction Markets: An Overview](#)" (with Susan Athey and Allan Ingraham). March 2003. White Paper, Market Design Inc. On behalf of British Columbia Ministry of Forests.

US-Canada Softwood Lumber Trade Dispute, "[An Analysis of Auction Volume and Market Competition for the Coastal Forest Regions in British Columbia](#)" (with Susan Athey and Allan Ingraham). September 2002. White Paper, Market Design Inc. On behalf of British Columbia Ministry of Forests.

US-Canada Softwood Lumber Trade Dispute, "[Reserve Prices, Stumpage Fees, and Efficiency](#)" (with Susan Athey and Allan Ingraham). September 2002. White Paper, Market Design Inc. On behalf of British Columbia Ministry of Forests.

US-Canada Softwood Lumber Trade Dispute, "[Auction-Based Timber Pricing and Complementary Market Reforms in British Columbia](#)" (with Susan Athey and Allan Ingraham). March 2002. White Paper, Market Design Inc. On behalf of British Columbia Ministry of Forests.

US-Canada Softwood Lumber Trade Dispute, "[Setting the Upset Price in British Columbia Timber Auctions](#)" (with Susan Athey and Allan Ingraham). September 2002. White Paper, Market Design Inc. On behalf of British Columbia Ministry of Forests.

US-Canada Softwood Lumber Trade Dispute, [“Auctioning Timber to Maximize Revenues in British Columbia”](#) (with Susan Athey and Allan Ingraham). June 2002. White Paper, Market Design Inc. On behalf of British Columbia Ministry of Forests.

US-Canada Softwood Lumber Trade Dispute, [“A Comparison of Equation-Based and Parity Pricing of Stumpage Fees for British Columbia Timber Under Long-Term Tenures”](#) (with Susan Athey and Allan Ingraham). April 2002. White Paper, Market Design Inc. On behalf of British Columbia Ministry of Forests.

US-Canada Softwood Lumber Trade Dispute, [“Testing for Anti-Competitive Bidding in Auction Markets”](#) (with Susan Athey and Allan Ingraham). March 2002. White Paper, Market Design Inc. On behalf of British Columbia Ministry of Forests.

New England Power Pool, Federal Energy Regulatory Commission, [“Review of the Proposed Reserve Markets in New England,”](#) (with Hung-po Chao and Robert Wilson) Market Design Inc., January 2005.

U.S. Department of Defense, Services, “Criterion Auctions, December 2003.

Expert Report of Peter Cramton, *D. Lamar Deloach, et al. v. Philip Morris, Inc., et al.*, Civil Action No. 00-CV-1253, United States District Court, Middle District of North Carolina. October 2003. For R.J. Reynolds. Concluded that R.J. Reynolds did not collude in U.S. tobacco auctions during the class period.

Supplier Behavior in California Energy Crisis, Federal Energy Regulatory Commission, Docket Nos. EL00-95-075 and EL00-98-063, [“Competitive Bidding Behavior in Uniform-Price Auction Markets,”](#) March 2003. For Duke Energy.

Supplier Behavior in California Energy Crisis, Federal Energy Regulatory Commission, Docket Nos. EL00-95-075 and EL00-98-063, [“Rebuttal Addendum: Assessment of Submissions of the California Parties,”](#) March 2003. For Duke Energy.

U.S. Department of Transportation, Docket Nos. FAA-2001-9852, FAA-2001-9854, [“Comments on Alternative Policy Options for Managing Capacity and Mitigating Congestion and Delay at LaGuardia Airport,”](#) June 2002. Recommending auctions to manage congestion at LaGuardia.

Verizon Wireless Petition for Permanent Forbearance from CMRS Number Portability, Federal Communications Commission, WT Docket No. 01-184, [“Declaration of Peter Cramton,”](#) February 2002. Comments in support of wireless number portability. For Leap Wireless.

ISO New England, Docket No. ER02, Federal Energy Regulatory Commission, [“Affidavit of Peter Cramton,”](#) February 2002. Comments on proposed changes to how the energy clearing price is calculated. For ISO New England.

2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services, WT Docket No. 01-14, Federal Communications Commission, [“Ex Parte Declaration of Peter Cramton,”](#) October 2001. Further comments on the CMRS spectrum cap. For Leap Wireless.

ISO New England, Docket No. EL00-62-015, Federal Energy Regulatory Commission, [“Affidavit of Peter Cramton,”](#) June 2001. Comment on modifications to installed capability market. For ISO New England.

2000 Biennial Regulatory Review Spectrum Aggregation Limits For Commercial Mobile Radio Services, WT Docket No. 01-14, Federal Communications Commission, [“Declaration of Peter Cramton,”](#) April 2001. Comments on the CMRS spectrum cap. For Leap Wireless.

C and F Block Broadband PCS Auction, Federal Communications Commission, [“Declaration of Peter Cramton,”](#) March 2001. Comments on the impact of fronts in the C and F Block Broadband PCS auction.

[“Lessons Learned from the UK 3G Spectrum Auction,”](#) May 2001. An expert report on the UK 3G Spectrum Auction. For UK National Audit Office.

[“Market Effectiveness Assessment,”](#) (with Jeffrey Lien) May 2001. An expert report assessing the effectiveness of the electricity restructuring plan in Ontario. For TransCanada.

First Millennium Communications, Inc. and Barbara Laurence vs. Entravision Communications Company, No. 1420009074, “Expert Report of Peter Cramton,” May 2001. Comment on the value of clearing rights for broadcast television stations 59 to 69. For First Millennium Communications and Barbara Laurence.

Pacific Communications vs. American Wireless, Superior Court of Fulton County, Georgia, No. 2000CV20099, [“Reply Declaration of Peter Cramton,”](#) April 2001. Further comments on the impact of a delayed sale of spectrum license by Pacific Communication. For American Wireless.

Pacific Communications vs. American Wireless, Superior Court of Fulton County, Georgia, No. 2000CV20099, [“Expert Affidavit of Peter Cramton,”](#) February 2001. Comments on the impact of a delayed sale of spectrum license by Pacific Communication. For American Wireless.

[“Lessons from the United States Spectrum Auctions,”](#) Prepared Testimony of Peter Cramton before the United States Senate Budget Committee, February 2000.

New England Power Pool, Docket No. EL00-83-000, Federal Energy Regulatory Commission, [“Affidavit of Peter Cramton,”](#) July 2000. Comment on deficiency charge in installed capability market. For ISO New England.

NSTAR Services Company vs. New England Power Pool, Docket No. EL00-83-000, Federal Energy Regulatory Commission, [“Affidavit of Peter Cramton,”](#) June 2000. Further comments on energy price cap as a response to design flaws. For ISO New England.

NSTAR Services Company vs. New England Power Pool, Docket No. EL00-83-000, Federal Energy Regulatory Commission, [“Affidavit of Peter Cramton,”](#) June 2000. Comments on energy price cap as a response to design flaws. For ISO New England.

New England Power Pool, Docket No. EL00-62-000; ER00-2052-000, Federal Energy Regulatory Commission, [“Affidavit of Peter Cramton,”](#) May 2000. Comments on installed capability market. For ISO New England.

New England Power Pool, Docket No. ER00-2016-000, Federal Energy Regulatory Commission, [“Affidavit of Peter Cramton,”](#) April 2000. Comments on one-part vs. three-part bidding in energy market. For ISO New England.

New England Power Pool, Docket No. ER99-4536-000, Federal Energy Regulatory Commission, [“Affidavit of Peter Cramton,”](#) October 1999. Summary of review of reserves and operable capability markets. For ISO New England.

New England Power Pool, Docket No. OA97-237-000, Federal Energy Regulatory Commission, [“Affidavit of Peter Cramton,”](#) October 1998. Reply to comments on review of rules. For ISO New England.

New England Power Pool, Docket No. OA97-237-000, Federal Energy Regulatory Commission, [“A Review of ISO New England's Proposed Market Rules,”](#)(with [Robert Wilson](#)), September 1998. For ISO New England.

Best Digital vs. U.S. West, American Arbitration Association, Denver Office, No. 77 181 00204 97, “Expert Report of Peter C. Cramton,” September 1998. Determine the value of spectrum licenses won by Best Digital in the C-block Broadband PCS auction. For Best Digital.

NextWave vs. Antigone and Devco, Petition to Deny License Proceedings, Federal Communications Commission, [“Statement on the Effect of NextWave’s Participation in the C-block Auction on Antigone and Devco,”](#) March 1997. For Antigone and Devco.

NextWave vs. Antigone and Devco, Petition to Deny License Proceedings, Federal Communications Commission, [“Reply Statement on the Effect of NextWave’s Participation in the C-block Auction on Antigone and Devco,”](#) April 1997. For Antigone and Devco.

Personal

Born on 12 November 1957

Married to [Catherine Durnell Cramton](#)

EXHIBIT PC-2

Redacted - Third Party Designated Confidential Information

EXHIBIT PC-3

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTER FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LTD.,

Claimant,

and

INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS,

Respondent,

and

NU DOTCO, LLC. and VERISIGN, INC.

Amicus Curiae

ICDR CASE NO: 01-18-0004-2702

WITNESS STATEMENT OF PAUL LIVESAY IN SUPPORT OF

ICANN'S REJOINDER AND AMICI'S BRIEFS

Confidential – Attorneys' Eyes Only

Not to be Publicly Disclosed in IRP



I, Paul Livesay, declare as follows:

1. I am a former Vice-President and Associate General Counsel of VeriSign, Inc. (“Verisign” or the “Company”). I have personal knowledge of the matters set forth herein, except where I indicate otherwise, and am competent to testify as to those matters.

2. From 2014 through 2018, I served as a Vice-President and Associate General Counsel for Verisign. In that capacity, I was in charge of intellectual property matters, had responsibility for certain strategic business transactions for the Company, and provided general advice and counseling to the Company’s management on business and legal matters. My position at the company had both business and legal components. My statement is only a statement of facts and not legal reasoning or opinions. Previously, I had been with Verisign in 2009-2010 as Vice-President, Strategy and Management, for Verisign’s digital certificate business.

3. I have been an intellectual property and technology transactions attorney for over twenty-five years. Prior to joining Verisign in 2014, among other roles, I practiced law at the firm of Wilson, Sonsini, Goodrich & Rosati, was General Counsel of RSA Data Security, Inc., was General Counsel at the design firm IDEO LLC, and was Vice-President, Technology, for Symantec Corporation. I am a member of the Bar of the State of California.

The Secondary Market for new gTLDs and Discussions with .WEB Applicants

4. In 2014, I was put in charge of identifying potential business opportunities for Verisign in ICANN’s New gTLD Program. Up until that point, Verisign had participated in the New gTLD Program by filing applications for new TLDs that were variants of its company name (*i.e.*, “.Verisign”) or internationalized versions of Verisign’s existing TLDs, but Verisign had not sought to acquire the rights to a new gTLD not already associated with Verisign.

Redacted - Third Party Designated Confidential Information

. The period for filing new applications as part of the New gTLD Program had ended. Redacted - Third Party Designated Confidential Information



Redacted - Third Party Designated Confidential Information

5. Redacted - Third Party Designated Confidential Information

I studied very closely the New gTLD Applicant Guidebook (the “Guidebook”) published by ICANN, the Auction Rules, and other information regarding the New gTLD Program available on ICANN’s website, www.icann.org, to familiarize myself with the rules applicable to the Program. Redacted - Third Party Designated Confidential Information

6. The Guidebook and Auction Rules do not prohibit applicants from entering into business transactions with other entities with respect to an applied-for TLD. Based on the Guidebook, it is apparent that ICANN’s concern with respect to such transactions is whether a transaction would require re-evaluation of the applicant, which could result in a delay in the resolution of a contention set. For example, Section 4.1.3 of the Guidebook acknowledges that applicants may seek to resolve string contentions (*i.e.*, which of various competing applicants for a TLD would be awarded the TLD) by establishing joint ventures among themselves, which could change the ownership of the applicant or the identity of the applicant itself.¹ The Guidebook cautions that material changes such as these could require re-evaluation, and encourages applicants to combine in ways that do not require re-evaluation: “Applicants are encouraged to resolve contention by combining in a way that does not materially affect the

¹ Afilias C-3 (*gTLD Applicant Guidebook*, Module 4, § 4.1.3, available at <https://newgtlds.icann.org/en/applicants/agb>).



remaining application. Accordingly, new joint ventures must take place in a manner that does not materially change the application, to avoid being subject to re-evaluation.”²

7. Similarly, Clause 68 of the Auction Rules recognizes that applicants may enter into “settlement agreements or post-Auction ownership transfer arrangements, with respect to any Contention Strings in the Auction”; although once within an active auction timeline, these activities are prohibited during a “Blackout Period” extending from the deposit deadline for an auction through full payment of the winning auction bid, but permitted both for the period prior to and after the Blackout Period.³

8. Redacted - Third Party Designated Confidential Information

). Donuts was a major participant in the new gTLD Program, filing hundreds of applications for new gTLDs. Under the arrangement between Donuts and Demand Media, which was entered into while the new gTLD applications were pending, the gTLDs would be transferred to Demand Media after rights to the subject new gTLDs were awarded to Donuts in exchange for Demand Media’s assistance in funding Donuts’ acquisition of the gTLDs. Donuts also was one of the several applicants for the .WEB gTLD. Attached hereto as Exhibit A is a true and correct copy of a press release dated June 11, 2012 from Demand Media describing its arrangement with Donuts (<https://ir.leafgroup.com/investor-overview/investor->

² *Id.*

³ Afilias C-4 (*Auction Rules for New gTLDs, Indirect Contentions Edition, Version 2015-02-24*, Clause 68(a) & (b), available at <https://newgtlds.icann.org/en/applicants/auctions>).

press-releases/press-release-details/2012/Demand-Media-to-Participate-in-Historic-Expansion-of-Generic-Top-Level-Web-Domain-Name-Extensions/default.aspx).

9. Through my research, I also became aware that it was not uncommon for entities interested in acquiring a new gTLD to form a special purpose entity to be the applicant for a new gTLD. For example, I understand that Donuts formed a separate special purpose entity for each gTLD for which it applied. For .WEB, Donuts formed Ruby Glen, LLC and used that entity to apply for the gTLD. By contrast, Google used the same entity, Charleston Road Registry Inc., to apply for all of the new gTLDs it sought to acquire.

10. One effect of the use of special purpose entities was to facilitate secondary market transfers of new gTLDs through the transfer of the special purpose entity independent of other assets of a party supporting the applicant. Another effect of the use of such entities can be to maintain as confidential the party for whose benefit the application was being pursued. In this regard, the new gTLD application form required the disclosure of the name of the applicant and the identity of any person or entity that owned more than 15% of the applicant.⁴ In some instances, this resulted in the disclosure of the real party in interest. For example, Google is identified as the owner of Charleston Road Registry Inc. In other instances, the requirement for a disclosure of the real party in interest was avoided by forming another entity to be the parent of the applicant, so the real parties in interest were not disclosed as the parent entity in the application. Donuts formed “Covered TLD LLC,” for example, and made that entity the disclosed parent entity on many of its applications.

11. Redacted - Third Party Designated Confidential Information

ICANN’s website identified each new gTLD for which an application had been filed and listed the identity of applicants along with a copy of non-confidential parts of their respective applications. Redacted - Third Party Designated Confidential Information

⁴ Afilias C-3 (*gTLD Applicant Guidebook*, Module 2, Attachment to Module 2, *Evaluation Questions and Criteria*, Question 11(c), available at <https://newgtlds.icann.org/en/applicants/agb>).

12. Redacted - Third Party Designated Confidential Information

13. Redacted - Third Party Designated Confidential Information

14. Redacted - Third Party Designated Confidential Information

The Domain Acquisition Agreement between Verisign and NDC

15. Redacted - Third Party Designated Confidential Information

16. Redacted - Third Party Designated Confidential Information

. Private

auctions are conducted on terms privately negotiated among the competing bidders for the TLD, and private auction agreements commonly include terms for the losing applicants to split the proceeds of the auction among themselves. In private auctions, which may have been the most common form of resolving contention sets, there are no Guidebook requirements, and commonly no other requirements, with respect to how a participant conducts its bid, disclosure of financing terms, disclosure of interested parties, or post award intentions of the participants. Indeed, some applicants seem to have made a lucrative business out of losing private auctions. In a public auction, by contrast, the terms are not privately negotiated among the participants/competitors, and the proceeds of the auction are placed in a fund to be set up by ICANN for investment benefitting the Internet community as a whole rather than benefitting the losing bidders in a private auction.

17. Redacted - Third Party Designated Confidential Information

18. On August 15, 2015, NDC and Verisign entered into the Domain Acquisition Agreement (“DAA”). A copy of the DAA is attached hereto as Exhibit D. The DAA is a conditional agreement pursuant to which Verisign agreed to provide the funds for NDC to participate in an auction for the .WEB gTLD. In the event NDC prevailed at the auction and



entered into a registry agreement for .WEB with ICANN -- upon application to ICANN and with ICANN's consent -- NDC would assign the .WEB registry agreement to Verisign.

19. Redacted - Third Party Designated Confidential Information

20. The DAA is compliant with all terms of the Guidebook and consistent with transactions by others with respect to the new gTLD Program. Verisign did not acquire any interest in or control over NDC. The application for .WEB was not transferred to Verisign. The DAA's registry agreement assignment provision was conditional and contingent, applied only to an executed registry agreement following an award of .WEB to NDC, and was subject to ICANN's prior consent. The structure of the agreement also was consistent with industry practices in the secondary market for new gTLD applications of which I became aware in my research of the New gTLD Program, as explained above and as further documented below.

21. Redacted - Third Party Designated Confidential Information

22. The express terms of the DAA establish that it does not transfer NDC's application for .WEB and that any transfer to Verisign would be in the future and contingent on



ICANN's normal processes for such transfers, including application to ICANN for consent to an assignment of the registry agreement and ICANN's consent. For example, the DAA provides:

Redacted - Third Party Designated Confidential Information

Thus, a transfer or assignment would only take place after a registry agreement was signed between ICANN and NDC, ICANN's subsequent consent to an assignment of the registry agreement to Verisign, and the subsequent execution and delivery of the Transfer Agreement.

23. The lack of any transfer of rights in NDC's Application or assignment of a registry agreement is further confirmed by the terms of the DAA that permitted a termination of
Redacted - Third Party Designated Confidential Information



24. Redacted - Third Party Designated Confidential Information

25. The Guidebook does not require an applicant to reveal the existence of, sources or amounts of any funding for a public or private auction for a new gTLD or other resolution of a contention set. ICANN's new gTLD application requires applicants to provide certain financial information to ICANN regarding its ability to *operate* a new gTLD.⁵ There is no requirement that an applicant disclose any information regarding funding for participation in an auction. It is further my understanding that financial information submitted as part of a gTLD application also is designated confidential by ICANN and not disclosed to other applicants or the public. Accordingly, under the terms of the new gTLD Program, even if the sources or terms of their funding for participation in the auction were subject to disclosure to ICANN, which they were not, other members of the contention set would never have access to that information.

26. As another example of the confidential nature of financial arrangements, it was disclosed after the fact that Automattic Inc. ("Automattic") financed the successful bid in a private auction for the .BLOG gTLD by applicant Primer Nivel S.A. ("Primer Nivel"). The auction took place in February 2015. In May 2016, before the .WEB auction, it was reported that Primer Nivel's bid had been financed by Automattic, the owner of the blogging platform wordpress.com. According to press reports, Automattic paid Primer Nivel \$19 million in exchange for Primer Nivel's agreement to assign the .BLOG gTLD to Automattic if it was successful in the private auction. One of the press reports that I reviewed regarding this

⁵ Afilias C-3 (*gTLD Applicant Guidebook*, §§ 1.2.1.2, 1.2.2 & 2.2.2.2, available at <https://newgtlds.icann.org/en/applicants/agb>).



transaction is attached hereto as Exhibit E (Kevin Murphy, WordPress Reveals IT Bought .blog For \$19 Million, Domain Incite (May 13, 2016), <http://domainincite.com/20440-wordpress-reveals-it-bought-blog-for-19-million>). This funding transaction appears to have been kept confidential and not revealed to ICANN or other bidders, which included an Afilias entity (Afilias Domains No. 1 Limited), prior to the .BLOG auction. Specifically, a press report states that WordPress financed Primer Nivel’s winning auction bid but “wanted to stay stealth while in the bidding process and afterward in order not to draw too much attention.” *See* Ex. F (Alan Dunn, Knock Knock WordPress Acquires Blog for 19 million, NameCorp (May 15, 2016), <https://namecorp.com/knock-knock-wordpress-acquires-blog-for-19-million/>). On April 29, 2016, ICANN consented to the assignment of .BLOG from Primer Nivel to Knock Knock WHOIS There, LLC, a subsidiary of Automattic. *See* Ex. G (<https://www.icann.org/resources/agreement/blog-2015-05-14-en>). To the best of my knowledge, Afilias did not object to the .BLOG auction after Automattic’s role in financing Primer Nivel’s bid was revealed. This transaction further supported my understanding then that pre-auction financing agreements, such as the DAA, were consistent with the Guidebook.

The Assurances of Performance

- 27. Redacted - Third Party Designated Confidential Information



28. Redacted - Third Party Designated Confidential Information

[Redacted content]



Afilias Claims in the IRP

29. It is my understanding that Afilias argues in this IRP that the DAA constitutes an impermissible transfer by NDC of rights in its new gTLD application. Such an argument is inconsistent with the express terms of the DAA and Confirmation of Understandings described above. Further, such an interpretation of the Guidebook would be contrary to industry practices with respect to the New gTLD Program that I learned in researching the Guidebook and secondary market.

30. Redacted - Third Party Designated Confidential Information

31. Redacted - Third Party Designated Confidential Information

A public auction is specifically provided for in the Guidebook, is fair and conducted under ICANN's oversight, and I am not aware of any requirement under the Guidebook that an applicant agree to a private auction. To the contrary, the Guidebook provides a private auction may only be conducted if *all* members of the Contention Set agree to have a private auction.⁶

⁶ Afilias C-3 (*gTLD Applicant Guidebook*, §§ 4.13 & 4.3, available at <https://newgtlds.icann.org/en/applicants/agb>).



32. Redacted - Third Party Designated Confidential Information

33. Redacted - Third Party Designated Confidential Information

34. Redacted - Third Party Designated Confidential Information



35. I understand that Afilias has stated that its bidding in the .WEB auction was constrained by the terms of its financing arrangement, which limited its bidding to no more than \$135 million.⁷ The limits on Afilias' funding demonstrates that Afilias' own conduct as a bidder during the .WEB auction was limited by its own financing arrangements, appearing to confirm again the industry practice of financing arrangements with parties not part of the .WEB contention set.

The Auction

36. In accordance with the DAA, Verisign provided funds for NDC to use in bidding for the .WEB gTLD in the public auction. NDC submitted a final bid that ICANN deemed to be and announced as the winning bid. Shortly after the auction, NDC paid ICANN \$135 million as the winning bid for the .WEB gTLD. Those funds were provided to NDC by Verisign.

37. IRedacted - Third Party Designated Confidential Information

38. Finally, I understand that Afilias makes a claim that there was some form of collusion between Verisign and ICANN during or following the auction proceedings. This is untrue. I was responsible for this transaction. I did not have any communications with ICANN before or following the auction process. Redacted - Third Party Designated Confidential Information

⁷ See Witness Statement of Ram Mohan, 1 November 2018, ¶ 35, fn. 38 (<https://www.icann.org/en/system/files/files/irp-afili-as-witness-statement-mohan-redacted-26nov18-en.pdf>).



. As a major participant in the DNS, Verisign has regular dealings with ICANN on a range of matters. Also, with respect to the questionnaire ICANN sent out to Verisign, NDC and contention set members who objected to ICANN regarding the public auction for .WEB, I am unaware of any advance notice by ICANN to NDC or Verisign of the questionnaire.

I swear under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 1st day of June 2020 at San Carlos, California.

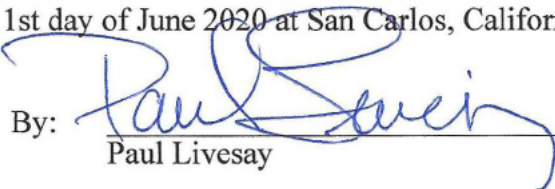
By: 
Paul Livesay

EXHIBIT PC-4

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INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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

VOLUME VII
ARBITRATION HEARING HELD BEFORE
AUGUST 11, 2020

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



(310) 207-8000 Los Angeles	(415) 433-5777 San Francisco	(949) 955-0400 Irvine	(858) 455-5444 San Diego
(310) 207-8000 Century City	(408) 885-0550 San Jose	(760) 322-2240 Palm Springs	(800) 222-1231 Carlsbad
(916) 922-5777 Sacramento	(800) 222-1231 Martinez	(702) 366-0500 Las Vegas	(800) 222-1231 Monterey
(951) 686-0606 Riverside	(818) 702-0202 Woodland Hills	(702) 366-0500 Henderson	(516) 277-9494 Garden City
(212) 808-8500 New York City	(347) 821-4611 Brooklyn	(518) 490-1910 Albany	(914) 510-9110 White Plains
(312) 379-5566 Chicago	00+1+800 222 1231 Paris	00+1+800 222 1231 Dubai	001+1+800 222 1231 Hong Kong

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INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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

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TUESDAY, AUGUST 11, 2020
ARBITRATION HEARING HELD BEFORE

PIERRE BIENVENU
RICHARD CHERNICK
CATHERINE KESSEDJIAN

VOLUME VII (Pages 1113-1308)

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

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A-P-P-E-A-R-A-N-C-E-S

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FOR THE CLAIMANT AFILIAS DOMAINS NO. 3 LTD.:

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

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

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

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

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

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

FOR AMICI NDC:

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

FOR AMICI VERISIGN:

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

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A-P-P-E-A-R-A-N-C-E-S
---o0o---

THE TRIBUNAL:

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

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INDEX OF EXAMINATION

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PAUL LIVESAY	PAGE
CROSS-EXAMINATION BY MR. LITWIN	1121

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
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CALIFORNIA, AUGUST 11, 2020

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

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

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

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

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

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

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

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

1 THE WITNESS: Correct.

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

5 THE WITNESS: Correct.

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

11 THE WITNESS: I do.

12 ARBITRATOR BIENVENU: Thank you.

13 Mr. Johnston.

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

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

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

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

24 (Discussion off the record.)

25 ARBITRATOR BIENVENU: Maybe, Mr. Livesay,

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

4 (Discussion off the record.)

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

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

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

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

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

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

23 //

24 //

25 //

1 CROSS-EXAMINATION

2 BY MR. LITWIN

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

9 A. All right.

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

17 A. The lower right-hand corner?

18 Q. Correct.

19 A. Okay.

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

25 A. Yes.

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

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

5 (Discussion off the record.)

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

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

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

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

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

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

25 A. Correct.

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

5 A. Correct.

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

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

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

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

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

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

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

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

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

5 Q. Understood, Mr. Livesay.

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

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

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

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

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

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

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

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

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

1 May regarding this matter.

2 Q. In early May of?

3 A. This year.

4 Q. Of this year?

5 A. Yeah.

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

9 A. No.

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

13 A. Nope.

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

16 A. Nope.

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

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

25 Q. Who gave you this assignment?

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

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

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

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

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

16 Q. Okay. That's fair enough.

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

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

21 Q. I think that's right.

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

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

1 A. Sure, absolutely.

2 Q. How often?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 pursue an actual agreement with a contention
2 member.

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

5 A. He's general counsel.

6 Q. And Mr. Bidzos?

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

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

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

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

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

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

22 A. Sure.

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

24 A. Yes.

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

1 this project at all?

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

4 Q. Do you know Mr. McAuley?

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

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

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

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

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

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

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

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

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

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

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

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

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

20 Do you recall that?

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

23 Q. Yes.

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

25 Q. Did you follow the progress of the new

1 gTLD Program during your time at Symantec?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8 MR. JOHNSTON: That's correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

9 A. I did, yep.

10 Q. And the auction rules?

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

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

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

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

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

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

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

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

3 A. Like what?

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

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

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

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

1 Redacted - Third-Party Designated Confidential Information

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

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

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

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

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

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

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

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

23 Do you see that, sir?

24 A. Yep.

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

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

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

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

16 Do you see that, sir?

17 A. Yep.

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

21 A. That's fair.

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

25 A. It says it right there, correct.

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

5 A. That's what it says.

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

8 Do you see that, sir?

9 A. What page number are we on?

10 Q. Page 32 of Tab 4.

11 A. All right. Yep.

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

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

23 A. That's what it says.

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

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

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

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

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

1 A. That's correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 that part. That would be great.

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

5 Have you seen this document before?

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

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

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

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

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

20 Q. BY MR. LITWIN: Correct.

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

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

3 A. Nope.

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

7 A. Say that again?

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

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

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

17 A. As far as I am aware.

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

1 appropriate forms."

2 Do you see that, sir?

3 A. I see that, yep.

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

8 Do you see that at the bottom of that?

9 A. Yep.

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

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

21 A. That's what it says.

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

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

3 Do you see that, sir?

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

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

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

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

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

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

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

20 Q. Excuse me?

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

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

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

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

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

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

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

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

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

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

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

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

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

20 Is that what it says, sir?

21 A. That's what it says.

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

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

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

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

11 A. This is a hypothetical question?

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

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

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

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

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

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

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

12 A. That's what it says.

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

18 A. You read the line.

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

1 correct?

2 A. That is what it says.

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

7 A. That's what it says.

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

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

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

18 A. That's what it says.

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

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

25 Q. I am not trying to read anything

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

6 A. Yep.

7 Q. Do you see that?

8 A. Yeah.

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

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

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

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

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

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

22 Q. I am just reading the rules.

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

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

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

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

14 Q. Well, what I am asking --

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

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

20 Q. Please continue, Mr. Livesay.

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

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

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

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

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

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

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

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

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

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

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

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

25 Like I said, the way we approached this is

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

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

11 A. That is exactly what it says.

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

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

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

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

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

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

8 A. That's right.

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

13 A. That's what it says.

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

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

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

25 MR. JOHNSTON: Stop interrupting.

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

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

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

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

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

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

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

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

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

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

12 And then we went on.

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

19 I'm sorry, please --

20 (Discussion off the record.)

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

23 (Discussion off the record.)

24 ARBITRATOR BIENVENU: Shall I repeat my
25 question?

1 (Discussion off the record.)

2 THE WITNESS: Please repeat the question.

3 (Discussion off the record.)

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

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

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

13 (Discussion off the record.)

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

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

24 ARBITRATOR BIENVENU: Excellent.

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

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

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

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

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

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

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

23 Q. Yes.

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

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

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

9 THE WITNESS: That's good.

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

13 THE WITNESS: Okay. Thank you.

14 ARBITRATOR BIENVENU: Thank you.

15 (Whereupon a recess was taken.)

16 ARBITRATOR BIENVENU: Thank you very much.

17 Mr. Johnston, you are there?

18 MR. JOHNSTON: Yes, I am.

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

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

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

25 You ready to proceed, Mr. Litwin?

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

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

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

6 ARBITRATOR BIENVENU: We can hear you.

7 MR. LITWIN: Much better.

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

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

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

25 Q. Okay. Thank you.

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

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

11 Redacted - Third-Party Designated Confidential Information

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18 A. Redacted - Third-Party Designated Confidential Information

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

21 Are you there, sir?

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

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

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

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

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

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

10 A. Yep.

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

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

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

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

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

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

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

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

10 Q. I --

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

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

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

23 You are familiar with that document?

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

1 again in advance of this testimony.

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

5 THE WITNESS: Yep.

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

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

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

22 THE WITNESS: Got it.

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

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

1 Q. In addition to your review of the
2 guidebook and other rules governing the new gTLD
3 Program, Redacted - Third-Party Designated Confidential Information
4
5
6

7 A. Redacted - Third-Party Designated Confidential Information

8 Q. Redacted - Third-Party Designated Confidential Information
9
10
11

12 A. In the sense -- how do you mean,
13 special-purpose vehicles -- go ahead. I am
14 listening.

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

18 A. Oh, correct, right, in terms of special.
19 Like in this example I found that sometimes an
20 entity would have a shell company for each
21 individual company, sometimes held by a parent, or
22 sometimes all the applications were held by one
23 entity, such as the way Google did it with
24 Charleston Road Registry. Redacted - Third-Party Designated
Confidential Information

25

1 Q. And we can look down at Paragraph 10,
2 where you continue your discussion about the
3 special purpose entities. You write, "For example,
4 Google is identified as the owner of Charleston
5 Road Registry, Inc.," correct?

6 A. Correct.

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

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

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

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

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

1 applications as the owner of Charleston Road
2 Registry.

3 Do you recall that?

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

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

16 A. Correct.

17 Q. You see that, sir?

18 A. Yep.

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

21 A. Correct.

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

1 another shell, in your words, correct?

2 A. I believe that's correct.

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

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

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

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

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

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

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

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

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

5 A. Correct.

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

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

21 Do you see that?

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

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

1 A. It was an example, yes.

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

4 Do you see that?

5 A. Yep.

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

10 A. The dates look correct.

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

14 A. That would be the case, yeah.

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

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

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

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

25 Q. Did you review these 107 applications by

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

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

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

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

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

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

23 MR. LITWIN: Very good.

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

1 Chuck, let me know when you get it.

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

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

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

13 Again, I am sorry for the delay.

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

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

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

24 MR. LITWIN: Got it.

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

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

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

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

7 A. Yep, yep.

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

10 Do you see that, sir?

11 A. Yep, yep.

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

19 Do you see that, sir?

20 A. I see that.

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

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

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

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

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

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

19 A. Correct.

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

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

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

5 Q. In the application --

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

9 Q. Sir --

10 A. Which is what you mean to imply.

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

14 A. Go ahead.

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

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

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

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

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

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

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

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

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

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

25 A. Based on the --

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

2 Objection; lack of foundation.

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

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

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

20 ARBITRATOR BIENVENU: Mr. Litwin?

21 MR. LITWIN: I can rephrase.

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

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

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

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

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1 agreement would have provided --

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

5 ARBITRATOR BIENVENU: Mr. Livesay.

6 THE WITNESS: Yes, sir.

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

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

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

19 THE WITNESS: Understood.

20 ARBITRATOR BIENVENU: Very well.

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

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

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ARBITRATOR BIENVENU: Mr. Litwin.

MR. LITWIN: Thank you, Mr. Chairman.

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

Do you recall that testimony, sir?

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

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

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

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

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

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

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

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

10 MR. LITWIN: Understood, your Honor.

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

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

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

18 Mr. Litwin, please pose your question.

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

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

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

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

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

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

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

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

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

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

1 THE WITNESS: Fair enough.

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

5 THE WITNESS: Fair enough.

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

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

22 THE WITNESS: Fair enough.

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

25 MR. LITWIN: Thank you.

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

4 A. Correct.

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

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

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

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

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

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

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

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

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

20 A. Nope, not aware of that.

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

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

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

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

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

7 A. Correct.

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

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

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

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

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

19 A. Yeah. So your question is what?

20 Q. Let me ask my question again.

21 A. Yeah.

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

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

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

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

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

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

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

15 A. I believe that sounds right.

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

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

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

24 Do you see that?

25 A. I do.

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

3 A. I believe that's correct.

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

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

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

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

15 A. Sounds correct.

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

18 A. I believe that's the case.

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

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

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

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

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

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

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

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

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

20 ARBITRATOR BIENVENU: Very well.

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

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

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

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

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

11 THE WITNESS: All right. Thank you.

12 (Whereupon a recess was taken.)

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

16 THE WITNESS: True, correct.

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

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

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

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

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

6 A. Yes.

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

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

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

20 A. I do, yes.

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1 financing an opportunity.

2 Q. Did VeriSign provide financing to NDC?

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

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

A. Correct.

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

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

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

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

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

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

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

A. Correct.

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A. Correct.

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

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

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

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

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

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

1 how this worked here.

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

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

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22 Q. Right.

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

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

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

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

A. Yeah.

Q. What does that mean?

A. Another word for saying seems like a very

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

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

A. Yes.

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

10 A. That sounds correct, yeah.

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

15 A. I believe so.

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

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

5 A. That's my recollection, correct.

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

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

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

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

16 A. Okay.

17 Q. Now, if that is correct --

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

21 A. This is not in the binder?

22 Q. It is not.

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

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

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

4 A. That's correct.

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

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

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

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

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

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

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

1 the next round.

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

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

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

18 A. However improbable, but okay.

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1 Q. And Mr. Rasco, I think you said it is
2 highly implausible, or words to that effect,
3 because, in fact, as we established earlier,
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Q. I will move on, Mr. Livesay.
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Q. Are you aware that Afilias has claimed in this IRP that NDC was obligated to disclose the existence and terms of the DAA to ICANN upon the execution of the DAA?

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

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

4 A. Correct.

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

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

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

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

16 Q. You provided -- sorry.

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

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

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

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

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

6 Q. Okay.

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

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

I am going to move on.

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

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2 ARBITRATOR BIENVENU: Which paragraph?

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

5 ARBITRATOR BIENVENU: Which paragraph?

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

8 MR. VAUGHAN: It is on Page 8.

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

10 ARBITRATOR BIENVENU: Thank you.

11 THE WITNESS: I am reading that.

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

15 A. Correct.

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

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

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

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

A. Correct.

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Q. Now, this confirmation was signed two days

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

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

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

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

7 Q. There you go. Okay.

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

12 A. Correct.

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

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

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

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

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

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

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

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

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21 A. Redacted - Third-Party Designated Confidential Information

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

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

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

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

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

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

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5 Do you see that, sir?

6 A. Yes, yes.

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

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

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

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

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

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

A. There it is.

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

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

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

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

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

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

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

1 Q. My question was --

2 A. Yep.

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

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

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

13 ARBITRATOR BIENVENU: Very well.

14 (Whereupon a recess was taken.)

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

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

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

20 ARBITRATOR KESSEDJIAN: Indeed, he's back.

21 ARBITRATOR BIENVENU: Yes, go ahead.

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

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

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

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

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

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

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

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

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

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

25 Do my colleagues have questions for

1 Mr. Livesay?

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

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

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

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

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

13 ARBITRATOR BIENVENU: Thank you.

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

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

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

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

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

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

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

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

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

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

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

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

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

24 Mr. Litwin, is Chuck available?

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

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

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

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

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

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

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

22 (Discussion off the record.)

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

1 MR. LITWIN: I believe it is.

2 ARBITRATOR BIENVENU: Okay. Very well.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 Is there a mechanism for someone who, like

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

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

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

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

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

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

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

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

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

24 THE WITNESS: Right.

25 ARBITRATOR BIENVENU: -- whether you

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

5 THE WITNESS:

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

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

25 ARBITRATOR KESSEDJIAN: Mr. Chairman --

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

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

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

11 THE WITNESS: Yeah.

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

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

20 THE WITNESS: Correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 collusive look to it for someone like VeriSign.

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

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

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

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

1 but it was happening anyway.

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

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

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

23 ARBITRATOR KESSEDJIAN: Okay.

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

1 that's straight and open.

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

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

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

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

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

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

8 No more questions, Mr. Chairman.

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

12 Mr. Chernick, any questions?

13 ARBITRATOR CHERNICK: No thank you.

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

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

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

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

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

24 (Whereupon a recess was taken.)

25 ARBITRATOR BIENVENU: Mr. Johnston, are we

1 ready to go?

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

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

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

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

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

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

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

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

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

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

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

23 ARBITRATOR BIENVENU: Thank you, Mr. Ali.

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

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

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

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

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

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

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

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

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

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

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

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

19 ARBITRATOR BIENVENU: Very clearly.

20 MR. MARENBERG: Thank you.

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

25 And I also express agreement with

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 after that.

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

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

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

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

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

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

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

3 Mr. Johnston.

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

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

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

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

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

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

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

25 Because once it goes beyond that

1 definition of jurisdiction, it directly impacts our
2 interests without an equal or fair representation.

3 But in terms of what the Panel's done as
4 opposed to the way the rules are attempted to be
5 used here, I only have compliments to offer.

6 ARBITRATOR BIENVENU: Thank you very much,
7 Mr. Johnston.

8 Can I ask, then, for the parties' thoughts
9 about posthearing submissions? I assume you have
10 had time over the past 24 hours to discuss that.

11 Mr. Ali, do you want to?

12 MR. ALI: Yes, we have, Mr. Chairman. I
13 think we agreed on a date for the filing -- the
14 first round filing of the posthearing submissions,
15 which is October 8th; is that correct, Jeff?

16 MR. LeVEE: Yes. I don't know that the
17 Amici have confirmed their agreement to that date,
18 but ICANN and Afilias have agreed that we will
19 submit our posthearing brief on 8 October of 2020.

20 If I might add, just so there's no
21 ambiguity, I would propose that we do so at 8:00
22 p.m. Pacific so that everyone knows exactly what
23 time they should be submitting their briefs.

24 MR. ALI: That's fine. Of course, this is
25 subject to your comments earlier, Mr. Chairman,

1 about the Panel having -- needing time to define
2 the questions and consider the evidence that you
3 have received over the course of the past seven
4 days.

5 ARBITRATOR BIENVENU: Did you discuss with
6 your colleagues, Mr. Ali, the question of the
7 length of the posthearing submissions?

8 MR. ALI: We did, and as you can imagine,
9 we had lengthy emails about the length, and we
10 couldn't reach agreement.

11 Our basic question is that --

12 ARBITRATOR BIENVENU: I am glad everyone's
13 sense of humor remains intact.

14 MR. ALI: Hopefully the posthearing briefs
15 will be shorter than the length of the emails.

16 In any event, our position is that we
17 should have the same number of pages as ICANN and
18 Amici put together, so that if each of the ICANN
19 and Amici have 50 pages each, we get 150 pages
20 simply because we need to respond to all of the
21 various arguments.

22 As we have seen, you have got a very
23 developed and large evidentiary record now based on
24 this hearing, and as we have seen previously,
25 particularly with the Amici, they cross-refer to

1 each other. So certainly it would be extremely
2 imbalanced if we were to be given the same number
3 of pages as each of ICANN and the Amici
4 individually.

5 So that's the starting -- that's the
6 discussion that we had, and ultimately I think we
7 would have to leave it with the Panel.

8 I would just make one other point, is that
9 the evidence that's been elicited here has been
10 through our cross-examination. So we would need to
11 have the opportunity to put all of that evidence in
12 context.

13 The other point is that insofar as
14 simultaneous submissions are concerned, it doesn't
15 really matter what the page limits are because at
16 this point, we don't have any further proceedings.
17 What we are trying to do is to put the evidence in
18 context and to help you, the panelists, by bringing
19 all of the various points, to crystallize them, to
20 put them in the context for you.

21 At the end of the day, it doesn't -- it is
22 not to our client's benefit to deluge you with
23 paper, but rather to present the case as clearly as
24 we can now that we have a full evidentiary record.

25 So that's where we are coming from, sir.

1 MR. LeVEE: May I?

2 ARBITRATOR BIENVENU: Yes. I thought he
3 was paving the way for the number, and you would
4 give us the number.

5 MR. LeVEE: Well, we did have a number of
6 discussions. Mr. Ali started, as he just
7 indicated, off the discussion by indicating that he
8 did not --

9 MR. ALI: Jeff, may I just interrupt you
10 for a second? Vice President Biden has just
11 nominated Kamala Harris for vice president.
12 Historic moment. Not to interrupt this historic
13 moment that we ourselves are engaged in here.

14 MR. LeVEE: So Mr. Ali did initially
15 suggest that the page limit -- that there not be a
16 page limit. ICANN strongly opposes that. I think
17 there should be limitations.

18 And then the issue was, well, should
19 Afiliias have some additional pages because they are
20 responding to more briefs, but we only are going to
21 file one brief. So Afiliias -- we have simultaneous
22 briefs, so Afiliias isn't going to be responding to
23 briefs. They are going to be submitting their
24 briefs just as ICANN is submitting its brief, just
25 as the Amici are submitting theirs.

1 So under the equality of treatment
2 principle, ICANN very much would like to have the
3 same number of pages as Afiliias. I understand, but
4 the Amici can confirm separately, that they have
5 agreed that whatever the page limit ICANN and
6 Afiliias are given, that they would have that number
7 of pages combined. So by way of example, if ICANN
8 and Afiliias each had 75 pages, then the Amici
9 combined would submit 75 pages.

10 I will tell you that ICANN proposed that
11 we submit a brief of 50 pages because we think 50
12 would be sufficient, and we're not looking to have
13 the Panel have another set of briefs that are
14 literally hundreds of pages long.

15 I think it is ultimately up to the Panel
16 to determine the length, but I do think that this
17 is a situation where ICANN and Afiliias should have
18 the same number of pages. If we don't use the
19 number that we are given, that's our prerogative,
20 and if the Amici are willing to -- still willing to
21 have collectively the number of pages that ICANN
22 and Afiliias have, I think that that would be
23 extraordinarily fair. It would be consistent with
24 the ICDR arbitration rules.

25 So that would be our proposal. I'll be

1 candid, Mr. Ali said he wanted 150 pages. We have
2 no interest in giving the Panel 450 pages or 350
3 pages, whatever that would work out with the Amici.
4 We think it is too much. There has been a lot of
5 ink provided to the Panel already, positions that
6 have been taken, and now the parties need to
7 comment on the what the evidence was.

8 And while it is true that Afilias did most
9 of the cross-examining, some of that was because
10 they withdrew witnesses. So the parties are where
11 we are, and I think ICANN's proposal is
12 extraordinarily reasonable and consistent with the
13 rules.

14 MR. ALI: Chairman, may I make a
15 suggestion here?

16 ARBITRATOR BIENVENU: Sure.

17 MR. ALI: Insofar as the responses to the
18 Amici is concerned, the Panel, of course, will be
19 aware of the page limits. There the parties have
20 agreed that the Amici shall each be permitted to
21 file separate briefs of 50 pages in length and that
22 the parties shall each be permitted to file briefs
23 100 pages in length.

24 As Mr. LeVee says, if we choose not to use
25 100 pages, that's, of course, our respective

1 prerogatives. That would be, I think, a good way
2 of resolving this matter, given the fact that
3 that's what we agreed, and that's what the Panel
4 accepted previously. So 50 pages for VeriSign, 50
5 pages for NDC, and 100 pages each for ICANN and
6 Afiliias would be my suggestion.

7 ARBITRATOR BIENVENU: Very well. You will
8 leave it with us.

9 MR. JOHNSTON: Can Amici be heard on this,
10 please?

11 ARBITRATOR BIENVENU: Yes, of course.

12 MR. JOHNSTON: At least I -- I am not sure
13 about Mr. Marenberg, but two months to prepare
14 postclosing briefs in a seven-day trial is
15 extraordinary in our view, and -- my view, it's a
16 lot of time.

17 As one of my colleagues said, memories
18 fade, and we just had this trial and hundreds of
19 pages of briefing immediately before the trial. It
20 seems to me that this could be pushed along more
21 quickly, which might be easier on everybody because
22 they will have this fresh in mind and not have to
23 reinvent the wheel in starting to think about their
24 posthearing briefs.

25 I am very cognizant that the Panel would

1 like time to pose some questions, and I think
2 that's a superb idea because it will hopefully
3 guide the briefs in the right direction as opposed
4 to, again, going over the whole history as though
5 this trial never took place.

6 So we started off proposing two weeks and
7 then went up to a month. But in terms of our
8 position, two months is a bit long.

9 So we would ask that it be a little bit
10 shorter and that the briefs not, again, be in the
11 hundreds of pages of length. There are -- you
12 know, it sometimes gets lost there that there are
13 people with other rights and interests in moving
14 this forward than just Afilias and ICANN.

15 These are people who went in and paid
16 their money at the auction and would like to see
17 this resolved and back to the Board to follow the
18 proper processes, at least as we see those
19 processes.

20 So we have some concern about the length
21 of time that's been set, and we have concerns about
22 the size of the briefs that Afilias wants because,
23 again, we have just had this trial. We are not
24 going to retry everything, hopefully, again based
25 on briefs, although I have no doubt that the

1 Afilias briefs will be excellent. We have seen
2 quite a few of them already.

3 ARBITRATOR CHERNICK: Mr. Chairman, is it
4 contemplated that upon the submission of the
5 posthearing briefs, the matter will be submitted
6 for decision to the Panel without necessity of
7 further argument?

8 ARBITRATOR BIENVENU: Well, that was the
9 next point I was going to raise. You recall that
10 in the charts -- the chart, singular, entitled
11 "Topics for Prehearing Conference" that was
12 delivered to the Panel after the prehearing
13 conference of 29 July, there was a box for closing
14 argument. There was disagreement -- sorry.

15 I think everybody agreed that it would be
16 at the discretion of the Panel, and the way we put
17 it was that we would decide after receiving
18 posthearing briefs, but that in the event that we
19 considered that closing argument would be helpful,
20 we would agree today or in the ensuing days on a
21 date for that purpose. It would be penciled into
22 everybody's agenda, and if ever we need to use it,
23 the date will be reserved.

24 So that was the last topic I was going to
25 cover.

1 I think normally we should not need
2 closing argument in addition to a prehearing --
3 sorry, posthearing briefs, but, you know, the
4 question having been raised by the parties, I am
5 happy to leave it aside as a possibility. But we
6 should fix the date right away so that everybody is
7 available if that is to happen.

8 I don't foresee it as needed at the
9 present time, but --

10 MR. ALI: Has the Panel discussed
11 potential dates so that we can consider?

12 ARBITRATOR BIENVENU: We have not. We
13 have not. That's a good suggestion, Mr. Ali.
14 Maybe we should send you a list of dates and the
15 parties can let us know what works for everybody.

16 MR. ALI: If I may just comment on what
17 Mr. Johnston said regarding the timing of the
18 posthearing briefs. Number one, state the obvious,
19 the parties agreed on a date.

20 Number two, harkening back to the comment
21 I made regarding the prehearing stage of this
22 arbitration, there is -- there are commercial
23 interests, of course, at play, but there are also
24 human frailties and human abilities. And my team
25 members are all taking a much-deserved break.

1 And then we have commitments as well that
2 in the way -- I had initially started out with
3 Mr. LeVee asking for October 15th or 16th, and we
4 compromised. I think I said October 9th, and ICANN
5 wanted October 8 because of other commitments that
6 ICANN has. So I think that that is fairly
7 reasonable, and I think a customary length of time
8 in international arbitration.

9 Certainly we are not intending to
10 regurgitate everything, but you do have an ample
11 evidentiary record from this hearing, and we do
12 feel that the Amici submission allowances of page
13 numbers is very reasonable and fits with what has
14 already been agreed by the parties.

15 MR. LeVEE: If I can just clarify one
16 thing? ICANN had originally proposed late
17 September. Mr. Ali had come back and said that
18 they had commitments, so we did go back and forth.
19 On that basis, we landed on October 8. So that is
20 what Afilias and ICANN agreed to following
21 negotiation. It is the case that Amici did express
22 concern.

23 ARBITRATOR BIENVENU: Very well. Leave it
24 with us.

25 I will mention, insofar as the list of

1 questions from the Panel is concerned, these will
2 be targeted questions on issues about which we
3 would like further assistance from the parties.

4 For the rest, we leave it to counsel to
5 structure their posthearing brief in the way that
6 they consider most useful to bring it all together,
7 knowing that we have the evidence of witnesses.

8 ARBITRATOR KESSEDJIAN: Please remember
9 our request for a common list of exhibits and a
10 common chronology, factual chronology.

11 (Discussion off the record.)

12 ARBITRATOR KESSEDJIAN: Please remember
13 our request of -- and then the two things.

14 (Discussion off the record.)

15 ARBITRATOR KESSEDJIAN: The first one is a
16 common list of exhibits chronologically ordered,
17 and then a factual common chronology so that we can
18 actually have common paths to what happened.
19 Factual, all the essential facts in this case.

20 By the way, if you do that, and we really
21 require that you do it, it will be easier for your
22 posthearing briefs because you would not have to
23 spend too much time on the facts.

24 MR. ALI: If I may, Professor Kessedjian,
25 we will do our best. My experience, it is not easy

1 to agree on certain facts.

2 ARBITRATOR KESSEDJIAN: I am not saying it
3 is easy.

4 MR. ALI: But I would -- I think we will
5 exercise our best efforts to provide the facts that
6 we can agree on.

7 I was just going to ask if the Panel has a
8 date in mind by which you would like that, or is
9 this to be submitted simultaneously with the
10 posthearing briefing?

11 ARBITRATOR KESSEDJIAN: We didn't discuss
12 that, but from my part, I would be happy to have it
13 with the posthearing brief.

14 ARBITRATOR BIENVENU: Yes, that would be
15 good.

16 All right. Anything else from the parties
17 or the Amici?

18 MR. ALI: If I may just take a quick --
19 just peek over my computer screen to my other
20 colleagues to see if they have anything.

21 Ethan, if there's anything, just text me.
22 Just one second, Mr. Chairman.

23 A very good question has been raised by
24 one of my colleagues, which is insofar as the
25 facts, the common list of facts are concerned, is

1 that also to be agreed with the Amici?

2 ARBITRATOR BIENVENU: Well, I think it
3 would be useful to submit it to the Amici for
4 comments once a first agreed chronology has been
5 generated between the parties, yes.

6 MR. ALI: Okay. We will try and work that
7 out, and hopefully we don't have to revert to the
8 Panel, but we'll do our best to achieve the
9 objective and fully understood what you're looking
10 for.

11 That having been said, from my side,
12 again, I would like to thank my colleagues on all
13 the other screens insofar as Amici and ICANN are
14 concerned. Of course, the Panel, for all of your
15 incredible work. I've certainly been extremely
16 impressed, as has already been expressed, with the
17 precision of your questions. It is not an easy
18 matter to grapple with.

19 I have to particularly let Mr. Chernick
20 know that since I was a little boy, I have always
21 loved Charlie Chaplin but have been petrified by
22 clowns. So spending seven days looking at the
23 clown has, I think, perhaps cured me of my phobia.

24 ARBITRATOR CHERNICK: So something has
25 been gained by this proceeding.

1 MR. ALI: Yes, absolutely.

2 And, of course, to TRIALanywhere. To
3 Balinda, to all of those who have not appeared on
4 the screens who have helped to make this production
5 happen, my deep gratitude.

6 I hope people do get some time to rest and
7 recover before we get into the -- into the rigors
8 of the fall. My thanks to all.

9 ARBITRATOR BIENVENU: Mr. LeVee, nothing
10 else on your part?

11 MR. LeVEE: I am not going to repeat what
12 I said before. I thank everyone. I hope in an
13 unusual summer that everyone has the opportunity to
14 have a nice vacation or holiday someplace. I wish
15 everyone well and thank you all.

16 ARBITRATOR BIENVENU: Thanks.

17 Mr. Johnston, Mr. Marenberg, no other
18 matter to --

19 MR. MARENBERG: In the area where I do a
20 lot of work, which is entertainment, they'd be
21 cuing the music at the Oscars by now.

22 ARBITRATOR BIENVENU: We have gone through
23 our agenda, so it remains to me to bring this
24 hearing to a close.

25 But before I do so, I would like to

1 express the Panel's gratitude to each and every
2 member of the teams of lawyers and support staff
3 that contributed to the representation of the
4 parties and the Amici in this IRP.

5 I would say, if I may say so, the parties
6 and Amici are extremely well-represented in this
7 case, and it truly is a pleasure for my colleagues
8 and I to work with professionals of such high
9 caliber.

10 We also appreciate the exemplary courtesy
11 and cooperation displayed among counsel throughout
12 the hearing. It makes it very easy for the Panel
13 when that happens.

14 We also wish to thank JD and his team for
15 their excellent services throughout the hearing.
16 Everything went very smoothly.

17 And last but not least, thank you to our
18 court reporter and those who support her for their
19 services in connection with this hearing.

20 So I know that on this note, my colleagues
21 join me in wishing everyone well. Stay safe, in
22 good health, and if I may end on a positive note,
23 we will get through this pandemic, and we will meet
24 in person again once we get to the end of this
25 tunnel.

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So thank you all and have a good end of
day.

MR. MARENBERG: Thank you.

ARBITRATOR KESSEDJIAN: Good-bye,
everyone.

MR. ENGLISH: Good-bye. Thanks everyone.

(Whereupon the proceedings were
concluded at 1:38 p.m.)

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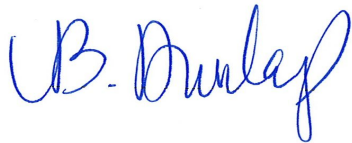
REPORTER'S CERTIFICATE

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STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN FRANCISCO)

I, BALINDA DUNLAP, certify that I was the official court reporter and that I reported in shorthand writing the foregoing proceedings; that I thereafter caused my shorthand writing to be reduced to typewriting, and the pages included, constitute a full, true, and correct record of said proceedings:

IN WITNESS WHEREOF, I have subscribed this certificate at San Francisco, California, on this 20th day of August, 2020.



BALINDA DUNLAP, CSR NO. 10710, RPR, CRR, RMR

	1153:11;1206:10; 1237:15,22	1174:12;1300:2	1301:20	1194:7,19;1195:21; 1196:4,7,8,14,18,25; 1199:11;1200:22; 1203:12;1207:9; 1210:4,14;1211:21, 25;1212:3,13; 1213:20;1214:5,18; 1217:1;1218:3; 1224:25;1225:10,15; 1230:8;1231:13; 1232:20;1233:22,24; 1239:16;1240:24; 1242:2,9,17,19; 1243:11,21;1246:21, 23;1248:7;1249:17, 24;1250:3,24; 1251:24;1252:24; 1253:13;1254:4,7, 17,18;1270:21; 1272:3;1277:8; 1284:25;1291:17; 1292:10
\$	accurately (1) 1197:4	additional (1) 1294:19	Afilias' (4) 1122:13,15; 1264:25;1282:19	agreements (12) 1137:23;1142:10; 1185:15;1188:16,18; 1191:2;1197:7,13; 1210:5,5;1247:25; 1254:1
\$11 (2) 1184:10;1189:13	accusing (1) 1286:11	address (5) 1171:22;1173:8, 12;1178:9;1182:3	aftermarket (1) 1188:19	agrees (1) 1250:3
\$135 (8) 1217:10,17; 1219:4,9;1221:3,15, 17;1223:8	achieve (2) 1136:2;1304:8	addressed (2) 1158:25;1268:21	afterward (1) 1122:14	ahead (9) 1127:5;1170:13; 1180:14;1230:4; 1238:15;1240:10; 1258:21;1260:7; 1271:18
\$149 (2) 1224:4;1225:6	achieves (1) 1228:4	addresses (3) 1268:2,18,19	again (29) 1122:1;1135:13; 1146:7;1159:19; 1167:17;1169:1; 1177:13;1186:8; 1196:24;1207:20; 1215:16;1218:10,10; 1223:3;1249:24; 1263:15;1268:11; 1276:1;1284:9; 1287:11,15;1288:2, 4;1298:4,10,23,24; 1304:12;1306:24	airline (1) 1285:4
\$500,000 (2) 1227:4;1228:3	acquire (9) 1135:10,14; 1136:8;1142:18; 1174:16;1185:2; 1194:19;1199:4; 1210:4	advertising (1) 1200:15	against (3) 1153:10;1289:22; 1290:5	alert (1) 1133:18
\$57.5 (1) 1236:14	acquired (3) 1123:7;1193:3; 1194:3	adequate (2) 1250:21;1272:12	AGB (1) 1166:20	Ali (26) 1282:4,5,23; 1286:25;1287:7; 1291:11,12,24; 1292:6,8,14;1294:6, 9,14;1296:1,14,17; 1300:10,13,16; 1301:17;1302:24; 1303:4,18;1304:6; 1305:1
\$65 (1) 1238:7	acquiring (1) 1194:11	adopted (1) 1290:23	agenda (2) 1299:22;1305:23	align (1) 1263:3
\$7 (6) 1223:18;1239:18, 21;1240:3,5,20	Acquisition (12) 1129:15;1136:3; 1188:16;1193:13,22; 1195:25;1196:2,8; 1198:15,24;1200:23; 1207:9	advance (7) 1169:1;1174:24; 1185:12;1187:7; 1208:10;1242:22; 1243:16	ago (6) 1163:9;1197:23; 1198:3,20;1223:4; 1272:20	aligned (1) 1263:11
\$71.9 (1) 1239:5	across (2) 1223:3;1283:25	adversarial (1) 1286:2	agree (18) 1142:12;1143:10; 1149:7;1150:24; 1156:2;1212:4,18; 1226:19;1227:25; 1241:17;1242:8; 1249:3;1268:5,14; 1289:4;1299:20; 1303:1,6	alleged (1) 1279:19
\$8 (2) 1239:23;1241:1	action (2) 1193:15;1241:14	adverse (1) 1287:2	agreed (17) 1211:22;1214:5, 24;1225:23; 1232:14;1276:19; 1291:13,18;1295:5; 1296:20;1297:3; 1299:15;1300:19; 1301:14,20;1304:1,4	allow (6) 1147:6;1148:16; 1150:7;1155:16,24; 1290:2
/	actions (2) 1241:10;1287:19	advice (1) 1133:25	agreement (103) 1124:8;1125:7; 1127:15;1129:1,15, 16;1135:18;1136:13, 18,25;1140:2; 1157:4;1161:16; 1162:8;1183:13,18, 21,21,24;1184:9,14, 20,23,25;1185:4,6, 21;1186:1,2;1187:3, 12,18,19;1188:21, 22;1189:14;1190:6, 7;1191:22;1192:3, 23,24;1193:13;	allowances (1) 1301:12
// (3) 1120:23,24,25	active (1) 1188:19	advise (1) 1255:3		allowed (1)
A	activities (6) 1156:17;1158:2; 1215:6;1218:20; 1233:11;1259:8	advises (1) 1134:6		
abeyance (1) 1177:16	actual (4) 1129:1;1171:16; 1219:16;1237:20	advisory (3) 1269:16;1270:4; 1272:1		
abilities (1) 1300:24	actually (14) 1142:16;1162:21; 1177:18;1192:7; 1213:22;1227:11; 1228:13;1231:4; 1236:18;1257:4; 1266:12;1270:11; 1276:5;1302:18	affect (1) 1270:17		
ability (4) 1177:22;1200:14; 1286:5,6	acute (1) 1285:19	affected (3) 1147:18;1152:8, 20		
able (6) 1121:22;1181:19; 1203:20;1266:11; 1278:8;1287:20	adamant (1) 1276:5	affecting (1) 1188:8		
above (5) 1212:17;1223:19; 1225:6;1228:4; 1231:1	add (3) 1201:17;1243:15; 1291:20	affirm (4) 1119:8;1154:24, 25;1201:8		
absolutely (4) 1127:1;1220:9; 1274:16;1305:1	added (1) 1283:10	affirmation (2) 1165:9;1211:14		
accept (1) 1253:5	adding (1) 1201:6	affords (2) 1242:22;1243:16		
accepted (2) 1139:16;1297:4	addition (4) 1122:9;1170:1;	Afilias (39) 1210:1,3;1241:20, 24;1252:14,23; 1253:12;1257:9,11, 13,16,22;1258:4,7, 25;1259:2,5,11; 1278:2;1279:20; 1286:7;1287:3; 1290:18,19;1291:18; 1294:19,21,22; 1295:3,6,8,17,22; 1296:8;1297:6; 1298:14,22;1299:1;		
accordance (1) 1218:4				
According (1) 1240:2				
Accordingly (1) 1140:10				
accumulation (1) 1262:19				
accurate (4)				

1244:12 allowing (1) 1284:11 allows (1) 1233:25 almost (2) 1123:23;1274:20 along (4) 1174:22;1226:2; 1246:24;1297:20 altered (1) 1149:9 although (1) 1298:25 always (4) 1150:9,17; 1275:16;1304:20 ambiguity (2) 1289:23;1291:21 Amici (28) 1284:15;1285:13, 16;1287:9,23; 1290:2,7;1291:17; 1292:18,19,25; 1293:3;1294:25; 1295:4,8,20;1296:3, 18,20;1297:9; 1301:12,21;1303:17; 1304:1,3,13;1306:4, 6 among (12) 1140:2,19,24; 1142:3;1167:3,16, 23;1170:24; 1176:10;1219:15; 1264:20;1306:11 amount (14) 1213:11;1215:15; 1219:17,18;1222:7, 9;1223:15;1225:11, 12;1228:2;1234:10; 1235:18;1260:16; 1278:4 amounts (3) 1230:19;1237:20; 1253:18 ample (1) 1301:10 analogies (1) 1230:14 analogize (5) 1224:9,10; 1225:21;1230:13,16 analogized (2) 1212:23;1224:13 analogous (7) 1213:23;1215:17, 22;1216:4,10,12; 1229:19 analogy (5) 1212:25;1230:22; 1231:18;1232:2,11 analysis (5)	1250:2;1267:25; 1268:15;1269:1,7 analyst (1) 1261:18 analyzed (1) 1143:20 anecdotal (1) 1264:2 Angeles (1) 1118:22 announced (3) 1131:17;1132:9, 18 announcement (3) 1255:3,17,19 answered (1) 1267:25 antagonists (1) 1276:19 anymore (1) 1268:18 apologies (3) 1240:9;1280:10; 1281:12 apologize (4) 1144:22;1155:18; 1218:25;1282:7 APP (2) 1260:21,24 appear (3) 1192:11;1193:10; 1290:2 appeared (1) 1305:3 appears (7) 1167:5;1179:24; 1183:10;1207:24; 1211:20;1212:22; 1241:7 append (1) 1202:17 appended (2) 1202:19,23 applicability (2) 1146:6,10 applicable (5) 1138:11;1205:3; 1248:24;1250:21; 1269:18 applicant (45) 1141:15,16; 1142:19,24;1143:6, 14,15,19;1144:7,11; 1146:23,24;1148:16; 1149:9;1150:7; 1152:24;1156:25; 1159:7,10,11; 1167:11,18,25; 1168:2,3,4,9,14; 1169:15,16;1171:12, 19;1172:20; 1174:20;1188:23; 1193:17,21;1195:25;	1196:2,3;1204:16; 1205:4;1206:8; 1233:25;1269:13 applicants (27) 1138:19,23; 1139:25;1140:4,6,8, 19;1141:1;1142:2; 1143:2;1147:6,19, 25;1148:6,7; 1152:11,21,25; 1153:9;1156:18; 1159:17;1170:10,25; 1188:24;1191:16; 1195:22;1279:15 applicant's (6) 1152:16;1167:12, 20;1168:5,15; 1193:22 application (74) 1130:11,13,15; 1137:8;1138:8; 1140:14;1141:21; 1143:3,7,13,25; 1144:2,5;1145:3; 1147:4,7;1149:3,6,9; 1152:14,16;1156:20; 1159:22;1160:20,25; 1162:16;1163:3; 1167:14,21;1168:6; 1171:8,16;1172:10, 12,23;1173:15,22; 1175:7;1176:22,25; 1177:11;1178:22; 1179:4,6,16,23,24; 1180:5,19,22,25; 1182:25;1183:7,22, 25;1184:7,16; 1185:5;1189:15; 1191:23;1206:6,12, 13,17;1208:18; 1212:1;1232:7; 1241:12;1243:15; 1244:7,11,16; 1249:1;1251:18 application' (1) 1241:16 applications (33) 1131:18;1132:10, 13;1140:6;1148:1,2, 6;1153:16;1170:6, 22;1171:11;1172:1, 15;1173:5;1175:17, 21,23,25;1176:4,7, 12;1181:17,24; 1182:14;1183:8; 1188:20,24;1189:25; 1191:2;1197:20; 1212:15;1262:13; 1263:24 applied (4) 1155:9;1158:23; 1174:11;1262:10 applies (3)	1151:18;1159:16; 1167:24 apply (8) 1145:25;1148:19, 22;1151:1,7,16; 1157:5;1169:14 appreciate (4) 1180:12;1187:16; 1203:10;1306:10 appreciated (1) 1276:17 appreciative (1) 1283:11 approach (2) 1191:11;1195:13 approached (1) 1157:25 approaches (1) 1191:9 approaching (1) 1271:10 appropriate (10) 1141:17;1143:4, 17;1147:1;1160:10, 12;1227:16;1231:8; 1272:8;1280:1 approve (2) 1154:16;1271:5 approved (4) 1151:23;1152:4; 1216:21;1271:1 April (1) 1175:8 arbitration (3) 1295:24;1300:22; 1301:8 ARBITRATOR (132) 1118:3,9,14,18; 1119:2,6,12,25; 1120:5,17;1134:1; 1144:20;1148:5; 1149:19;1160:13; 1161:24;1162:4,24; 1163:11;1164:4,10, 14,16,19,23;1165:6, 8;1168:18;1169:2,6, 20,23;1177:14; 1182:3,20;1186:5,7, 15,20;1187:1; 1200:2,8,11; 1201:19;1202:6,16, 23;1203:2,6; 1210:20;1211:5,13; 1249:2,5,10; 1258:13,16,20,21; 1259:23;1260:2,4,6, 9,11,13;1261:3,11; 1262:6;1263:20; 1264:17;1265:12,21; 1266:14,23;1267:2, 11,22;1268:23; 1269:10;1271:3,21, 25;1272:21,25;	1273:1,3,12,21; 1274:10,15;1275:10; 1278:14,23;1279:2; 1280:6,9,13,14,20, 25;1281:5,15,20; 1282:23;1284:13,19; 1288:16;1289:12; 1291:6;1292:5,12; 1294:2;1296:16; 1297:7,11;1299:3,8; 1300:12;1301:23; 1302:8,12,15; 1303:2,11,14; 1304:2,24;1305:9, 16,22;1307:4 ARCHI (2) 1210:2,11 area (4) 1126:15;1127:4; 1261:10;1305:19 argue (1) 1200:9 argument (6) 1160:10;1230:24; 1299:7,14,19;1300:2 arguments (3) 1160:10;1265:10; 1292:21 arm's (1) 1215:20 arm's-length (1) 1229:20 around (4) 1135:2;1137:11, 13;1248:12 arrangement (5) 1174:3,13;1181:9; 1215:13;1268:2 article (1) 1181:8 articles (2) 1133:1;1134:21 aside (1) 1300:5 Assets (4) 1194:8;1196:6; 1199:5;1204:24 assign (9) 1167:12,19; 1168:5,15;1169:16; 1212:2;1220:6,22; 1221:14 assigned (10) 1135:21;1157:5; 1216:23;1217:24; 1219:13;1224:25; 1226:17;1229:13; 1231:7;1246:23 assignee (5) 1247:1;1248:7; 1271:2;1272:12; 1280:1 assignment (15)
--	---	--	---	---

1125:25;1126:9; 25;1132:15;1137:4; 1181:11;1194:9; 1239:16,24;1240:17; 1270:15,20;1271:1, 6;1272:9 assignments (1) 1197:21 assignment's (1) 1216:20 assist (1) 1216:16 assistance (3) 1124:13;1125:11; 1302:3 associate (1) 1122:23 associated (3) 1173:12;1174:19; 1179:22 ASSOCIATES (1) 1176:7 assume (10) 1121:22;1219:8; 1237:9,16;1238:5, 10,12,16;1247:12; 1291:9 assumed (1) 1166:12 assuming (1) 1237:14 assurance (1) 1250:21 assure (2) 1198:18;1202:8 Atallah (4) 1255:12,20; 1256:1,3 Attached (4) 1188:20;1190:23; 1192:4;1195:24 attachment (2) 1207:12,13 attachments (1) 1204:5 attempted (1) 1291:4 attempts (1) 1130:23 attention (21) 1121:14;1138:6; 1139:18;1146:18; 1166:13;1167:7; 1169:4;1183:15; 1193:8;1194:15; 1198:22;1208:20; 1211:19;1224:16; 1234:8;1241:5; 1242:5;1247:13; 1248:20;1250:17; 1254:20 attorney (3) 1124:20;1135:3;	1202:22 attorney-client (1) 1133:17 attorney-in-fact (1) 1124:3 attorneys (1) 1127:16 auction (122) 1135:20;1137:10, 11,14,15,17,22; 1138:9,14;1140:20; 1157:3;1194:5,21; 1196:4,5,6,9;1199:1, 3,11,12;1204:15,17; 1205:16,23;1206:2, 7;1208:12;1209:12; 1211:23,24;1213:4, 6;1214:7,11;1215:6; 1216:17,19;1217:12; 1218:2,20;1219:13, 17,18;1220:5,22,24; 1221:13,22;1222:8, 9,15;1223:23; 1226:2,22;1228:4; 1229:1;1230:1; 1233:9,11,15; 1234:1,5,9,14,20,23; 1235:2,7,15; 1236:13;1237:23; 1239:11,15,20,23; 1240:4,12,15,22,25, 25;1242:20; 1245:23;1246:2,5, 20;1247:7;1248:16; 1251:20;1252:1,2, 10;1254:25;1255:2; 1256:15;1257:12,17; 1258:5;1259:3,7,9, 17,17;1260:17; 1270:11;1271:19; 1272:16;1275:17,21, 25;1276:3,6,22,23; 1277:6,20;1278:11, 18,20;1290:17; 1298:16 auctioned (1) 1208:13 auctions (1) 1235:23 aughts (1) 1262:24 AUGUST (11) 1118:1;1137:21; 1207:8,23;1245:10; 1255:19,25;1256:9, 17;1257:2;1264:2 authority (1) 1209:6 authorize (1) 1277:25 Automatic (4) 1206:22;1207:3; 1209:17,20	Automatic-Primer (2) 1208:3,8 availability (1) 1275:7 available (7) 1132:23;1139:17; 1175:21,24;1265:24; 1285:8;1300:7 avoid (3) 1140:14;1246:16; 1247:21 avoided (1) 1172:8 awarded (1) 1174:17 awards (1) 1290:16 aware (45) 1128:1,25; 1130:21;1131:1,3; 1132:9,12,14,18,22; 1133:1;1136:9,11, 15;1137:17;1142:15, 23;1146:17; 1163:21;1170:10; 1173:3;1175:15,18, 20;1205:20,24; 1206:1,5,11,14,16, 20;1208:19; 1212:15;1225:9; 1241:20,24;1255:1, 9;1259:16;1261:7; 1268:10;1270:9; 1274:12;1296:19 away (4) 1122:4;1232:7; 1280:16;1300:6 awkward (1) 1192:16 awry (4) 1216:3;1224:14; 1226:9;1232:15	1263:6;1264:7; 1273:9;1275:2; 1277:13,19;1278:5; 1298:17;1300:20; 1301:17,18 back-end (9) 1178:18;1179:11, 18,21,25;1180:20, 21;1181:1;1182:24 background (1) 1265:2 balance (1) 1228:25 Balinda (1) 1305:3 bank (4) 1227:3;1228:1; 1229:23;1232:9 banking (1) 1224:12 bargained (2) 1229:7,10 based (8) 1152:1;1181:25; 1196:13;1200:22; 1201:1;1217:6; 1292:23;1298:24 bases (1) 1217:8 basic (2) 1198:14;1292:11 basically (3) 1124:19;1275:19; 1290:12 basis (5) 1174:12;1269:16; 1270:4;1286:23; 1301:19 bear (4) 1150:9,18;1222:6; 1230:5 bearing (1) 1158:19 bears (1) 1230:8 became (6) 1127:15;1132:22; 1135:20;1170:10; 1212:15;1276:16 become (9) 1132:14,18,23; 1136:5;1137:17; 1156:25;1157:1; 1248:7;1274:11 becomes (6) 1141:15;1143:6, 15;1144:7;1146:24; 1159:10 began (2) 1125:21;1132:15 begin (3) 1207:17;1281:22; 1282:3	beginning (3) 1264:18;1275:14; 1284:15 begins (1) 1214:22 behalf (8) 1161:14;1162:7; 1172:23;1281:7; 1282:4,15;1284:16; 1285:13 behavior (2) 1277:23,23 behind (4) 1121:12;1167:7; 1170:16;1279:14 below (3) 1147:22;1212:17; 1228:25 benefit (8) 1192:7,7;1229:2; 1230:7,10;1233:16; 1278:12;1293:22 benefits (1) 1231:11 benefitting (1) 1278:13 BERS (7) 1179:4,25;1180:8; 1181:14,20;1183:3; 1264:6 best (7) 1200:14;1224:11; 1248:12;1256:7; 1302:25;1303:5; 1304:8 better (8) 1118:12,13,14; 1165:7;1195:17; 1198:16,19;1283:25 beyond (3) 1253:17;1290:13, 25 bid (21) 1207:2;1213:6,16, 17;1217:11;1219:5, 9;1234:10;1235:13, 14;1236:6;1237:5,7, 11,16;1238:3,8,9; 1260:16;1261:5; 1277:3 bidder (7) 1190:8;1199:2; 1204:17;1209:12; 1233:21,24;1235:25 bidders (3) 1190:17;1191:16; 1235:12 bidding (6) 1137:23;1214:13, 14;1215:8;1235:12, 18 Biden (1) 1294:10
		B		
		back (53) 1126:23;1127:6; 1137:12;1141:6,24; 1144:16;1149:2; 1152:7;1155:23; 1159:5,23;1164:20, 24;1166:1,19; 1168:25;1169:3,23; 1170:3;1177:16; 1184:19;1186:14,23; 1190:5;1196:15; 1198:16,22;1200:12; 1201:22;1203:23; 1215:11;1219:15; 1222:19;1226:10,13; 1229:22;1230:16; 1234:16;1253:25; 1258:17,20,24;		

<p>bids (5) 1214:15;1234:20; 1235:5;1238:23; 1261:12</p> <p>Bidzos (12) 1126:2,3,18,22,24; 1128:4;1129:6; 1133:6,23;1134:17, 25;1274:7</p> <p>B-i-d-z-o-s (1) 1126:22</p> <p>BIENVENU (110) 1118:3,9,14,18,19; 1119:2,6,12,25; 1120:5,17;1134:1; 1144:20;1148:5; 1149:19,20;1160:13; 1161:24;1162:4,24; 1163:11;1164:4,10, 14,16,19,23;1165:6, 8;1168:18;1169:2,6, 20,23;1177:14; 1182:3,20;1186:5,7, 15,20;1187:1; 1200:2,8,11; 1201:19;1202:6,16, 23;1203:2,6; 1210:20;1211:5,13; 1249:2,5,10; 1258:13,21;1259:23; 1260:4,9,13;1261:3, 11;1262:6;1263:20; 1264:17;1265:5,12, 21;1266:14,23; 1267:2,11,22; 1268:23;1269:10,23; 1271:3,21,25; 1272:21;1273:1; 1280:9,14,20,25; 1281:5,15,20; 1282:23;1284:13,19; 1288:16;1291:6; 1292:5,12;1294:2; 1296:16;1297:7,11; 1299:8;1300:12; 1301:23;1303:14; 1304:2;1305:9,16,22</p> <p>big (1) 1127:23</p> <p>billion (2) 1136:22;1274:4</p> <p>binder (11) 1120:3;1121:13, 21;1138:6;1139:6; 1144:21,24;1166:23; 1192:24;1236:21; 1256:24</p> <p>BIO (2) 1210:2,11</p> <p>bit (13) 1118:15;1179:15; 1211:1,3;1226:5; 1242:21;1251:22;</p>	<p>1266:2;1274:24; 1278:22;1283:24; 1298:8,9</p> <p>biweekly (1) 1127:3</p> <p>black (2) 1149:18;1278:22</p> <p>blackout (2) 1277:22,25</p> <p>blank (1) 1204:25</p> <p>BLOG (5) 1206:23;1207:2, 22;1208:13;1209:12</p> <p>blow (7) 1144:25;1145:16; 1147:13,23;1149:21; 1177:21,23</p> <p>blown (2) 1145:13;1161:11</p> <p>Board (2) 1173:18;1298:17</p> <p>body (1) 1137:25</p> <p>book (1) 1120:2</p> <p>bootstrap (1) 1159:20</p> <p>borrower (5) 1227:2,4;1228:5, 5;1230:10</p> <p>borrower-lender (1) 1230:13</p> <p>boss (3) 1126:1,6,6</p> <p>both (10) 1121:7;1157:9; 1169:15;1200:11,15; 1217:5;1222:4; 1270:24;1275:3; 1276:15</p> <p>bottom (6) 1141:18;1147:8, 12;1208:21;1251:8, 11</p> <p>bought (2) 1262:22,23</p> <p>box (3) 1148:12;1278:22; 1299:13</p> <p>Boy (2) 1178:13;1304:20</p> <p>breach (2) 1218:4;1268:25</p> <p>breached (1) 1238:19</p> <p>break (11) 1127:18;1164:2,5, 8;1166:3;1179:14; 1210:19;1211:6; 1242:14;1258:23; 1300:25</p> <p>breaking (2)</p>	<p>1164:3;1230:22</p> <p>breezed (1) 1265:8</p> <p>brief (7) 1289:6;1291:19; 1294:21,24;1295:11; 1302:5;1303:13</p> <p>briefing (2) 1297:19;1303:10</p> <p>briefly (1) 1133:20</p> <p>briefs (21) 1291:23;1292:14; 1294:20,22,23,24; 1295:13;1296:21,22; 1297:14,24;1298:3, 10,22,25;1299:1,5, 18;1300:3,18; 1302:22</p> <p>bring (5) 1164:24;1204:22; 1289:20;1302:6; 1305:23</p> <p>bringing (1) 1293:18</p> <p>broadening (1) 1275:7</p> <p>broader (4) 1181:6,7;1183:7; 1260:25</p> <p>brought (2) 1164:12;1211:8</p> <p>bunch (1) 1251:19</p> <p>business (48) 1122:7;1123:4,8; 1125:18;1128:9,18, 20;1132:7;1133:23, 24;1135:4;1137:1,1, 5;1166:16;1194:8,8; 1204:24;1205:8; 1215:24;1246:12; 1247:17;1248:3; 1261:18,22;1262:20, 21;1263:5,5,8,12,12, 17,23;1264:5,9,13, 14,15;1273:13,22, 23,25;1274:2,3,6,12, 19</p> <p>businesses (14) 1197:19;1199:5; 1262:19,22,23; 1263:3,4,7,9,14,19; 1264:6;1273:25; 1274:8</p> <p>businesspeople (1) 1229:20</p> <p>busy (1) 1283:5</p> <p>buy (3) 1195:7;1198:8; 1227:2</p> <p>buyer (5)</p>	<p>1193:17,20; 1194:3;1199:4; 1221:17</p> <p>buying (2) 1195:9;1276:25</p> <p>buys (1) 1193:17</p> <p style="text-align: center;">C</p> <p>C-56 (4) 1144:18;1158:9; 1159:6;1165:15</p> <p>caliber (1) 1306:9</p> <p>CALIFORNIA (3) 1118:1,8;1281:12</p> <p>call (16) 1127:19;1217:20; 1229:12;1255:1,11, 16,20,23;1256:5,9, 11,17;1261:17; 1270:18;1273:14; 1275:17</p> <p>called (11) 1129:15;1145:3; 1146:19;1160:24; 1209:13;1239:22; 1252:16;1255:9; 1256:1,3;1265:23</p> <p>came (7) 1185:16;1193:5; 1232:19;1265:4; 1277:13;1278:5; 1279:23</p> <p>CAMERA (2) 1176:7;1177:9</p> <p>Can (88) 1118:12;1120:12; 1122:2,8;1138:5; 1141:24;1144:18; 1145:15;1146:20; 1147:10;1150:24; 1154:4,25;1155:4; 1159:5;1165:4,6; 1168:18;1171:1,10; 1176:24;1177:4,15, 16,19,20,25;1178:2, 12;1179:14; 1182:21;1186:23; 1191:4,19;1195:18; 1198:18;1200:7; 1201:16,16,24,25; 1206:14;1210:21,22; 1211:4;1213:10; 1214:21;1228:13,21, 22;1229:17; 1231:19;1232:5; 1238:10;1246:1; 1247:10;1248:6; 1253:15;1254:15; 1256:21,23;1260:6, 7;1264:9;1266:13,</p>	<p>19;1273:4;1278:11; 1279:18;1280:22; 1281:22;1282:24; 1283:20,20;1284:18; 1285:6;1289:10; 1290:21;1291:8; 1292:8;1293:24; 1295:4;1297:9; 1300:11,15;1301:15; 1302:17;1303:6</p> <p>candid (1) 1296:1</p> <p>candidly (2) 1283:13,22</p> <p>Cannon (1) 1121:5</p> <p>capable (1) 1274:16</p> <p>capacity (1) 1180:24</p> <p>care (1) 1124:6</p> <p>careful (1) 1286:21</p> <p>carefully (5) 1139:1;1145:7; 1147:24;1161:5; 1197:15</p> <p>case (27) 1125:7;1139:12; 1149:17;1167:5; 1171:13;1175:14; 1183:10;1207:24; 1208:6,19;1209:18; 1217:8;1219:12; 1222:3;1224:14; 1228:17,24;1231:3; 1243:19;1259:9; 1261:18;1276:23; 1278:20;1293:23; 1301:21;1302:19; 1306:7</p> <p>cases (2) 1152:13;1217:22</p> <p>cash (2) 1231:22;1278:12</p> <p>cashing (2) 1231:20,20</p> <p>Catherine (2) 1118:20;1273:8</p> <p>cause (4) 1142:5;1153:6; 1247:4;1252:17</p> <p>caused (1) 1262:9</p> <p>caution (1) 1253:2</p> <p>cautioned (1) 1134:3</p> <p>cautions (1) 1141:1</p> <p>CEO (5) 1126:2;1129:7;</p>
--	--	--	--	---

1133:7;1173:17; 1209:5 certain (10) 1174:16;1181:10; 1184:5;1219:2; 1254:2,3,13;1258:7; 1272:15;1303:1 certainly (16) 1128:8;1132:21; 1155:12;1187:24; 1197:16;1208:10,11; 1218:12;1269:6; 1275:5;1283:3,3; 1286:4;1293:1; 1301:9;1304:15 certificate (9) 1123:3,7;1132:6; 1262:21;1263:5,11; 1273:25;1274:2,5 certificates (1) 1274:1 chair (5) 1118:19;1160:3; 1273:10;1275:14; 1287:16 Chairman (39) 1120:15,21; 1129:7;1133:11,21; 1134:10;1144:23; 1148:8;1149:25; 1163:14;1164:1; 1165:1;1168:17; 1169:25;1173:17; 1187:2;1209:5; 1210:18,25;1211:17; 1249:7;1258:10,15, 19;1259:21;1260:3; 1266:9,21;1272:25; 1274:7;1280:8; 1282:5;1284:11,17; 1291:12,25;1296:14; 1299:3;1303:22 Chairman's (1) 1166:7 challenging (1) 1284:8 change (78) 1140:13;1141:22; 1143:5,21;1145:3,9, 23;1146:2,6,10,15, 19;1147:5;1148:17, 18,21,23;1149:6,7,8, 14;1150:3,8,25; 1151:6,6,10,12,21, 22;1152:3,4,9,14,22; 1153:4,8,10,15,19; 1154:3,16,24; 1156:1,7,9,13; 1157:13,15,18; 1158:10,13,18,20,22, 25;1159:1,2; 1160:25;1161:7,17; 1162:9,15;1163:3, 18;1165:13;1166:4, 5;1195:10,11,14; 1197:6;1206:18; 1208:17,22;1234:21; 1238:24;1248:25 changed (5) 1143:8;1144:11; 1151:15;1210:9; 1268:12 Changes (13) 1141:13;1142:16; 1143:3;1144:1; 1147:7,25;1159:16, 17,19,20,21; 1160:19;1166:9 changing (1) 1156:19 Chaplin (1) 1304:21 Charleston (6) 1170:24;1171:4, 14,20,25;1172:1 Charlie (1) 1304:21 chart (1) 1299:10 charts (1) 1299:10 Check (3) 1231:20,20,21 Chernick (9) 1118:21;1258:17; 1260:10,11;1280:12, 13;1299:3;1304:19, 24 Chicago (1) 1283:9 choose (1) 1296:24 chose (1) 1202:17 chronologically (1) 1302:16 chronology (4) 1302:10,10,17; 1304:4 Chuck (17) 1121:23;1139:11; 1144:18,25;1145:15; 1147:13,23;1149:20; 1176:25;1177:1,4, 20;1178:3;1204:22; 1236:18;1265:24; 1267:13 CHURCH (1) 1176:8 circular (1) 1159:3 circulating (1) 1259:19 circumstance (1) 1151:15 circumstances (2) 1217:18;1219:10 citing (1) 1207:4 CITY (8) 1176:7,25;1177:2; 1178:21;1179:16,22, 24;1180:19 claimant (2) 1282:4;1290:4 claimed (2) 1241:20,24 claims (2) 1279:19;1289:21 clarification (3) 1119:22;1120:13; 1169:18 clarify (5) 1160:16;1165:13; 1191:4;1265:7; 1301:15 clause (2) 1190:3;1193:20 clauses (2) 1193:9;1279:5 clean (3) 1182:5;1186:10, 17 clear (12) 1131:5;1142:16; 1150:2;1191:19; 1192:18;1213:14; 1215:8,10;1232:1; 1247:23;1262:14; 1276:12 clearing (1) 1188:25 clearly (3) 1284:18,19; 1293:23 click (1) 1171:14 client (4) 1282:15;1284:5; 1287:13,19 client's (2) 1286:17;1293:22 clocking (1) 1281:10 close (4) 1131:13;1212:12; 1262:12;1305:24 closed (4) 1130:12,13; 1175:8;1194:19 closely (3) 1137:7;1138:7; 1152:19 closer (2) 1118:10;1120:3 closing (12) 1160:10;1198:24; 1199:18,19;1201:2, 4,10;1204:13; 1205:12;1299:13,19; 1300:2 closure (1) 1130:15 CLOTHING (1) 1176:8 clown (1) 1304:23 clowns (1) 1304:22 CO (10) 1143:8;1191:19; 1229:4;1245:15,17; 1249:24;1250:14; 1251:23;1270:20; 1278:3 COACH (1) 1176:8 Cochran (1) 1128:14 cognizant (1) 1297:25 cohort (1) 1226:3 collaborate (2) 1127:10,12 collateral (3) 1226:23;1232:3,3 colleague (1) 1149:20 colleagues (11) 1118:20;1258:11; 1259:25;1271:9; 1292:6;1297:17; 1303:20,24;1304:12; 1306:7,20 collectively (1) 1295:21 collision (5) 1130:17,21; 1131:4,6,12 collusive (1) 1277:1 COM (11) 1133:3,10; 1134:23;1135:4,8; 1136:13,17,21; 1262:18;1264:5; 1273:15 combination (1) 1289:17 combined (2) 1295:7,9 combines (1) 1231:11 comfortable (1) 1270:21 coming (2) 1132:6;1293:25 commenced (1) 1206:13 comment (12) 1134:12;1175:12; 1183:5;1242:23; 1243:17;1265:13; 1266:15;1267:13,23; 1296:7;1300:16,20 commenting (1) 1287:19 comments (5) 1288:12;1289:2,6; 1291:25;1304:4 commercial (4) 1226:23;1247:25; 1250:2;1300:22 commitments (4) 1248:23;1301:1,5, 18 common (7) 1225:15;1302:9, 10,16,17,18;1303:25 commonly (1) 1127:8 communicate (1) 1241:15 communicated (1) 1131:2 communicating (3) 1243:12;1244:4, 10 communication (5) 1134:14;1242:24; 1243:18;1253:4; 1270:10 communications (4) 1133:17;1134:4; 1253:3;1254:24 commuting (1) 1123:22 companies (2) 1156:17;1185:22 company (19) 1126:5;1131:16, 21;1133:5,15; 1135:5;1170:20,21; 1197:25;1209:13; 1223:14;1261:19; 1262:2,17;1263:16, 22;1264:3;1270:9; 1273:24 Company's (4) 1218:4;1223:14; 1243:14,18 compare (1) 1226:25 compared (1) 1152:25 comparing (1) 1227:8 comparison (1) 1227:24 compensated (1) 1125:10 competing (1) 1153:16 competition (1)
--

1135:2 competitor (1) 1274:20 competitors (5) 1166:17;1246:13, 17;1247:18,22 complain (1) 1259:12 complained (6) 1252:15;1257:9; 1258:4,7;1259:1,5 complaining (4) 1257:12,14; 1259:3,10 complaint (2) 1258:8;1259:13 complaints (3) 1251:17;1257:16; 1259:16 completely (1) 1275:24 compliance (1) 1250:23 compliant (3) 1212:8;1269:17; 1272:2 complicated (1) 1282:12 complied (2) 1247:8;1271:15 compliments (1) 1291:5 comply (1) 1241:11 comprise (1) 1138:1 comprised (1) 1234:23 compromised (1) 1301:4 computer (2) 1178:13;1303:19 conceiving (1) 1269:14 concept (1) 1131:3 concern (22) 1142:4;1151:13; 1161:14;1162:6,12, 14,22,25;1189:23; 1191:15;1192:8; 1203:7;1251:21; 1267:16;1277:15; 1279:12;1282:1; 1289:16,17;1290:12; 1298:20;1301:22 concerned (10) 1133:23;1190:1; 1210:1;1279:7; 1282:19;1293:14; 1296:18;1302:1; 1303:25;1304:14 concerning (4)	1124:14;1125:12; 1134:18;1208:2 concerns (17) 1130:16,22; 1133:2,9;1134:22; 1158:10;1167:2; 1187:25;1247:4; 1282:20;1285:12,18, 18;1286:1;1289:1; 1290:22;1298:21 concluded (2) 1185:1;1307:8 concludes (2) 1140:10;1281:21 concluding (2) 1135:11,15 conclusion (3) 1240:3;1252:5; 1258:5 concurrent (2) 1255:2,17 conditional (2) 1211:21;1214:4 conditioned (2) 1193:14;1194:4 conditions (2) 1167:9;1168:21 conduct (1) 1277:10 conducted (2) 1155:7;1282:1 confer (1) 1258:11 Conference (2) 1299:11,13 confident (1) 1274:16 confidential (14) 1242:2,7,10; 1252:22;1253:11,20, 23;1254:2,5,6,10,18; 1269:16;1270:4 confidentiality (4) 1243:3;1248:1; 1254:14;1279:5 confirm (6) 1120:12;1143:12; 1181:19;1201:16; 1253:15;1295:4 confirmation (4) 1251:12,15,25; 1252:9 confirmed (2) 1188:18;1291:17 confirming (1) 1250:23 confused (5) 1160:1;1191:5; 1198:10;1241:3; 1270:6 confusing (2) 1192:15;1259:7 connection (9)	1118:23;1125:12; 1137:4;1146:8; 1167:13,20;1168:6; 1284:2;1306:19 conscious (1) 1133:12 consent (9) 1176:19,20; 1212:2;1241:13; 1243:21;1244:1,8, 14,16 consider (6) 1153:15;1157:18; 1271:13;1292:2; 1300:11;1302:6 consideration (2) 1285:23,24 considered (4) 1253:22;1254:9; 1261:14;1299:19 considering (2) 1161:14;1162:7 considers (1) 1158:18 consistent (5) 1212:9,13; 1290:16;1295:23; 1296:12 Constantine (1) 1121:5 constitute (1) 1242:9 constructed (1) 1268:19 consult (2) 1146:5,9 contact (8) 1146:12;1171:17, 21,21;1173:4,12; 1272:14;1277:22 contacted (2) 1124:25;1272:9 contemplated (1) 1299:4 contemplating (1) 1271:22 contention (49) 1129:1;1138:23; 1139:22;1140:1,3,5, 9,19;1142:3,6,9; 1153:20;1154:4,5; 1158:3;1167:2,3,16, 23;1168:1;1169:8,9, 14,15,17;1183:12; 1184:22;1185:16; 1188:15,23;1189:18, 20,25;1190:2,11,14; 1191:18;1195:20; 1235:21;1275:18,19; 1276:9,15,17; 1277:7,10,21; 1278:8;1279:15 context (10)	1149:23;1231:16; 1249:14;1255:8,8; 1257:6;1263:1; 1293:12,18,20 contingent (6) 1193:22;1196:3; 1239:19;1240:11,21; 1248:11 continue (8) 1149:23;1155:20; 1171:2;1207:18; 1211:15;1230:12; 1235:12,25 continued (1) 1236:3 continues (1) 1242:16 continuing (1) 1243:10 contort (1) 1230:14 contract (4) 1136:18;1233:24; 1249:14;1255:4 contracting (3) 1127:19;1129:9; 1189:10 contractor (1) 1124:20 contracts (1) 1249:20 contractual (1) 1125:7 contributed (1) 1306:3 contributing (1) 1261:12 control (2) 1278:17;1287:5 controlled (1) 1209:16 conversations (4) 1133:14;1191:13; 1196:16;1269:12 cooperation (2) 1211:9;1306:11 co-owner (5) 1175:19;1179:5, 11;1180:1,8 copy (9) 1188:21;1195:23; 1245:14,18,19,22; 1253:16;1265:25; 1266:2 core (1) 1263:4 corner (1) 1121:17 CORP (1) 1131:7 corporate (2) 1128:15;1234:5 corrections (2)	1119:20;1120:6 correctly (7) 1157:11;1158:7; 1171:10;1192:11; 1232:14;1239:17; 1275:22 cost (1) 1221:22 counsel (21) 1122:24;1129:5; 1133:7,15;1176:14; 1182:13;1209:24; 1252:15,16,17; 1253:3,4,17; 1257:20,21;1269:13; 1282:11;1284:5; 1287:20;1302:4; 1306:11 counterparties (1) 1271:11 countersigned (1) 1251:8 couple (5) 1122:16;1162:17; 1204:1;1217:23; 1218:11 course (21) 1120:8;1132:25; 1134:5,16;1142:23; 1170:9;1174:2; 1183:11;1188:13; 1236:6;1282:17; 1283:14;1288:21; 1291:24;1292:3; 1296:18,25;1297:11; 1300:23;1304:14; 1305:2 court (4) 1126:17;1192:6; 1228:14;1306:18 courteous (2) 1289:8,14 courtesy (2) 1255:1;1306:10 cover (5) 1217:8;1266:23, 24;1267:6;1299:25 Covered (3) 1172:13,25; 1222:22 crazily (1) 1261:2 create (6) 1151:4,22;1152:3; 1159:18;1213:24; 1248:14 created (3) 1147:5;1251:20; 1290:10 creates (1) 1200:16 creating (4) 1141:2;1151:4;
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1238:14;1265:2 credibility (1) 1208:11 criteria (16) 1143:21;1145:4; 1146:2,6,11; 1147:11,24;1149:5; 1150:19;1156:7; 1158:22;1159:2,3, 21;1163:4;1197:6 Criteria' (1) 1161:1 criterion (23) 1147:15;1148:10, 14;1149:2,15; 1150:9,17;1151:15; 1152:8,8,16,20,21; 1153:9,14,21; 1154:2,11,14; 1155:5;1156:2; 1165:14;1166:4 criticism (2) 1248:3;1288:13 criticisms (5) 1166:16;1246:12, 17;1247:18,21 cross (1) 1275:13 cross-examination (5) 1120:16,20; 1121:1;1211:15; 1293:10 cross-examine (2) 1286:9,17 cross-examined (1) 1286:15 cross-examining (1) 1296:9 cross-refer (1) 1292:25 crystallize (1) 1293:19 cuing (1) 1305:21 cured (1) 1304:23 curious (1) 1276:16 current (1) 1248:9 customary (1) 1301:7 cut (5) 1120:8;1182:9; 1186:8;1200:16; 1263:21	1174:25;1187:7; 1197:8;1207:23; 1208:4,9,10; 1211:21;1212:8,23; 1213:19,20;1214:4, 9,14,18,21;1215:6; 1216:14;1217:21; 1218:20;1219:23; 1222:17;1224:19; 1233:9;1239:9; 1241:9,12,22,23; 1242:1,6,7;1243:6, 25;1244:5,13,17,23; 1245:9,11,20; 1246:15;1247:20; 1248:11,22;1250:9, 18,19;1252:10,13, 18,21;1253:9,20; 1254:9;1256:18; 1257:2,8,20;1258:3, 25;1261:13;1268:3; 1269:5,8;1270:1,3; 1271:12,23;1275:22; 1276:1;1277:14; 1279:6;1290:15 date (17) 1175:2;1201:3,4, 10;1204:13; 1244:24;1245:4,6; 1259:14;1270:12; 1291:13,17;1299:21, 23;1300:6,19;1303:8 dated (2) 1118:25;1266:24 dates (8) 1175:10;1183:9; 1207:11;1246:1; 1256:21,22;1300:11, 14 David (1) 1129:25 day (10) 1123:17;1156:24; 1168:25;1252:3,4; 1265:16;1286:13; 1290:6;1293:21; 1307:2 days (14) 1119:18;1184:1; 1234:24;1251:25; 1252:5;1256:19; 1283:10,14,19; 1284:8,24;1292:4; 1299:20;1304:22 De (1) 1255:22 deadline (1) 1263:24 deadlines (1) 1283:8 deal (12) 1161:15;1162:8; 1195:1;1196:22;	1205:13;1209:20; 1220:13;1231:10; 1233:6;1247:3; 1271:11;1282:13 dealing (1) 1124:21 deals (5) 1136:8;1193:19; 1197:19;1210:13; 1269:14 decide (2) 1156:12;1299:17 decided (1) 1262:1 decision (4) 1128:23;1158:19; 1188:9;1299:6 decisions (2) 1128:10;1235:21 decline (2) 1124:2;1163:25 dedication (1) 1283:12 deed (1) 1228:14 deep (1) 1305:5 deeper (1) 1230:20 defer (4) 1154:17,19; 1155:3;1165:22 deference (1) 1285:22 define (2) 1213:4;1292:1 defined (7) 1201:11,12,22; 1202:14;1203:13,15, 20 defines (3) 1213:11;1214:23; 1215:14 definitely (8) 1129:18;1135:22; 1222:11;1259:19; 1267:6;1275:2; 1276:11,12 definition (1) 1291:1 delay (8) 1142:5;1156:20, 21;1162:21;1177:8, 13;1247:4,7 delegation (3) 1130:22;1180:3; 1188:25 delivered (2) 1252:19;1299:12 deluge (1) 1293:22 Demand (24) 1174:3,8,11,12,15;	1175:15;1176:6,11; 1178:17,21,23; 1179:3,9,17,20; 1180:17,23;1181:4, 12,13,16;1182:23; 1183:4;1286:7 demonstrated (1) 1289:14 demonstrating (1) 1285:5 departure (2) 1123:19;1124:16 depending (1) 1127:13 Depends (1) 1211:3 depth (2) 1195:5;1198:6 describe (4) 1170:4;1179:2,6; 1269:15 described (2) 1159:3;1197:4 describes (1) 1178:15 description (2) 1135:24;1158:16 designated (2) 1252:22;1253:10 designee (4) 1234:10,14,19; 1238:23 desires (1) 1193:21 despite (3) 1197:14;1256:16; 1288:9 detail (1) 1148:10 details (2) 1201:10;1209:19 determination (1) 1268:24 determine (4) 1152:22;1154:15; 1268:7;1295:16 determined (1) 1272:12 determining (2) 1159:15;1267:24 develop (2) 1233:4;1262:9 developed (2) 1147:24;1292:23 developing (1) 1128:24 development (1) 1127:9 deviation (2) 1234:21;1238:24 difference (4) 1221:18;1222:1,7, 24	differences (1) 1231:23 different (17) 1156:16;1157:8; 1179:12;1181:23; 1188:17;1190:20,23; 1191:11;1192:8; 1201:6,17;1213:7; 1217:6;1231:23; 1276:14;1281:11; 1286:12 differently (2) 1153:24;1154:1 difficult (3) 1182:6;1210:24; 1268:7 difficulty (1) 1201:5 digital (3) 1123:3;1273:25; 1274:1 diligence (1) 1284:22 dinnertime (2) 1273:5;1281:13 direct (15) 1121:14;1138:6; 1139:18;1167:7; 1183:15;1193:8; 1194:15;1198:21; 1208:20;1211:18; 1224:15;1241:5; 1248:20;1250:17; 1254:20 directed (1) 1226:11 directing (2) 1146:18;1282:3 direction (3) 1186:16;1233:15; 1298:3 directly (5) 1122:21;1274:6; 1289:22;1290:5; 1291:1 Directors (1) 1173:18 disadvantage (1) 1152:25 disagreement (1) 1299:14 disclose (16) 1133:8;1134:4; 1183:7;1241:21; 1243:5,20,25; 1244:12,17,22; 1245:10;1246:3; 1247:20;1252:9; 1253:2;1256:18 disclosed (12) 1172:11,14; 1175:16;1178:21; 1181:5;1182:23;
D				
DAA (84) 1135:12,15,17; 1136:3;1137:20,20, 23;1146:5,9;				

1209:5;1246:15,22; 1252:13,21;1253:10 disclosure (2) 1172:7;1280:4 disclosures (1) 1156:16 discover (1) 1208:2 discovered (1) 1279:13 discretion (6) 1184:21;1233:21; 1242:18;1243:4,25; 1299:16 discuss (8) 1139:20;1146:2; 1164:7;1191:21; 1242:19;1291:10; 1292:5;1303:11 discussed (2) 1272:1;1300:10 Discussion (16) 1119:24;1120:4; 1122:5;1161:20,23; 1162:1,3,13;1171:2; 1242:24;1266:22; 1271:17;1293:6; 1294:7;1302:11,14 discussions (18) 1126:10,13; 1133:6;1134:17,25; 1183:11;1185:7; 1187:24;1188:13,14; 1189:19;1190:16; 1191:15;1192:1; 1197:17;1244:13; 1272:6;1294:6 display (3) 1265:22;1266:19; 1267:13 displayed (2) 1160:22;1306:11 dispute (1) 1125:15 disputes (2) 1124:14;1125:12 disqualifications (1) 1270:17 Disspain (1) 1285:20 distinction (1) 1128:17 divulge (2) 1133:17,25 DNS (3) 1132:3,19;1274:3 document (64) 1129:14,17,19,21; 1145:2,5,12,17; 1146:20;1149:1; 1158:9,12,21; 1159:6,14;1160:5,8, 23,24;1161:1,10;	1163:10,16,17; 1165:14;1166:4,23; 1167:7;1168:20,23; 1177:15;1188:4,8; 1189:4;1193:5; 1195:3,5;1196:23; 1198:6,11;1199:21, 22,25;1200:21; 1201:12,13;1202:1, 5,17;1203:9;1204:9, 11;1205:19,21,25; 1215:3;1228:22; 1237:15;1253:22; 1257:5;1264:25; 1267:3,4;1268:20 documentation (1) 1250:22 documented (1) 1212:17 documents (14) 1121:13,15,20,23; 1122:10;1144:23; 1185:18;1197:18; 1198:17;1202:10,12, 13,14;1264:20 dollars (4) 1136:22;1204:24; 1223:19;1261:10 Domain (23) 1129:15;1130:24, 25;1131:14;1135:7; 1157:2;1166:15; 1174:14;1180:2; 1207:9;1216:22; 1219:14;1222:8,23; 1223:5;1225:5; 1229:25;1234:20; 1242:20;1246:11; 1247:15;1248:8; 1261:22 domains (4) 1135:7;1264:11; 1275:6,7 done (6) 1124:23;1138:20; 1155:19;1230:15; 1248:16;1291:3 Donuts (26) 1172:13,20; 1173:6,8,11,12,25; 1174:3,13,17,18,19; 1176:1;1178:6,8,16, 22,23;1179:17; 1180:18,24;1181:6, 9;1182:23;1209:7; 1259:8 Donuts' (4) 1173:17,18; 1176:12;1209:5 Donuts's (2) 1175:16;1176:6 DOT (41) 1143:7;1191:19;	1192:5,12,17,22; 1193:3,13,14; 1194:2,4,12,16,19, 20;1195:21; 1196:14;1197:1; 1198:24;1199:1,5; 1201:3;1204:16; 1205:8,15,17,22; 1206:1,5,8,16; 1229:4;1245:15,17; 1249:24;1250:13; 1251:23;1262:18; 1268:20;1270:20; 1278:3 D-o-t (1) 1192:13 DotTech (1) 1196:1 doubt (2) 1270:2;1298:25 down (18) 1139:8;1148:9; 1151:20;1171:1; 1178:2,12;1179:14; 1188:2;1190:11; 1212:7;1218:24; 1230:22;1231:19; 1234:3;1242:21; 1263:16,22;1277:16 downside (1) 1229:16 draft (21) 1129:17;1183:13, 17;1184:8,11; 1185:6,8;1186:4; 1187:3,12,17,19; 1188:21;1190:6; 1191:2,2;1192:3,5; 1196:24;1197:7; 1200:22 drafted (1) 1251:16 drafting (4) 1127:17;1129:19, 20;1269:2 drafts (2) 1185:19;1191:8 drew (2) 1142:1;1169:3 drive (2) 1279:22,22 due (2) 1136:13;1218:4 during (18) 1127:22;1132:1; 1134:12,20;1136:12; 1141:14;1146:22; 1164:7;1170:9; 1175:12;1183:5,11; 1188:12;1195:19; 1234:20;1236:12; 1277:22;1289:14	E earlier (8) 1165:13;1175:8; 1209:10;1217:9; 1239:3;1257:10; 1271:8;1291:25 early (7) 1123:13,17; 1124:25;1125:2; 1127:13;1262:23,24 earn (1) 1239:10 easier (3) 1225:3;1297:21; 1302:21 easy (6) 1268:7;1281:12; 1302:25;1303:3; 1304:17;1306:12 echo (1) 1134:11 ECO (1) 1176:8 economics (1) 1261:25 ecosystem (2) 1250:15;1278:13 eCyber (1) 1195:23 editing (1) 1188:4 effect (3) 1189:16;1190:7; 1239:2 effectuate (1) 1248:13 efforts (4) 1131:12;1140:9; 1283:12;1303:5 either (6) 1191:16;1229:6; 1247:2;1268:21; 1282:2;1290:14 electronically (1) 1139:17 element (1) 1214:14 elements (1) 1215:17 elicited (1) 1293:9 elicits (1) 1134:15 else (11) 1120:1;1127:11, 25;1128:5;1214:1; 1244:15;1252:24; 1253:12;1278:9; 1303:16;1305:10 elsewhere (1) 1156:18	email (6) 1127:7;1171:22; 1173:8,12,15;1178:8 emails (2) 1292:9,15 emotionally (1) 1282:7 employed (2) 1122:22;1124:18 enable (2) 1147:24;1227:4 enabled (1) 1185:1 encouraged (1) 1140:2 encourages (2) 1140:18;1156:19 encouraging (1) 1142:15 encryption (1) 1132:5 end (13) 1125:20;1132:19; 1136:12;1138:20; 1156:24;1217:3; 1231:2;1232:18; 1239:8;1293:21; 1306:22,24;1307:1 ended (2) 1157:3;1190:10 end-of-round (8) 1235:8;1236:1,7, 15;1237:2,17,19,25 ends (1) 1119:3 ENERGY (1) 1176:8 engage (1) 1271:10 engaged (3) 1271:9;1288:14; 1294:13 engagement (1) 1195:20 ENGLISH (5) 1164:21;1165:2; 1280:23;1281:18; 1307:6 enough (11) 1126:16;1151:9; 1202:2;1203:1,5,22; 1220:19;1221:21; 1230:23;1246:4; 1266:10 ensuing (1) 1299:20 ensure (5) 1142:11;1166:9; 1225:22;1226:10; 1236:2 ensuring (1) 1148:1 enter (2)
--	---	--	--	---

1233:21;1238:8 entered (7) 1174:13;1210:1,3; 1211:25;1237:5,7,25 entering (4) 1136:3;1235:5; 1250:9;1271:22 enterprise (1) 1135:9 entertainment (1) 1305:20 entire (6) 1139:15,17; 1217:2;1253:22; 1254:17;1282:15 entirely (1) 1127:25 entirety (3) 1194:12;1221:2; 1254:9 entities (3) 1171:3;1195:14; 1275:18 entitled (8) 1139:21;1163:3; 1183:21;1194:7; 1223:6;1224:5; 1228:7;1299:10 entity (46) 1142:18;1170:20, 23;1172:9,11,14,20; 1173:25;1192:12,17, 23;1193:3,14,14,18; 1194:3,4,12,12,16, 19,20;1195:8,9,22; 1196:14;1198:9,15, 25;1199:2,6; 1204:16;1205:8,15, 17,22;1206:1,6,8,16; 1209:16;1213:6; 1215:14;1231:4,5,20 entry (2) 1184:23;1248:22 envisioned (1) 1140:23 equal (1) 1291:2 equality (1) 1295:1 equally (3) 1174:18;1223:12, 21 equals (1) 1223:15 equitable (1) 1148:1 era (1) 1262:18 error (3) 1147:17;1150:23; 1151:14 especially (1) 1182:6	essential (1) 1302:19 establish (2) 1140:8;1149:13 established (4) 1133:21;1157:14; 1228:6;1239:3 establishing (1) 1140:23 estate (3) 1227:3,17,17 estimate (1) 1211:2 Ethan (2) 1121:4;1303:21 Europe (1) 1178:17 evaluate (3) 1152:22;1156:8; 1246:25 evaluated (3) 1157:6;1246:19; 1280:1 evaluates (2) 1152:9;1158:10 evaluating (4) 1128:9;1158:17, 18;1183:6 evaluation (6) 1141:14;1146:22; 1175:13;1246:21; 1248:14,16 even (11) 1150:24;1220:14; 1225:15;1240:13; 1244:3;1252:23; 1253:11;1259:6; 1264:13;1277:13; 1284:1 event (16) 1133:16;1141:21; 1149:14;1150:1,2; 1151:2,10,12; 1211:24;1220:4; 1221:6,12;1224:24; 1235:24;1292:16; 1299:18 events (1) 1219:2 eventual (1) 1239:5 eventually (5) 1217:11;1246:19, 24;1264:12;1280:4 everybody (4) 1297:21;1299:15; 1300:6,15 everybody's (3) 1186:17;1273:3; 1299:22 everyone (13) 1128:13;1177:5; 1192:9,18;1278:11;	1283:6;1291:22; 1305:12,13,15; 1306:21;1307:5,6 everyone's (2) 1192:7;1292:12 evidence (18) 1119:7;1147:16; 1150:22;1160:17; 1164:7;1202:25; 1203:4;1257:15; 1264:18;1281:8; 1288:6,7;1292:2; 1293:9,11,17; 1296:7;1302:7 evident (1) 1213:17 evidentiary (4) 1281:21;1292:23; 1293:24;1301:11 evidently (1) 1282:11 exact (2) 1130:8;1235:17 exactly (5) 1137:18;1158:11; 1173:24;1269:22; 1291:22 examination (1) 1134:12 example (20) 1131:8;1155:8; 1170:19;1171:3,22; 1172:12,13;1175:1; 1176:5;1193:5,6; 1202:20;1214:12; 1217:19,21;1218:5; 1228:2;1231:19; 1277:20;1295:7 examples (7) 1142:20;1174:23; 1185:15;1197:10,17; 1217:23;1231:17 Excellent (4) 1118:9;1162:24; 1299:1;1306:15 except (3) 1217:22;1218:11; 1226:12 excepted (1) 1254:14 exception (1) 1254:12 exceptions (1) 1254:19 excerpts (1) 1139:13 exchange (5) 1189:14;1190:17; 1191:17,23;1227:5 exchanges (1) 1283:4 exclude (1) 1269:12	exclusively (1) 1233:15 Excuse (8) 1133:11;1148:20; 1182:1;1198:1; 1214:19;1245:9; 1253:1;1273:1 execute (2) 1234:18;1238:22 executed (9) 1137:20,20; 1195:17;1196:5; 1204:2;1210:6,15; 1245:9;1270:20 execution (4) 1184:1;1208:4; 1241:23;1252:8 executive (5) 1173:5,10,19; 1178:5;1209:6 executives (4) 1126:13;1128:2; 1260:14;1262:8 exemplary (1) 1306:10 exercise (1) 1303:5 Exhibit (25) 1144:18;1158:9; 1165:15;1174:7; 1183:17;1188:20; 1190:6;1195:24; 1196:13;1207:17; 1208:21;1214:13,17, 21;1215:6;1218:20; 1219:22;1224:19; 1233:7,9,11; 1236:19;1251:6; 1266:4,6 exhibits (4) 1122:18,20; 1302:9,16 existence (6) 1241:22;1242:1,9; 1243:5,20;1245:11 existing (1) 1248:25 exists (1) 1269:3 exited (1) 1124:9 exit-round (1) 1235:14 expanding (1) 1132:19 expect (1) 1283:23 expected (1) 1246:24 expecting (1) 1142:9 expense (1) 1221:10	experience (3) 1269:10;1289:9; 1302:25 expertise (2) 1131:10;1250:6 explain (4) 1177:9;1261:13; 1276:4;1286:10 explained (3) 1212:16;1235:11; 1262:7 explaining (1) 1196:17 explanation (7) 1147:16;1148:14, 16,23;1150:5,8; 1287:21 explicitly (1) 1222:22 explore (1) 1279:16 express (4) 1284:25;1285:18; 1301:21;1306:1 expressed (1) 1304:16 expressly (1) 1268:21 extent (3) 1241:15;1243:13; 1269:3 external (3) 1252:15,16,17 extraordinarily (4) 1283:5,11; 1295:23;1296:12 extraordinary (1) 1297:15 extremely (6) 1282:11,16; 1283:7;1293:1; 1304:15;1306:6
F				
face (2) 1118:17;1267:25 fact (42) 1121:10;1133:13; 1146:15;1147:5; 1152:13;1171:24; 1176:11;1184:6; 1194:7;1195:4; 1197:14;1206:2,17; 1209:1,4;1226:24; 1227:25;1228:25; 1229:25;1234:13; 1239:3;1249:18; 1251:2;1252:13; 1255:16,23;1256:11, 18;1259:6;1272:19; 1274:1,19;1275:16, 17;1276:1;1277:6,				

11;1278:16; 1286:16;1287:3; 1288:9;1297:2 factors (3) 1156:13,22; 1188:7 facts (6) 1302:19,23; 1303:1,5,25,25 factual (4) 1238:17;1302:10, 17,19 fade (1) 1297:18 failing (1) 1214:25 faint (1) 1122:1 fair (61) 1126:16;1127:20, 21;1128:17; 1131:11;1136:1,17; 1137:3;1138:24; 1139:4,9;1140:18, 20,21;1141:25; 1142:7;1146:1,4,8; 1148:1;1150:6,10; 1151:9,24;1152:1; 1155:6;1158:8,12; 1165:19,22;1182:22; 1183:4;1193:12; 1194:1;1202:2; 1203:1,2,5,22; 1204:12;1208:1,7; 1220:19;1227:23; 1230:23;1231:3,13; 1235:22;1237:22; 1246:4;1249:16; 1251:15;1253:25; 1254:1,16;1256:16; 1259:15;1266:16; 1269:6;1291:2; 1295:23 fairly (2) 1229:19;1301:6 fairness (3) 1147:18;1152:20; 1168:19 fall (3) 1125:23;1136:13; 1305:8 familiar (13) 1129:14;1130:5,9; 1145:6,12;1151:17; 1161:2,9;1168:23; 1173:13;1182:15; 1249:25;1275:1 familiarize (2) 1138:11;1143:24 familiarized (3) 1160:18;1201:23; 1276:11 family (1)	1124:22 far (5) 1146:17;1187:25; 1190:12;1232:11; 1282:18 faster (1) 1211:1 favorably (1) 1288:8 favored (1) 1275:16 favours (1) 1275:18 February (1) 1208:13 Fee (23) 1217:22;1218:1, 10,16,18;1219:1; 1223:15,18,25; 1239:10,14,14,18,22, 23,24;1240:1,3,5,14, 20,24;1241:1 feed (1) 1279:9 feel (3) 1270:21;1282:8; 1301:12 feeling (1) 1247:1 feels (1) 1288:4 fees (6) 1217:24;1219:17; 1239:13,13;1253:18, 23 few (11) 1119:17;1121:20; 1128:1;1133:1; 1154:24;1202:10; 1258:11;1260:4; 1273:7;1280:15; 1299:2 fifth (1) 1267:17 figure (2) 1201:8;1227:21 figured (2) 1232:16;1279:22 figuring (1) 1250:7 file (4) 1158:20;1294:21; 1296:21,22 filed (9) 1118:23;1146:15; 1158:14;1195:12; 1227:11;1259:8; 1265:16,17;1267:8 files (2) 1185:16;1197:25 filing (4) 1122:13;1158:22; 1291:13,14	filings (7) 1122:12,14,16,19, 20;1264:22;1265:3 final (2) 1213:15;1237:11 finally (5) 1135:24;1209:23; 1252:21;1253:10; 1258:3 finance (6) 1128:16;1135:19, 19;1213:5,5,13 financed (3) 1207:3;1213:6,11 financial (4) 1125:14;1133:2; 1134:21;1273:14 financially (1) 1270:24 financier (2) 1225:10;1230:8 financing (29) 1213:1,2,20; 1214:1;1215:13,14, 15,17,18,22,23,24, 25;1216:4,7,11,22; 1224:10,12;1225:10, 15;1226:22;1230:8, 17,21,24;1231:11, 13,15 financings (1) 1230:15 find (5) 1126:14;1135:5; 1203:16;1215:1; 1264:10 finding (2) 1134:18;1215:3 findings (1) 1290:14 fine (8) 1177:14;1186:23, 25;1192:21;1200:7; 1202:11;1225:4; 1291:24 finish (5) 1155:16;1180:12, 15;1182:10;1186:21 finished (1) 1186:12 firm (2) 1121:4;1185:17 first (39) 1123:14;1145:17; 1146:19;1147:12; 1148:11,14;1150:5; 1159:6;1164:2; 1168:18;1184:20; 1186:4;1196:24; 1198:13;1211:1; 1217:21,25,25; 1218:15,18;1220:21, 24;1239:14,22;	1240:3;1241:1; 1243:15;1257:6; 1258:7,8;1259:5,13; 1261:12;1265:22; 1268:6;1284:21; 1291:14;1302:15; 1304:4 fists (1) 1232:5 fits (1) 1301:13 five (9) 1120:11,13; 1147:18;1163:9; 1184:1;1185:9; 1197:23;1198:20; 1202:5 fix (1) 1300:6 fixed (2) 1216:7;1270:8 flipping (1) 1246:7 focusing (2) 1169:3;1264:5 folks (8) 1128:3,18,24; 1170:25;1195:13; 1196:16;1226:2; 1284:5 follow (5) 1131:25;1234:18; 1238:22;1247:5; 1298:17 Following (12) 1130:15;1157:8; 1178:15;1185:3; 1215:18;1220:15; 1252:8;1254:25; 1257:18;1258:4; 1277:19;1301:20 force (2) 1124:10;1229:24 foreclose (4) 1228:1;1229:17, 18,23 foresee (1) 1300:8 foreshadowed (1) 1281:23 forget (1) 1268:20 forgetting (1) 1280:10 form (11) 1127:6;1143:22; 1144:2,10;1163:1; 1187:21;1188:22; 1195:21,24;1196:7, 18 formal (1) 1259:13 formed (1)	1172:13 forming (2) 1172:9;1188:1 forms (6) 1124:10;1141:17; 1143:4,17,20;1147:1 forte (1) 1135:9 forth (4) 1165:17;1205:3; 1218:18;1301:18 forward (2) 1188:9;1298:14 found (4) 1138:19;1153:4,5; 1170:19 foundation (8) 1160:6,12,15; 1176:14;1182:2,12, 18;1200:20 founded (1) 1174:14 four (11) 1119:23;1120:11, 12,12;1147:18; 1189:20;1190:25; 1191:1,1,7,7 fourth (3) 1174:9;1267:17, 23 frailties (1) 1300:24 France (1) 1281:13 frankly (1) 1284:23 fresh (1) 1297:22 Friday (1) 1235:11 front (6) 1118:17;1145:14; 1161:11;1176:15; 1218:22;1231:2 full (3) 1177:21;1287:20; 1293:24 fully (4) 1203:6;1210:6,14; 1304:9 function (1) 1142:17 functionally (1) 1286:12 fund (2) 1157:2;1231:24 funded (2) 1156:17;1217:10 funding (2) 1213:24;1225:13 funds (10) 1211:22;1213:3, 15;1214:6,10;
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1215:19;1216:6,13; 1231:21;1261:12 further (19) 1153:3;1177:20; 1185:7,20,24; 1189:9;1206:17; 1212:7,17;1234:3; 1239:9;1241:12; 1242:21;1243:8,19; 1259:22;1293:16; 1299:7;1302:3	1140:4,7;1148:10; 1158:17;1178:25; 1216:3,19;1228:4; 1232:11,11,15; 1244:21;1260:25; 1278:12;1284:1; 1287:11;1288:2; 1290:25 good (22) 1118:3,4,6; 1119:14;1121:3; 1126:19;1136:20; 1164:2,3,9;1176:23; 1210:19;1274:10; 1275:8;1281:20; 1282:21;1297:1; 1300:13;1303:15,23; 1306:22;1307:1 Good-bye (2) 1307:4,6 Google (26) 1170:23;1171:4, 22,24;1183:13,18, 25;1184:6,15,16,20; 1185:8;1187:4,17; 1188:6,9,22,22; 1189:7,12;1190:6,8, 9;1191:9;1197:16; 1268:19 Google's (1) 1185:4 govern (1) 1138:1 governing (4) 1144:15;1145:8; 1161:6;1170:2 graciousness (1) 1284:23 GRAMONT (1) 1255:22 granting (3) 1152:23;1153:8, 10 grapple (1) 1304:18 gratitude (2) 1305:5;1306:1 great (7) 1145:1;1148:13; 1168:25;1275:4; 1276:19;1281:14; 1282:17 grounds (2) 1176:13;1285:9 group (8) 1125:23;1127:14, 23,25;1128:16; 1130:19;1270:14; 1272:17 grow (2) 1264:9,10 growth (3) 1133:3,9;1134:22	gTLD (49) 1125:19;1126:4; 1128:7,11;1130:11; 1132:1,21;1134:19; 1137:6,8;1138:2,8, 10;1139:14; 1144:15;1145:3,8; 1160:25;1161:6; 1163:3;1170:2,6; 1188:17,20,23,25; 1192:14,18;1193:15, 23;1194:5,22; 1195:22,25;1196:4; 1199:3;1204:18; 1205:23;1206:3; 1211:23;1212:10,15, 16;1214:7,11; 1233:25;1248:24; 1263:24;1274:21 gTLDs (13) 1130:22;1131:19; 1132:11,20;1136:8; 1170:5;1174:16,19; 1210:3;1262:10,14; 1273:16;1274:12 guarantee (1) 1229:18 guess (16) 1138:13;1141:19; 1156:21;1160:2; 1168:8;1206:10; 1214:25;1215:9; 1240:18;1251:22; 1254:4;1256:20; 1261:2;1279:18; 1287:7;1290:22 guessing (1) 1263:18 guide (1) 1298:3 guidebook (32) 1137:8;1138:8,14; 1139:14;1142:22; 1155:8;1156:18; 1157:10;1158:5; 1159:7;1160:18; 1161:18;1162:10,18; 1163:9;1170:2; 1212:9;1241:12; 1247:6;1248:23; 1250:5,10,15; 1267:24;1268:1,1, 17,25;1269:2,8; 1271:15;1290:16 guideline (1) 1247:6 guidelines (2) 1145:19,21 guy (3) 1129:12;1193:6; 1215:21	H half (2) 1211:2;1274:9 hand (1) 1290:1 handful (1) 1144:23 handle (1) 1189:17 handled (6) 1130:19;1269:4; 1282:9,16;1283:2,7 handling (1) 1284:23 hands (2) 1210:9;1233:6 handwritten (1) 1266:3 hanging (2) 1228:21;1229:1 happen (10) 1133:19;1140:23; 1215:8;1217:5,6; 1247:2;1262:4; 1270:14;1300:7; 1305:5 happened (3) 1157:20;1217:8; 1302:18 happening (1) 1278:1 happens (7) 1216:19,25; 1220:4;1227:21; 1232:18;1257:13; 1306:13 happy (3) 1176:18;1300:5; 1303:12 hard (2) 1157:21;1284:22 harkening (1) 1300:20 Harris (1) 1294:11 Head (2) 1201:5;1246:7 heading (1) 1208:12 headquarters (1) 1234:6 heads-up (1) 1265:11 health (1) 1306:22 hear (7) 1118:13;1129:23; 1134:7;1165:4,6; 1284:18;1288:18 heard (8) 1182:17;1206:4;	1255:8;1272:19; 1275:14,23;1279:21; 1297:9 hearing (18) 1275:3,15,16; 1279:19;1281:22,25; 1282:16,19,21; 1283:15;1289:15,24; 1292:24;1301:11; 1305:24;1306:12,15, 19 heavily (1) 1152:16 held (3) 1170:21,22; 1215:7 hell (1) 1232:8 help (9) 1135:19;1157:2; 1176:8;1190:10; 1246:1;1257:1; 1274:7;1282:17; 1293:18 helped (1) 1305:4 helpful (2) 1280:18;1299:19 Here's (1) 1286:1 hereto (2) 1188:20;1195:24 high (6) 1190:24;1196:19, 21;1261:4,20;1306:8 higher (7) 1120:2;1231:22; 1260:20;1261:1,3,5, 8 highlight (2) 1236:19,24 highlighted (4) 1154:10;1169:13; 1225:16;1268:6 highlighting (1) 1172:5 highly (1) 1239:2 himself (1) 1165:3 hired (1) 1274:6 Historic (2) 1294:12,12 history (7) 1132:4;1135:1,8; 1269:3;1270:23; 1274:5;1298:4 hit (1) 1222:4 hold (3) 1156:22;1186:14; 1247:7
G				
gained (1) 1304:25 games (1) 1286:7 gave (4) 1125:25;1130:8; 1142:19;1185:17 general (8) 1122:23;1129:5; 1133:7,15;1143:9; 1189:3;1194:1; 1243:2 generally (6) 1138:16;1169:9; 1189:6;1215:12,13; 1240:22 generated (1) 1304:5 generic (5) 1214:3;1263:1; 1270:13;1272:17; 1275:4 genericized (1) 1213:25 gentleman (2) 1128:14;1178:4 gets (4) 1192:15;1230:10; 1248:2;1298:12 given (8) 1140:11;1162:25; 1270:23;1283:8; 1293:2;1295:6,19; 1297:2 gives (2) 1217:23;1250:13 giving (2) 1203:8;1296:2 glad (1) 1292:12 Glen (6) 1172:19,24; 1173:17,20,25; 1209:5 Glen's (1) 1173:4 goal (2) 1135:18;1136:5 goes (18)				

holder (2) 1228:12,23	1148:15;1149:2,15; 1150:3,5,5,13; 1151:7,13,17,21; 1152:5,21;1153:3, 12,15;1154:15,17; 1155:4,4;1156:8; 1157:17,17;1158:10, 16;1159:6,12; 1160:19;1163:19; 1165:18,22;1166:10; 1174:17;1175:13; 1178:22;1182:25; 1183:6;1184:22; 1194:21;1196:9; 1199:1,1,2,20; 1204:15,15,17; 1205:23;1206:2,12, 19;1208:17,22; 1210:15;1212:1,1; 1220:12,25;1221:2, 6,13,14,15,21; 1230:1;1231:8; 1232:4;1237:21; 1241:15,22;1242:20, 24;1243:6,13,18,25; 1244:5,10;1245:11, 19;1246:2,16,24; 1251:18;1252:10,14, 15,23;1253:11; 1254:25;1255:2,4, 10,12;1256:1,3,5,9, 17,18;1257:9; 1258:4,9;1259:1,5, 13,16;1265:14; 1267:10;1269:3,17; 1270:2,14;1271:5, 13,18;1272:1,18; 1275:16,17,20; 1276:12,17;1278:13; 1283:1,11;1285:21; 1291:18;1292:17,18; 1293:3;1294:16,24; 1295:2,5,7,10,17,21; 1297:5;1298:14; 1301:4,6,16,20; 1304:13	identified (12) 1140:1;1171:4,7,8, 25;1173:5,17; 1178:5;1179:17; 1180:18,21;1181:16 identifies (1) 1147:11 identify (4) 1125:17;1126:4; 1128:6;1137:5 identifying (1) 1206:7 ii (3) 1184:4;1243:9,12 imagine (1) 1292:8 imbalanced (1) 1293:2 immediate (1) 1126:6 immediately (2) 1235:19;1297:19 impact (5) 1152:15;1153:4, 16,19;1154:3 impacts (2) 1152:10;1291:1 implausible (1) 1239:2 implemented (1) 1178:16 imply (2) 1157:12;1180:10 implying (1) 1180:11 important (6) 1136:18,25; 1139:1;1182:4; 1209:11;1278:15 impressed (2) 1289:11;1304:16 improbable (1) 1238:18 inaccurate (9) 1141:16;1143:6, 15,19;1144:7,12; 1146:24;1159:11,22 inappropriate (1) 1227:9 Inc (2) 1171:5;1195:23 incisive (1) 1282:21 include (1) 1178:17 included (1) 1139:15 includes (1) 1185:14 including (4) 1122:14;1217:2; 1283:21;1290:3 inconsistent (1)	1120:14 increase (2) 1118:11;1132:22 increasingly (1) 1261:4 incredible (1) 1304:15 incredibly (1) 1178:13 incur (1) 1239:4 indeed (2) 1249:21;1258:20 Indelicarto (11) 1126:1,18,19,20, 24;1128:5;1133:7, 14,18,22;1134:17 I-n-d-e-l-i-c-a-r-t-o (1) 1126:20 Indelicarto's (1) 1129:3 Independent (2) 1118:24;1124:20 in-depth (2) 1269:1,8 indicated (2) 1282:6;1294:7 indicating (1) 1294:7 individual (1) 1170:21 individually (1) 1293:4 individuals (1) 1173:22 industry (9) 1132:7;1139:3; 1166:14,15;1174:14; 1212:14;1246:11; 1247:14,15 inferences (1) 1287:2 inform (2) 1157:17;1187:10 information (27) 1138:9,17,19,22; 1141:13,14;1143:13; 1144:6;1146:23; 1158:4;1159:9; 1161:17;1162:9; 1172:25;1187:9; 1208:2;1209:2; 1210:13,16;1236:24; 1237:22,23;1243:13; 1244:4;1250:13; 1253:3;1268:10 Information' (1) 1242:10 informed (5) 1174:24;1187:6; 1253:15;1256:2,10 informing (2) 1252:23;1253:12	informs (1) 1158:13 infrastructure (1) 1132:4 initially (2) 1294:14;1301:2 initiative (3) 1174:10;1260:15; 1262:9 ink (1) 1296:5 inquire (1) 1144:14 inquiry (1) 1203:3 inside (1) 1169:15 insofar (5) 1293:13;1296:17; 1301:25;1303:24; 1304:13 instance (8) 1171:18;1218:9; 1219:12;1220:21,24; 1225:19;1285:16; 1287:15 instances (1) 1172:7 instead (1) 1130:24 instruct (1) 1186:8 instructed (3) 1126:3;1238:2,8 instructions (4) 1211:8;1234:11, 19;1238:22 intact (1) 1292:13 integrated (2) 1201:13;1266:10 intel (1) 1128:24 intelligence (1) 1263:13 intended (5) 1187:12,20; 1216:2;1223:22; 1226:21 intending (1) 1301:9 intent (2) 1223:9;1270:18 intention (1) 1285:14 interest (22) 1125:14;1172:8, 10;1180:1;1186:17; 1216:1,8;1224:9,23; 1225:11,17,18,19; 1227:5,11;1228:2; 1231:4,5;1232:4,6; 1262:10;1296:2
I				
ICANN (171) 1130:16;1131:17; 1132:9,18;1138:8, 17,21;1140:18,20, 22;1141:1,17,19; 1143:16,25;1144:8, 14;1146:5,10,12,15, 25;1147:4,6,22;	ICANN's (19) 1125:19;1138:10; 1142:3;1143:21; 1145:2;1154:19; 1156:4;1160:24; 1163:19;1166:6; 1175:21,24;1212:2; 1252:15;1257:21; 1265:23;1267:7; 1268:8;1296:11 ICDR (1) 1295:24 idea (5) 1131:15;1189:9; 1221:1,9;1298:2 iDefense (2) 1263:13;1264:12			

interested (2) 1270:25;1275:6	1127:4	20;1177:7;1182:1, 12,13;1209:24; 1253:1;1266:9; 1272:23;1280:14,17, 22,25;1281:2; 1289:3,4;1291:7; 1297:9,12;1300:17; 1305:17	1272:25;1273:3,8, 12,21;1274:10,15; 1275:10;1278:14,23; 1279:2;1280:6; 1302:8,12,15,24; 1303:2,11;1307:4	late (2) 1262:24;1301:16
interesting (4) 1189:8;1197:16; 1261:21;1269:14	1127:19,22	investigative (2) 1127:19,22	Kevin (1) 1129:12	Later (5) 1125:23;1127:15; 1264:13;1267:8; 1274:11
Interests (5) 1194:9;1226:6; 1291:2;1298:13; 1300:23	investment (3) 1224:24;1225:7, 12	INVESTMENTS (1) 1176:9	kind (14) 1124:4;1125:23; 1127:17;1180:4; 1256:11;1263:16; 1265:2,8;1275:23; 1277:22,23;1278:7, 22,24	law (1) 1121:4
interfere (1) 1130:23	invite (3) 1265:12;1266:14; 1267:12	Johnston's (1) 1134:11	knaw (6) 1130:9;1142:8; 1162:17;1163:25; 1246:18;1257:19	lawyer (2) 1195:1,4
internally (1) 1272:6	invoked (1) 1135:5	join (2) 1123:6;1306:21	Knock (2) 1209:13,13	lawyers (2) 1129:11;1306:2
international (1) 1301:8	involve (3) 1169:9;1190:16; 1285:6	joined (5) 1131:24;1132:8; 1165:3;1263:6,15	knowing (1) 1302:7	lay (1) 1200:20
Internet (1) 1174:14	involved (13) 1127:16,16; 1128:21;1129:11,18, 20;1135:3,23; 1180:24;1253:17; 1256:12,13;1278:16	joining (4) 1118:5,20,22; 1132:2	knowledge (5) 1151:1;1160:17; 1176:10,17;1182:19	leading (1) 1277:19
Internets (1) 1131:9	IRP (4) 1241:21;1264:22; 1289:18;1306:4	joint (4) 1140:8,12,24; 1141:2	known (1) 1263:1	learn (1) 1256:8
interpret (7) 1140:11;1156:4,4; 1162:5;1165:23; 1202:13,21	involvement (1) 1256:14	Jose (5) 1215:21;1225:24; 1235:22;1249:25; 1251:23	knows (1) 1291:22	learned (1) 1174:2
interpretation (7) 1154:20;1155:2, 13;1199:14;1201:9; 1203:8;1269:1	IRP (4) 1241:21;1264:22; 1289:18;1306:4	JP (1) 1274:18	lack (5) 1160:12;1176:14; 1182:2,12;1277:9	learning (1) 1274:13
interpretations (1) 1154:18	issue (5) 1269:2;1286:18, 18;1287:14;1294:18	judge (1) 1136:20	lacked (1) 1160:6	least (16) 1131:13;1145:17; 1170:25;1179:4,13, 21;1180:24; 1188:16;1247:24; 1261:10;1279:8,10; 1285:5;1297:12; 1298:18;1306:17
interprets (2) 1152:6;1154:17	issued (5) 1175:7,12;1181:4; 1183:4;1255:19	July (5) 1246:2;1251:3,7; 1255:10;1299:13	landed (1) 1301:19	leave (6) 1229:1;1293:7; 1297:8;1300:5; 1301:23;1302:4
interrupt (4) 1200:3;1213:22; 1294:9,12	issues (4) 1153:6;1283:24; 1289:21;1302:2	jumped (1) 1144:3	language (10) 1155:9;1165:23; 1181:23;1187:20; 1188:8;1201:7,21, 23,24;1202:2	leaving (3) 1124:19,24; 1263:12
interrupted (3) 1203:24;1287:17, 20	iterate (1) 1199:22	jumping (1) 1159:19	largely (4) 1122:16;1139:10; 1262:1;1263:7	left (13) 1123:6,16;1124:8, 17;1166:3;1185:17; 1201:7;1211:3; 1222:24;1228:21; 1229:15,15;1263:7
interrupting (2) 1155:17;1159:25	iterated (2) 1185:9;1202:12	jumps (1) 1200:5	large (3) 1132:22;1262:18; 1292:23	legal (11) 1133:25;1135:1; 1173:19;1177:21; 1187:20;1194:12; 1203:8;1209:6; 1229:23,24;1265:10
interruption (1) 1163:12		June (11) 1118:25;1123:13, 14;1131:24;1132:8, 14;1175:3;1181:4; 1204:3;1265:17; 1266:24	larger (1) 1274:2	lender (1) 1227:10
into (39) 1124:3;1125:23; 1127:14,18;1128:11, 19;1132:21;1136:3; 1144:14;1149:5; 1156:9,23;1159:2, 21;1168:14;1170:4; 1174:13;1184:23; 1188:2;1203:8; 1209:22;1210:1,4; 1211:25;1213:25; 1216:6,11;1220:15; 1230:20;1233:21; 1248:22;1250:9; 1271:22;1275:5; 1276:8;1285:23; 1299:21;1305:7,7	J	juries (1) 1285:6	last (17) 1119:17;1122:16; 1123:17;1138:25; 1144:3;1165:12; 1167:8;1193:9; 1208:21;1275:15,23; 1282:6;1283:5,9,14; 1299:24;1306:17	length (11) 1168:25;1215:20; 1292:7,9,15; 1295:16;1296:21,23; 1298:11,20;1301:7
intriguing (1) 1263:9	January (2) 1131:17,22	jurisdiction (4) 1289:24;1290:14, 23;1291:1	lasted (1) 1289:23	lengthy (1) 1292:9
introductory (1) 1149:21	JD (3) 1280:22;1281:16; 1306:14			Less (4) 1205:3;1222:22; 1228:17;1278:17
investigate (1)	Jeff (2) 1291:15;1294:9			lesson (1) 1142:1
	Jim (2) 1126:2;1274:7	K		
	job (1) 1156:4	Kamala (1) 1294:11		
	John (1) 1128:14	keep (6) 1143:9;1148:12; 1215:5;1230:16; 1231:17;1290:7		
	Johnston (39) 1119:13,14,19; 1120:6,15,18; 1121:7;1133:11; 1134:2,6,8;1155:15; 1159:25;1160:3,14; 1164:17,18;1176:13,	keeping (1) 1247:25		
		Kessedjian (24) 1118:20;1258:16, 20;1260:2,6;		

letter (3) 1251:6;1257:7,20	1251:22;1283:24; 1298:9;1304:20	1172:20,25; 1178:1;1209:13	1161:22;1163:1,4; 1176:3;1196:24; 1212:7;1215:1; 1218:23,24;1226:4, 8;1227:15;1240:10; 1248:6;1250:5; 1260:23;1270:1; 1272:3;1276:8; 1295:12;1304:9,22	1288:22 managed (1) 1131:13 management (2) 1123:3;1273:18 managing (1) 1282:20 manner (4) 1140:5,13;1141:3; 1281:25 many (2) 1170:10;1172:14 March (2) 1208:16,23 Marenberg (12) 1284:16,17,20; 1287:25;1288:17; 1289:5;1290:3,10; 1297:13;1305:17,19; 1307:3 marked (1) 1121:12 market (10) 1128:11;1131:14; 1156:16;1170:5; 1187:7,11,22; 1212:14;1226:1; 1269:15 marketplace (2) 1157:9;1158:2 material (4) 1141:22;1143:5; 1152:14;1159:21 materiality (5) 1147:19;1153:14, 21;1154:2,11 materially (4) 1140:13;1152:9, 15;1153:4 materials (1) 1147:7 matter (10) 1125:1;1165:16; 1179:12;1269:9; 1282:11;1293:15; 1297:2;1299:5; 1304:18;1305:18 matters (4) 1124:13;1127:9; 1165:18;1290:15 maximum (1) 1184:10 may (45) 1120:10;1122:13; 1123:17;1125:1,2; 1140:4,8,23; 1157:19,19;1160:16; 1164:23;1167:11,19; 1168:4,14;1173:7; 1174:16;1188:6,7; 1201:19;1205:18; 1206:4;1207:1; 1244:22;1255:13;
LeVee (13) 1282:24;1283:1; 1284:14;1285:1; 1291:16;1294:1,5, 14;1296:24;1301:3, 15;1305:9,11	Litwin (73) 1120:19,21; 1121:2,4;1122:6; 1133:20;1134:9; 1144:21,22;1145:15, 20;1148:7;1149:19, 25;1155:15,18; 1160:9,22;1163:12, 14;1164:1,19,25; 1165:1,7,10,11; 1169:3,24,25; 1176:16,23;1177:18, 24;1178:2;1182:9, 20,21;1186:9,22; 1187:1,2;1198:1; 1200:8,10,18,19; 1201:15,24;1203:3, 23,25;1210:18,24; 1211:17;1249:3,6,9, 12;1253:5,9; 1255:24;1258:10,15, 18,22;1259:21,24; 1265:24,25;1266:6, 20;1267:1	LLC' (1) 1172:13 loan (4) 1212:23,24; 1215:24;1226:23 loans (1) 1227:3 lobbying (2) 1131:12,16 located (1) 1138:20 locations (1) 1283:21 lock (1) 1277:15 long (11) 1123:23;1163:8, 10;1242:13; 1245:22;1269:21,24; 1272:20;1283:18; 1295:14;1298:8 longer (1) 1210:22 look (48) 1122:3,18; 1128:23;1138:4; 1145:6,12,24; 1147:10;1149:3; 1150:5;1151:20; 1156:11;1158:4,21; 1161:2,9;1163:16; 1170:8,17;1171:1, 10;1172:24;1174:6; 1175:2,10;1184:3, 12;1187:14; 1192:22;1198:2; 1201:2,14,20; 1202:4,10;1214:12; 1215:25;1216:19; 1223:3;1224:21; 1233:1,18;1236:23; 1264:16;1266:24; 1274:8;1276:24; 1277:1 looked (26) 1132:21;1144:10; 1145:22;1149:16; 1155:8;1156:15; 1171:9,18;1173:21; 1181:3;1185:9; 1187:24;1188:6; 1202:5;1224:20; 1263:8;1270:16; 1272:7,10;1275:3,8; 1276:16,21;1279:24; 1280:2,3 looking (33) 1128:18;1139:7,8; 1142:22;1149:22; 1156:25;1157:1; 1158:1,2,9;1160:21;	looks (7) 1179:9;1181:12; 1183:1;1199:10; 1220:10;1226:4; 1254:17 Los (1) 1118:22 lose (3) 1231:1;1277:12; 1284:1 losers (2) 1276:25;1277:3 lost (1) 1298:12 lot (27) 1124:21;1131:8; 1132:12;1138:17; 1156:13,14,22; 1157:8;1160:5; 1202:9;1215:19; 1225:21;1226:13; 1233:2,3;1235:22; 1260:20;1261:23; 1262:23;1263:2; 1274:13;1275:2; 1277:14;1288:7; 1296:4;1297:16; 1305:20 lots (1) 1262:19 loved (1) 1304:21 lower (1) 1121:17	
level (5) 1190:24;1196:19, 21;1198:14;1261:20	live (2) 1123:21;1279:9		M	
lien (1) 1227:18	Livesay (85) 1118:3,18; 1119:14,25;1120:16; 1121:3,10;1122:8, 22;1124:5;1127:20; 1133:22;1134:11; 1135:25;1138:13; 1143:10;1144:14; 1146:14;1149:12; 1150:2,11;1151:9; 1152:1;1154:1; 1155:6,20;1157:12; 1158:8;1160:16; 1161:13;1162:5; 1163:16;1164:5,20; 1165:2,9,11; 1177:25;1181:15; 1182:1,22;1186:5, 16,22;1187:3,16; 1188:11;1191:3,12; 1192:20;1193:12; 1195:16;1197:5; 1198:21;1200:2,13, 19;1201:20; 1202:16;1204:1,12; 1211:7,14,18; 1215:12;1217:9,15; 1218:14,24;1220:18; 1224:15;1227:25; 1241:4;1257:15; 1258:22;1260:1,14; 1267:3,15;1269:11; 1272:22;1273:7; 1280:7;1281:3,6			
light (2) 1251:16;1285:19	LLC (4)			
likely (3) 1121:6;1153:5; 1173:15				
likewise (1) 1119:8				
limit (7) 1179:3;1235:19; 1242:17;1243:11; 1294:15,16;1295:5				
limitation (2) 1168:8,9				
limitations (3) 1287:12;1288:2; 1294:17				
limited (8) 1167:15,22; 1169:13;1176:21; 1178:17;1183:2; 1225:11;1285:15				
limits (2) 1293:15;1296:19				
line (7) 1152:18;1154:5; 1160:4;1167:8; 1198:4;1203:3; 1267:23				
Lines (1) 1198:4				
list (7) 1210:7,8;1300:14; 1301:25;1302:9,16; 1303:25				
listed (6) 1173:4,22; 1175:18;1176:6,12; 1181:13				
listening (1) 1170:14				
lists (1) 1180:7				
literally (1) 1295:14				
little (15) 1122:1;1127:24; 1179:15;1192:15,16; 1197:21;1198:10; 1210:24;1211:3; 1242:21;1243:9;				

1258:18;1259:7; 1260:2,21,24; 1265:1;1268:9; 1278:15;1283:16,16; 1284:15;1294:1,9; 1296:14;1300:16; 1302:24;1303:18; 1306:5,22 Maybe (23) 1119:25;1120:1; 1128:24;1130:5; 1148:11;1168:12; 1179:6;1206:24; 1211:3;1226:25; 1229:2;1230:25; 1246:1;1252:3; 1253:24;1260:25,25; 1261:1;1264:4; 1269:19,20;1271:19; 1300:14 McAuley (2) 1129:25;1130:4 mean (29) 1127:12;1128:22; 1131:15;1137:14; 1153:22;1168:12; 1170:12;1171:7; 1179:1;1180:10; 1181:7,8;1190:1; 1196:22;1213:21; 1215:22;1216:5,6; 1219:16;1222:25; 1231:14;1232:24; 1253:21;1257:11; 1258:8;1259:2; 1261:4;1268:8; 1272:6 meaning (3) 1174:15;1233:9; 1272:6 means (2) 1179:7;1201:12 meant (3) 1223:19;1271:7; 1279:16 mechanically (1) 1196:18 mechanism (5) 1199:16;1269:13, 25;1270:3,7 Media (23) 1174:4,8,11,12,16; 1175:15;1176:6,11; 1178:17,21,23; 1179:4,10,17,20; 1180:17,23;1181:5, 12,13,16;1182:23; 1183:4 medical (1) 1124:3 MEET (3) 1210:2,10; 1306:23	meeting (2) 1165:3;1281:19 meetings (3) 1127:7,8;1133:22 member (3) 1129:2;1278:8; 1306:2 members (22) 1120:11;1153:20; 1154:3;1167:3,16, 23;1169:10; 1183:12;1184:22; 1185:16;1188:14; 1189:20,24;1190:2, 13;1277:7,10,21; 1281:7;1284:4; 1289:9;1300:25 Membership (1) 1194:9 memo (1) 1127:7 memorial (2) 1265:14,23 memories (1) 1297:17 memory (2) 1195:16;1206:9 mention (1) 1301:25 mentioned (5) 1128:2;1129:10; 1138:4;1264:18,19 mentioning (1) 1278:15 met (1) 1150:17 mic (4) 1118:10,11,16; 1120:1 microphone (1) 1165:5 middle (5) 1125:21;1141:20; 1186:9;1224:21; 1266:15 might (19) 1119:22;1127:25; 1133:17,20;1142:19; 1162:21;1173:7; 1215:25;1216:23; 1228:19;1230:24; 1259:9;1266:10,11; 1270:17;1272:16; 1275:5;1291:20; 1297:21 million (38) 1131:14;1184:10; 1189:13;1217:10,17; 1219:4,9;1221:3,15, 17;1223:8,18,19,20, 21;1224:4;1225:6; 1229:7;1236:14,15; 1237:2,3,7,12;	1238:3,7,9,10; 1239:5,11,19,21,23; 1240:3,6,21;1241:2; 1261:9 mind (4) 1134:15;1155:4; 1297:22;1303:8 mindset (1) 1264:8 mine (1) 1283:22 minus (1) 1254:18 minute (9) 1144:17;1198:1; 1201:20;1204:22; 1223:4;1258:16; 1266:21;1268:4; 1288:18 minutes (8) 1163:2;1164:5,11; 1211:10;1258:11; 1280:15,17,19 misconstruing (1) 1213:22 misrepresentation (1) 1249:22 misspeaking (1) 1259:10 misspoke (1) 1148:8 misunderstood (1) 1253:24 misused (2) 1216:1;1289:20 modifying (1) 1188:3 module (4) 1139:16,16; 1167:8;1168:22 moment (9) 1194:20;1198:3, 25;1199:4,19; 1200:12;1204:14; 1294:12,13 money (13) 1216:1;1222:9; 1225:21;1226:10,13; 1227:15;1228:18; 1231:2,24;1232:12; 1278:9,12;1298:16 moneys (12) 1184:6;1205:16, 22;1216:15;1220:12, 14;1221:7,20; 1222:18;1224:11; 1225:22;1232:13 month (3) 1123:11,15; 1298:7 months (3) 1122:17;1297:13; 1298:8	more (32) 1118:15;1127:15; 1135:6,7;1140:5; 1148:10;1163:9,15; 1181:21;1202:9; 1211:3;1225:7; 1226:13;1230:24; 1231:12,17;1233:3; 1235:22;1238:7; 1260:24,25;1264:10; 1266:16,20;1274:24; 1276:8,10;1279:16; 1280:8;1289:13; 1294:20;1297:20 Morgan (1) 1274:18 morning (8) 1118:4,4,6,7; 1119:14;1121:3,24; 1281:24 mortgage (15) 1225:19;1226:24; 1227:2,7,9,18,23; 1228:11,12,19,21, 23;1229:17; 1230:22;1232:9 mortgaged (1) 1230:13 mortgages (1) 1227:10 Most (8) 1127:8;1136:18, 25;1160:7;1289:8,9; 1296:8;1302:6 mostly (1) 1122:20 mother (1) 1124:1 move (8) 1145:25;1148:9; 1177:20;1191:3; 1209:9;1211:4; 1241:4;1248:19 moved (1) 1129:9 moving (3) 1166:1;1243:8; 1298:13 much (22) 1120:17,22; 1150:10,18;1164:10, 16;1165:7,8;1189:9; 1198:19;1210:22; 1225:24;1228:17; 1256:14;1259:23; 1275:11,20;1281:8; 1291:6;1295:2; 1296:4;1302:23 much-deserved (1) 1300:25 multiple (1) 1283:21 music (1)	1305:21 must (9) 1140:12;1141:16; 1143:15;1144:7; 1146:24;1237:24; 1267:8;1273:22; 1282:6 myself (2) 1138:11;1276:11 <hr/> N <hr/> nailed (1) 1231:18 name (18) 1118:18;1121:3; 1128:14;1129:12; 1130:2,5,9,17,21; 1131:4,6,12; 1166:15;1171:21,21; 1177:21;1246:11; 1267:9 names (4) 1131:14;1173:23; 1174:11;1261:22 naming (4) 1132:7;1270:13; 1272:17;1273:23 narrower (1) 1289:1 natural (1) 1272:11 naturally (3) 1175:24;1237:15; 1246:21 nature (9) 1179:2;1182:11; 1183:2;1249:20; 1269:17;1272:2; 1274:21;1285:1; 1288:14 NDC (100) 1129:16;1135:16, 19;1136:3;1146:2, 14;1149:3;1150:24; 1157:2,13,14,20; 1161:16;1162:8; 1207:9;1211:22,24; 1212:2,24;1213:2, 12;1214:6,10,24; 1216:15,16,22; 1217:16;1219:2,8; 1220:5,20,22,23; 1221:3,7,13,16,17, 25;1222:19,20; 1223:13,14,21,24; 1227:20;1228:9; 1229:24;1231:5; 1233:14,20;1234:4, 11,17;1235:4; 1237:5,7;1238:2,21; 1239:3,9,19; 1240:11;1241:10,14,
---	---	---	---	---

<p>21;1242:22,22; 1243:5,9,12,16,19, 24;1244:3;1245:10; 1246:19;1247:20; 1248:21;1249:13; 1250:8,19;1251:3, 18;1252:9,13,25; 1253:13,19;1255:4; 1260:16;1261:12; 1267:24;1277:22; 1284:16;1286:11; 1287:13;1288:3; 1297:5 NDC's (8) 1149:9;1238:19; 1241:16;1244:6; 1250:23,23;1286:3,4 necessarily (9) 1128:20,25; 1179:5;1187:23; 1188:3;1263:3; 1267:5;1268:14; 1277:6 necessary (3) 1147:25;1241:11; 1244:5 necessity (1) 1299:6 need (12) 1148:22;1179:6; 1198:2;1202:6; 1218:25;1232:6; 1266:4;1292:20; 1293:10;1296:6; 1299:22;1300:1 needed (4) 1166:9;1243:25; 1244:7;1300:8 needing (1) 1292:1 needs (4) 1143:19;1266:12; 1269:7;1286:21 negotiating (2) 1174:24;1248:11 negotiation (1) 1301:21 negotiations (1) 1189:23 NET (1) 1264:5 new (43) 1125:19;1126:4; 1128:7;1130:11,22; 1131:18,25;1132:7, 10;1134:19;1137:6, 7;1138:2,8,10; 1139:14;1140:12; 1144:15;1145:3,8; 1151:22;1152:3; 1159:18;1160:24; 1161:6;1163:3; 1165:5;1170:2,5,6;</p>	<p>1188:17,20,23,25; 1192:13;1195:25; 1206:7;1212:10,14, 16;1225:25; 1248:24;1250:1 news (1) 1207:4 next (17) 1147:10,12; 1148:9;1150:22; 1153:14;1163:16; 1220:15;1223:20,20; 1235:19;1236:1,3; 1237:9,16;1238:1; 1268:24;1299:9 nice (1) 1305:14 nine (1) 1283:22 nitty-gritty (1) 1188:2 Nivel (5) 1206:23;1208:3,8, 16;1209:20 Nivel's (1) 1207:2 nominated (1) 1294:11 nonpublic (1) 1254:15 nonrefundable (2) 1218:10,11 Nope (6) 1125:13,16; 1145:6;1146:3; 1161:3;1206:20 normally (1) 1300:1 note (3) 1192:8;1306:20, 22 noted (5) 1160:14;1197:6; 1254:11;1255:15; 1279:8 notes (6) 1147:4;1151:21; 1152:21;1153:15; 1266:3;1279:11 Notice (9) 1141:13;1161:16; 1162:9;1184:23; 1196:8;1198:25; 1199:20;1204:14; 1243:5 notified (1) 1194:20 notifies (2) 1242:22;1243:16 notify (8) 1141:16;1143:3, 16;1144:8;1146:25; 1147:6;1159:12;</p>	<p>1160:19 notion (2) 1248:2;1290:23 notwithstanding (1) 1243:2 nth-order (3) 1229:12;1232:19, 22 NU (10) 1143:7;1191:19; 1229:4;1245:15,17; 1249:24;1250:13; 1251:23;1270:20; 1278:3 number (22) 1121:14,15; 1132:13,23;1141:9; 1185:8;1229:14; 1266:5;1278:5; 1282:13;1292:17; 1293:2;1294:3,4,5; 1295:3,6,18,19,21; 1300:18,20 numbers (4) 1260:21;1263:18; 1264:16;1301:13</p>	<p>1135:1;1300:18 Obviously (3) 1127:5;1182:18; 1284:5 occur (3) 1196:6;1198:25; 1199:18 occurred (1) 1199:19 October (9) 1244:22;1245:2,9; 1291:15,19;1301:3, 4,5,19 off (31) 1119:24;1120:4,8; 1122:5;1123:9; 1131:14;1145:16; 1161:20,23;1162:1, 3,13;1166:3;1182:9; 1186:8;1200:16; 1218:23;1245:25; 1256:14;1263:11,21; 1264:1;1266:22; 1276:25;1277:3,11; 1290:18;1294:7; 1298:6;1302:11,14 offer (3) 1120:15;1278:8; 1291:5 offers (1) 1278:3 offset (1) 1205:3 often (6) 1127:2;1139:2; 1166:16;1246:12; 1247:18;1248:3 once (6) 1156:10;1158:24; 1201:23;1290:25; 1304:4;1306:24 one (84) 1134:15;1140:5, 22;1147:15; 1151:21;1157:23; 1162:18,18;1163:24; 1165:12;1170:22; 1174:23;1176:15,18; 1177:21;1181:13,18, 19,20;1182:5; 1183:1;1185:23; 1188:22;1190:12,19; 1191:10,11;1192:4; 1195:12,22;1198:1; 1203:11,14;1205:24; 1216:6;1220:17; 1221:11;1226:7,9; 1231:19;1239:15; 1240:15;1247:23; 1250:12;1252:3,4,6, 6;1261:17;1262:17, 22;1264:15;1266:20, 24;1267:6,7,8;</p>	<p>1268:7,18;1271:12; 1273:10;1276:7,10; 1277:4;1278:2,4,8, 11,15,20;1279:14; 1280:23;1282:12; 1290:1,6,21;1293:8; 1294:21;1297:17; 1300:18;1301:15; 1302:15;1303:22,24 ones (1) 1279:8 one-sided (2) 1286:24;1290:11 one-time (1) 1235:24 only (33) 1119:21;1120:12; 1163:6;1167:2; 1180:7,7;1181:19; 1182:5,16;1224:13; 1230:17;1232:11; 1235:15;1238:9; 1239:10;1252:14; 1253:3,15;1256:10; 1257:5,8;1258:4,25; 1266:20;1272:19; 1274:11;1276:2; 1279:18;1280:18; 1284:4;1287:9; 1291:5;1294:20 open (2) 1121:7;1279:1 opening (3) 1209:24;1281:23; 1289:19 operate (3) 1187:12,21; 1199:8 operated (1) 1190:24 operator (3) 1136:5;1210:15; 1221:11 opinion (6) 1187:21;1250:4; 1269:9,16;1270:5; 1272:1 opportunities (8) 1125:18;1126:4, 14;1128:6,21; 1134:18;1135:6; 1137:5 opportunity (14) 1119:15;1128:23; 1148:15;1150:7; 1210:19;1213:1; 1242:23;1243:17; 1262:4;1264:10; 1275:9;1288:21; 1293:11;1305:13 opposed (4) 1177:11;1262:11; 1291:4;1298:3</p>
			O	
		<p>oo0- (2) 1118:2;1307:9 object (6) 1134:2,7;1160:4; 1176:13;1287:1,8 objecting (1) 1290:6 objection (4) 1160:13;1182:2,4, 11 objections (1) 1283:1 objective (3) 1136:2;1289:1; 1304:9 obligate (1) 1216:14 obligated (7) 1159:11;1184:5, 15;1217:16;1221:7, 17;1241:21 obligation (3) 1218:15;1219:8; 1239:4 obligations (8) 1167:13,20; 1168:6,16;1238:20; 1241:11;1251:24; 1262:13 obtain (1) 1181:10 obtaining (1) 1180:2 obvious (2)</p>		

<p>opposes (1) 1294:16</p> <p>opposing (1) 1284:5</p> <p>opposite (1) 1275:24</p> <p>order (9) 1147:6;1164:6; 1182:4;1187:10,21; 1202:24;1203:3; 1240:23;1285:15</p> <p>ordered (1) 1302:16</p> <p>organizational (1) 1142:17</p> <p>orient (1) 1170:15</p> <p>original (5) 1120:14;1147:16; 1150:23;1151:14; 1223:23</p> <p>originally (3) 1262:20,21; 1301:16</p> <p>Oscars (1) 1305:21</p> <p>others (9) 1150:10;1176:10; 1187:14;1196:9; 1212:10;1216:24; 1233:3;1248:15; 1276:15</p> <p>otherwise (5) 1134:6;1177:16; 1242:17;1243:11; 1254:17</p> <p>ours (1) 1162:22</p> <p>ourselves (2) 1277:16;1294:13</p> <p>out (22) 1122:2;1188:7; 1197:25;1201:8; 1202:11;1217:5,19; 1222:24;1227:21; 1231:15;1232:16; 1250:7;1255:11; 1274:4;1279:23; 1288:8,9;1290:4,7; 1296:3;1301:2; 1304:7</p> <p>outcome (2) 1125:15;1233:4</p> <p>outcomes (1) 1233:2</p> <p>outline (1) 1164:3</p> <p>outside (7) 1128:1,3,4; 1157:19;1169:15,17; 1253:16</p> <p>over (29) 1119:17;1122:16;</p>	<p>1124:2;1131:18; 1132:10,20,25; 1134:16;1136:21; 1139:10;1144:3; 1187:24;1209:6; 1216:10;1221:3; 1222:19;1223:23; 1224:4;1229:2,4,14, 22;1230:7;1234:24; 1283:14;1291:10; 1292:3;1298:4; 1303:19</p> <p>overage (3) 1228:7;1230:11, 25</p> <p>overexpose (1) 1277:16</p> <p>overview (1) 1146:20</p> <p>owed (1) 1205:4</p> <p>own (3) 1250:2,7;1286:6</p> <p>owner (8) 1171:4;1172:1; 1181:2;1206:7; 1228:5,8,20,21</p> <p>ownership (4) 1172:24;1195:10; 1209:2;1268:12</p>	<p>Pages (25) 1211:20;1292:17, 19,19;1293:3; 1294:19;1295:3,7,8, 9,11,14,18,21; 1296:1,2,3,21,23,25; 1297:4,5,5,19; 1298:11</p> <p>paid (7) 1205:11;1217:5, 11;1219:1;1220:12; 1222:9;1298:15</p> <p>pandemic (1) 1306:23</p> <p>Panel (47) 1118:19;1119:8; 1129:14;1281:7; 1282:8,10;1283:7, 10;1284:4,21; 1285:10,25;1286:8, 10,20,21;1287:1,5, 22;1288:13;1289:7, 9,14,17,25;1290:12, 19,21,22;1292:1; 1293:7;1295:13,15; 1296:2,5,18;1297:3, 25;1299:6,12,16; 1300:10;1302:1; 1303:7;1304:8,14; 1306:12</p> <p>panelists (1) 1293:18</p> <p>Panel's (4) 1283:12;1290:13; 1291:3;1306:1</p> <p>paper (3) 1139:8;1267:10; 1293:23</p> <p>papers (1) 1122:15</p> <p>paradigm (1) 1226:25</p> <p>Paragraph (71) 1138:7,25; 1149:21;1166:2; 1167:8;1170:17; 1171:1;1172:19; 1174:9;1176:1; 1178:12,14;1179:16; 1180:18;1183:24; 1184:3,13,19; 1188:11;1194:15,17, 18;1195:18; 1196:13;1197:4; 1201:2;1203:14,19; 1204:13;1208:18,21; 1211:19;1212:7,12, 21;1219:21,22; 1220:3,15,15,20,23; 1221:12;1223:3; 1224:17,18,18,22; 1233:7,18,20; 1234:3,8,17;1241:6;</p>	<p>1242:5;1246:9; 1249:2,5,9;1250:18; 1254:22;1265:13; 1266:16,17,18; 1267:12,13,16,17,18</p> <p>Paragraphs (2) 1198:22;1224:20</p> <p>parallel (1) 1263:10</p> <p>parent (5) 1170:21;1172:9, 11,14;1195:23</p> <p>Paris (3) 1118:21;1273:9; 1284:1</p> <p>part (20) 1124:9,16;1132:3; 1137:1;1145:1; 1146:21;1168:21; 1172:11;1174:10; 1176:21;1191:9; 1196:16;1208:3; 1211:1;1219:4,9; 1225:16;1277:24; 1303:12;1305:10</p> <p>participant (2) 1166:15;1246:11</p> <p>participants (1) 1188:17</p> <p>participate (7) 1211:23;1213:4; 1214:6,11;1233:14, 25;1234:4</p> <p>participation (1) 1290:7</p> <p>particular (7) 1144:16;1215:2; 1227:13,19;1230:21; 1257:7;1280:3</p> <p>particularly (5) 1152:10;1274:18; 1285:19;1292:25; 1304:19</p> <p>parties (35) 1147:17;1152:8, 10,20;1153:5; 1156:19;1158:5; 1172:10;1219:15; 1223:12;1226:19; 1232:16;1242:8; 1264:22;1281:24; 1283:3,4;1288:18; 1289:22,22;1290:2, 6;1296:6,10,19,22; 1300:4,15,19; 1301:14;1302:3; 1303:16;1304:5; 1306:4,5</p> <p>parties' (1) 1291:8</p> <p>partner (9) 1175:16,19; 1176:6,12;1179:7,</p>	<p>17;1180:18; 1182:23;1183:2</p> <p>partners (2) 1178:16,17</p> <p>partnership (4) 1178:24,25; 1179:1,3</p> <p>parts (2) 1261:16;1281:11</p> <p>party (15) 1168:7;1171:17; 1172:8;1196:1; 1201:14;1215:19; 1224:3;1225:23,25; 1242:10;1249:17; 1250:3;1282:2; 1287:6,9</p> <p>past (6) 1163:2;1197:3; 1281:13;1283:2; 1291:10;1292:3</p> <p>patent (1) 1125:22</p> <p>path (8) 1156:24;1248:9, 17;1279:10,17,24; 1280:3,5</p> <p>paths (1) 1302:18</p> <p>patience (3) 1283:13,13; 1284:22</p> <p>patient (1) 1287:17</p> <p>paving (1) 1294:3</p> <p>pay (7) 1184:5,15; 1188:23;1189:13; 1205:16,21;1277:3</p> <p>payable (1) 1253:19</p> <p>paying (3) 1239:8;1276:24; 1277:11</p> <p>payment (10) 1189:24;1190:2, 17;1191:17,23; 1217:3,4;1219:5,10; 1240:2</p> <p>payments (1) 1217:4</p> <p>payor (1) 1189:1</p> <p>peek (1) 1303:19</p> <p>peel (1) 1256:14</p> <p>penciled (1) 1299:21</p> <p>people (16) 1126:5;1128:8; 1131:8;1142:9;</p>
P				
	<p>Pacific (1) 1291:22</p> <p>package (1) 1121:6</p> <p>page (68) 1121:13,14,15; 1139:19,19;1141:7, 9,10,24;1145:17; 1146:19;1147:12,13; 1153:13;1155:1; 1159:6;1160:21; 1163:17,17;1166:20, 24;1167:6;1168:19; 1170:17;1174:6; 1183:16;1184:12,20; 1192:24;1193:9; 1198:4;1207:18,18; 1208:20;1212:8,22; 1214:18,22;1217:15, 20;1218:19; 1219:23;1223:4; 1224:16,17;1233:12; 1234:3,9,16,16; 1241:7;1242:6; 1245:8;1249:8,9; 1250:17;1251:5,8, 11,24;1254:20; 1265:23;1293:15; 1294:15,16;1295:5; 1296:19;1301:12</p>			

1173:18;1228:22; 1262:2;1272:7; 1275:18;1276:14; 1277:12;1283:20,25; 1298:13,15;1305:6	1246:2;1255:7; 1259:18;1272:11; 1298:5	1143:25	practice (2) 1236:11;1271:5	1273:18;1294:10,11
per (1) 1261:19	placed (2) 1255:1;1256:10	portion (5) 1163:6;1171:15; 1175:23;1180:6; 1281:21	practices (4) 1187:7,11,22; 1212:14	press (12) 1133:2;1134:21; 1174:8;1175:2,6,11; 1179:1,7;1181:3; 1183:5;1206:24; 1207:16
percent (14) 1222:6,14,17,23; 1223:7,10,12,13; 1224:5;1228:7; 1229:5;1261:24; 1263:19;1274:2	plain (2) 1155:9;1165:23	portions (1) 1175:20	praise (2) 1285:10,10	pressure (1) 1282:10
perfectly (1) 1202:11	plan (1) 1210:23	pose (2) 1200:18;1298:1	precedent (3) 1151:22;1152:3; 1208:9	presumption (3) 1118:5;1149:5; 1186:13
performed (1) 1170:3	platform (1) 1261:24	posed (1) 1160:6	precedents (5) 1147:18;1151:20; 1159:18;1197:8,13	pretty (7) 1127:24;1182:18; 1213:14,17;1242:13; 1245:14,21
perfunctory (1) 1270:22	play (2) 1277:19;1300:23	posing (1) 1288:25	precision (1) 1304:17	prevail (2) 1205:15;1206:2
perhaps (14) 1164:1;1170:15; 1173:8,8;1176:14; 1195:16;1201:21; 1260:6;1265:18,21; 1281:22;1283:18; 1286:16;1304:23	played (1) 1275:5	position (6) 1152:24;1203:18; 1262:3;1275:25; 1292:16;1298:8	precluded (2) 1252:23;1253:11	prevailed (5) 1194:21;1211:24; 1220:5;1221:13; 1239:11
period (8) 1135:17;1175:12; 1183:5;1192:15; 1248:14;1263:2; 1277:22,25	player (1) 1247:14	positions (2) 1288:8;1296:5	predominant (1) 1263:7	prevailing (5) 1193:15;1194:4; 1196:3;1239:19; 1240:11
periods (1) 1283:18	playing (1) 1286:7	positive (1) 1306:22	predominantly (1) 1273:24	prevent (3) 1242:17;1243:11; 1259:9
permissible (1) 1270:3	pleading (2) 1266:7;1267:6	possesses (1) 1253:4	preface (1) 1285:13	previously (11) 1123:1;1141:15; 1143:14;1144:6; 1146:23;1156:11; 1159:9;1193:19; 1255:9;1292:24; 1297:4
permitted (2) 1296:20,22	please (28) 1122:8;1134:14; 1141:6;1144:19; 1145:15;1149:23; 1155:20;1161:19; 1162:2;1163:13; 1165:10;1167:6; 1176:25;1177:6,21; 1178:3;1195:18; 1200:15,18;1203:13; 1233:8;1236:19,25; 1258:12;1287:25; 1297:10;1302:8,12	possibility (6) 1229:12;1232:19, 22;1233:1;1278:17; 1300:5	prefer (2) 1266:18;1275:20	price (25) 1204:21,23; 1205:7,11;1222:23; 1223:23;1225:6; 1229:1;1235:8,8,13; 1236:1,2,7,14,15; 1237:1,2,17,18,19, 25;1239:6;1278:18; 1290:17
person (4) 1130:6;1173:13; 1182:5;1306:24	pleased (1) 1284:3	possible (2) 1132:19;1269:17	prefers (1) 1276:12	prices (3) 1260:20;1261:4,4
personally (1) 1126:3	pleasure (1) 1306:7	possibly (2) 1180:2;1247:7	prehearing (5) 1282:9;1299:11, 12;1300:2,21	primary (3) 1138:22;1142:3; 1173:3
perspective (3) 1268:9;1287:13; 1288:3	pm (3) 1273:4;1291:22; 1307:8	postaction (2) 1197:21;1277:8	preliminary (1) 1131:13	Primer (4) 1206:22;1207:2; 1208:16;1209:20
pertaining (1) 1195:21	point (30) 1120:10;1134:2; 1137:16;1160:2; 1164:3;1173:21; 1198:18;1202:24; 1203:12;1213:10; 1221:25;1222:4; 1240:16;1246:19; 1248:10;1264:2; 1271:8,8,10; 1275:12;1276:18; 1278:4,15;1279:24, 25;1286:4;1293:8, 13,16;1299:9	postclosing (1) 1297:14	prep (1) 1197:24	principal (7) 1213:11;1214:10, 23;1215:2,15; 1216:8;1228:3
petrified (1) 1304:21	pointed (3) 1181:13;1289:6; 1290:3	postdate (2) 1207:8,22	preparation (3) 1198:18;1204:7; 1264:21	principle (1) 1295:2
phase (1) 1282:9	points (2) 1231:12;1293:19	postdelegation (1) 1181:11	prepare (2) 1122:10;1297:13	Prior (17) 1132:2,3;1137:23; 1188:18;1196:5,9; 1208:4;1210:14;
phobia (1) 1304:23	poorly-phrased (1) 1155:24	posted (2) 1163:19;1166:5	prepared (2) 1289:8,13	
phone (2) 1176:24;1197:1	portal (1)	posthearing (16) 1288:20,21; 1291:9,14,19; 1292:7,14;1297:24; 1299:5,18;1300:3, 18;1302:5,22; 1303:10,13	prerogative (2) 1287:4;1295:19	
phrase (1) 1150:1		potential (18) 1120:11;1125:18; 1137:5;1152:14; 1161:15;1162:7; 1188:5;1190:8; 1196:8;1231:9; 1233:2;1240:23; 1260:24;1271:2,11; 1275:4;1276:19; 1300:11	prerogatives (1) 1297:1	
pick (1) 1203:24		potentially (3) 1128:23;1132:24; 1286:18	present (4) 1182:14;1235:1; 1293:23;1300:9	
Pierre (2) 1118:19;1149:20		pound (1) 1232:5	presentation (1) 1286:24	
place (7) 1140:13;1238:17;			presented (5) 1156:6;1195:6,7; 1198:7,8	
			presenting (1) 1150:14	
			preserve (3) 1241:16;1243:14; 1244:6	
			preserving (1) 1226:6	
			president (8) 1122:23;1123:2; 1173:6,11;1178:5;	

1226:20;1234:16; 1241:13;1251:20; 1252:1,10;1259:17; 1262:12,17 private (16) 1130:24;1131:9; 1226:1;1247:25; 1248:1;1275:17,25; 1276:6,12,22,23,23; 1277:5,24;1278:10, 20 privates (1) 1278:21 privileged (2) 1134:4,14 Probably (7) 1127:3,21; 1230:14,23;1241:2; 1263:18;1268:17 problem (4) 1279:16;1286:19, 19,20 Procedural (1) 1285:15 procedures (3) 1144:15;1145:8; 1161:5 proceed (7) 1120:19;1163:13; 1164:25;1165:10; 1182:8;1214:15; 1258:19 proceeded (1) 1126:24 proceeding (11) 1182:7;1285:2; 1286:2,19;1287:12; 1288:6,10,11; 1290:8,11;1304:25 proceedings (6) 1283:17;1285:11; 1287:18;1288:3; 1293:16;1307:7 proceeds (6) 1219:15;1220:25; 1223:7;1224:6; 1226:18;1230:1 Process (16) 1118:24;1141:14; 1145:4,10,24; 1146:22;1147:5; 1148:2;1160:25; 1161:7;1163:4; 1231:7;1249:25; 1254:25;1270:8; 1288:14 processed (1) 1208:22 processes (2) 1298:18,19 produce (1) 1252:17 produced (4)	1257:2,8;1258:3, 25 production (1) 1305:4 professionals (1) 1306:8 Professor (1) 1302:24 Program (22) 1125:19,24; 1126:4;1128:7; 1132:1,22;1134:19; 1137:6;1138:2,10, 12,22;1144:16; 1145:9;1161:6; 1170:3;1188:17; 1212:11,16;1248:25; 1269:18;1272:3 progress (3) 1127:9;1131:25; 1157:16 progressed (1) 1127:4 project (10) 1127:10,13,24; 1128:1,21;1129:10; 1130:1,3,10;1136:12 prominent (3) 1166:14;1246:10; 1247:14 promise (1) 1278:3 PROMO (2) 1210:2,10 promptly (8) 1141:16;1143:16; 1144:8;1146:25; 1159:11;1234:18; 1238:21;1250:19 proper (1) 1298:18 property (4) 1227:6,13;1228:4, 20 proposal (2) 1295:25;1296:11 propose (1) 1291:21 proposed (7) 1190:22;1242:24; 1243:18;1271:14; 1288:19;1295:10; 1301:16 proposing (1) 1298:6 prosaic (1) 1231:12 protect (2) 1226:21;1227:15 protected (2) 1228:15,16 protections (7) 1216:5,13;	1224:13;1230:18; 1231:23;1232:13; 1249:24 protects (1) 1227:17 prove (2) 1249:18;1277:13 provide (21) 1148:16,22; 1150:8;1179:18; 1184:9,21;1211:22; 1212:23;1213:2,24; 1214:6,9,24; 1216:22;1226:14,16; 1230:18;1244:21; 1245:19;1250:20; 1303:5 provided (31) 1125:11;1149:2; 1186:1,3;1193:13; 1195:24;1197:18; 1198:25;1199:20; 1204:14;1205:21; 1213:3,15;1214:10; 1216:16;1219:11; 1225:13;1229:24; 1238:21;1239:9; 1242:1,21;1243:10, 15,19;1245:14,16, 18,22;1250:8;1296:5 provider (12) 1179:5,12,22,25; 1180:8,22;1181:1, 14,21;1183:3; 1199:1;1204:15 provides (29) 1139:25;1141:12; 1143:12;1154:2; 1158:16;1168:4; 1183:24;1184:13,20; 1194:18;1199:19; 1204:13;1215:6,14; 1220:20,23;1226:12; 1231:21;1233:14,19, 20;1234:4,9,17; 1241:13;1242:7; 1243:3,9;1250:19 providing (16) 1124:12;1125:6; 1154:18,20;1180:20; 1196:7;1199:22,24; 1215:19;1216:6,12, 13;1232:13; 1237:14;1243:12; 1244:4 provision (10) 1166:4;1167:15, 18,22;1168:20; 1169:7;1196:23; 1213:10;1220:10; 1268:1 provisions (12) 1165:20,24;	1199:16;1205:19,20; 1213:9;1217:1; 1218:8;1224:22; 1226:21;1248:1; 1269:2 provoked (1) 1177:7 public (13) 1130:25;1171:15; 1175:12,20,23; 1180:6;1183:5; 1255:3,17,18; 1275:21;1276:2,5 publicly (2) 1181:5;1244:22 published (3) 1133:2;1134:21; 1138:8 pull (1) 1148:11 pulled (1) 1197:25 pulling (2) 1121:23;1177:3 purchase (9) 1193:21;1194:8, 16;1201:3;1204:20, 23;1205:7,11;1239:5 purpose (4) 1171:3;1173:25; 1180:19;1299:21 purposes (2) 1182:24;1250:22 pursuant (4) 1125:7;1143:20; 1211:21;1214:5 pursue (4) 1126:14;1129:1; 1185:7;1196:21 pursuing (1) 1128:21 pushed (2) 1276:1;1297:20 put (27) 1118:16;1120:1; 1129:8;1139:11; 1144:18;1152:23; 1155:4;1156:21; 1176:14;1177:5,16; 1205:13;1225:21; 1228:11;1235:12,18; 1236:18;1247:6; 1262:2;1263:1; 1283:20;1286:5; 1292:18;1293:11,17, 20;1299:16 puts (2) 1149:22;1203:17 putting (4) 1216:5;1230:19; 1232:12;1282:10	Q
			quarter (1) 1185:20 quick (3) 1220:7;1253:8; 1303:18 quickly (3) 1177:15;1211:3; 1297:21 quiet (1) 1287:25 quite (7) 1133:1;1235:16; 1266:2;1287:17,22; 1288:8;1299:2 quote (7) 1150:16;1152:23; 1153:3;1175:16; 1207:3;1234:18; 1286:22 quotes (2) 1146:21;1159:6 quoting (1) 1201:6	
			R	
			R-10 (1) 1236:19 RA (4) 1231:6;1240:17; 1247:1;1280:2 Radix (13) 1191:10;1192:3, 25;1193:2,6; 1195:13;1196:21; 1197:17;1199:4; 1200:22;1205:16,21; 1206:7 Radix's (1) 1194:18 raise (3) 1282:2;1285:13; 1299:9 raised (5) 1130:16;1133:9; 1278:5;1300:4; 1303:23 raising (2) 1133:2;1134:21 ran (2) 1197:19;1233:2 range (1) 1236:2 ranges (1) 1235:18 rapid (1) 1274:13 Rasco (8) 1235:4,11;1238:6, 8,13;1239:1;1251:7;	

1255:9 R-a-s-t-a-u (1) 1129:13 rate (1) 1216:8 rates (1) 1231:22 rather (4) 1141:20;1151:14; 1226:15;1293:23 reach (3) 1130:23;1140:2; 1292:10 reaching (1) 1255:11 reaction (1) 1274:23 read (53) 1122:13,20; 1138:18;1149:4; 1152:18;1153:12,23, 25;1154:25; 1157:23;1158:24; 1160:7;1162:5; 1165:20;1167:24; 1168:1,11,13; 1169:12,18;1174:9; 1179:9,13;1180:7; 1181:8;1198:23; 1199:15;1201:10,15, 17;1202:1,14,21; 1203:14;1218:8; 1220:7;1258:23; 1264:25;1265:3,8, 18;1266:10,18; 1267:6,8,10,15,19, 20;1274:17;1275:2, 22;1276:11 reading (19) 1137:16;1151:18, 25;1152:2;1153:22; 1154:19,22,23,24; 1158:1;1174:22; 1194:23,24;1199:9; 1201:7,9;1225:4; 1228:10;1249:11 ready (4) 1120:19;1164:25; 1280:21;1281:1 real (8) 1172:8,10;1220:7; 1227:3,17,17; 1253:7;1279:9 realistic (1) 1230:25 reality (1) 1277:14 realize (1) 1277:25 really (26) 1126:11;1135:5; 1151:17;1153:23; 1155:12;1156:4;	1167:25;1168:13; 1189:8;1190:9; 1195:5;1198:6; 1215:8;1251:22; 1256:13,14;1263:10, 10,16;1264:15; 1271:20;1272:7; 1279:15,21;1293:15; 1302:20 realm (1) 1158:24 reask (1) 1247:10 reasking (1) 1186:24 reason (12) 1123:19;1127:21; 1155:2;1166:11; 1177:8,10;1216:20; 1220:5;1245:4,6; 1271:1;1287:6 reasonable (5) 1242:23;1243:17; 1296:12;1301:7,13 reasons (3) 1185:8;1275:5; 1290:3 recall (46) 1123:11;1124:15; 1126:8,11;1130:2,7; 1131:20;1134:24; 1136:15;1137:18,22, 24;1142:18;1163:1, 4,6,7,24;1166:3; 1168:24;1171:10,18; 1172:3;1173:7,14, 16,23;1176:3; 1178:9;1195:4; 1197:9;1198:5; 1206:15;1210:8; 1239:16;1245:4,7, 17;1255:14;1256:6; 1257:7;1260:22; 1271:16;1275:3; 1278:2;1299:9 receive (2) 1166:13;1247:13 received (21) 1121:6;1131:18; 1132:10,12;1183:12; 1185:15,19;1187:4; 1188:15,21;1192:3, 24;1195:20; 1196:18;1197:7; 1200:22;1202:20; 1204:10;1252:24; 1253:13;1292:3 receiving (2) 1126:9;1299:17 recently (2) 1119:15;1203:9 recess (4) 1164:15;1211:12;	1258:14;1280:24 recognize (1) 1232:6 recollection (9) 1198:16;1235:17; 1236:5,9;1237:18; 1245:25;1256:7; 1257:1,3 recommendation (1) 1286:22 recommendations (2) 1285:24;1288:24 recommends (1) 1158:5 reconsidered (1) 1231:8 record (23) 1119:24;1120:4; 1122:5;1161:20,23; 1162:1,3,13; 1176:18;1177:3; 1182:5;1186:10,18; 1200:17;1213:14; 1266:22;1282:13; 1289:2;1292:23; 1293:24;1301:11; 1302:11,14 recoup (7) 1221:10,22; 1222:16,17;1224:24; 1225:7;1229:25 recoups (1) 1228:1 recourse (1) 1228:13 recover (2) 1223:7;1305:7 redirect (2) 1272:23;1280:16 reduced (1) 1213:16 reduction (1) 1124:10 reevaluation (12) 1140:15;1141:3; 1142:5,12,19; 1158:7;1162:16,19, 20;1206:13;1247:3; 1268:13 re-evaluation (1) 1141:21 reexamine (1) 1198:17 refer (16) 1121:15;1139:5; 1166:1;1172:19; 1176:1;1192:17; 1201:22;1203:15; 1206:21,24;1209:10; 1219:21;1224:18; 1251:11;1256:23; 1279:12 reference (4)	1163:7;1194:11; 1209:7;1243:20 referenced (2) 1122:19;1193:5 referencing (1) 1188:14 referred (1) 1209:25 referring (6) 1138:16;1198:4; 1214:17;1220:4; 1271:4;1275:1 refers (1) 1133:13 reflected (2) 1287:12;1289:2 refresh (1) 1257:1 refreshing (1) 1257:3 refund (5) 1218:6;1220:14, 24;1221:15,18 refundable (1) 1217:22 refunded (4) 1217:5,24; 1218:13;1221:2 refused (2) 1221:6;1238:9 regard (2) 1146:13;1282:2 regarding (16) 1125:1;1138:9; 1146:5,10;1157:20; 1183:7;1206:23; 1207:22;1208:17; 1227:12;1244:5; 1251:18;1259:16; 1290:15;1300:17,21 regards (2) 1160:17;1197:20 registry (43) 1131:7;1133:4,10; 1134:23;1135:11,15, 20;1136:4,13,17; 1157:1,4;1170:24; 1171:5,14,20; 1172:2;1174:14; 1178:15,18;1179:12, 18,21;1180:20,22; 1181:1;1182:24; 1185:2;1210:4,5,14, 15;1211:25;1212:3; 1224:25;1231:9; 1239:16;1240:24; 1246:20,23;1248:7, 8;1270:21 Registry's (1) 1171:25 regurgitate (1) 1301:10 reinvent (1)	1297:23 rejoinder (3) 1265:13,23; 1266:1 related (7) 1124:12;1132:6; 1152:19;1196:25,25; 1237:23;1239:22 relating (1) 1124:13 relation (1) 1119:7 relationship (7) 1179:7;1181:5; 1188:1,6;1227:20; 1273:13,15 relatively (1) 1285:2 release (9) 1174:8;1175:3,6, 11;1179:2,8;1181:3; 1183:5;1206:24 releases (1) 1207:16 relenting (1) 1290:9 relevant (2) 1138:1;1145:22 relief (3) 1289:21;1290:5, 16 relitigating (1) 1285:14 relook (1) 1207:11 rely (1) 1177:11 relying (1) 1208:8 remains (2) 1292:13;1305:23 remarks (1) 1281:23 remedy (2) 1290:21,22 remember (6) 1155:21;1245:5,6; 1267:4;1302:8,12 remembering (1) 1207:15 remote (5) 1182:7;1217:7; 1226:15;1233:1,3 remove (2) 1190:7;1281:16 removing (3) 1190:16;1191:15, 18 reorganize (1) 1158:6 repay (5) 1216:15;1217:17; 1218:15;1219:9;
---	--	---	--	--

1239:4 repeat (4) 1161:24;1162:2; 1289:19;1305:11 rephrase (6) 1135:25;1155:24; 1169:21;1182:21; 1255:24;1269:23 rephrased (1) 1165:21 rephrasing (1) 1165:21 report (4) 1126:23;1127:6; 1274:18;1275:1 reported (2) 1166:10;1207:2 reporter (2) 1126:17;1306:18 reporter's (1) 1192:6 reports (4) 1207:8,22; 1274:17,24 represent (8) 1139:15;1180:1; 1181:22;1198:23; 1209:23;1236:12; 1237:21;1255:18 representation (8) 1177:12;1182:16; 1201:1;1249:13; 1250:9,24;1291:2; 1306:3 representations (1) 1288:22 representative (1) 1235:4 represented (4) 1176:5;1179:11; 1200:24;1248:22 representing (2) 1176:21;1182:14 represents (2) 1215:2;1249:17 reproach (1) 1186:16 request (58) 1143:21;1145:3,9, 24;1146:2,6,11,15, 20;1147:5;1149:8, 14;1150:3,25; 1151:6,10,12,22,23; 1152:3,9,23;1153:4, 16,19;1154:3,16; 1156:1,7,9,13; 1157:13,15,18; 1158:13,18,20,22; 1159:1,2;1160:25; 1161:7;1163:3; 1165:14;1166:4; 1181:11;1195:11,15; 1197:6;1206:18;	1208:17,22;1250:20; 1268:13;1270:15,19; 1302:9,13 requested (2) 1221:14;1251:2 requesting (1) 1240:16 requests (5) 1152:22;1158:10, 25;1163:18;1166:5 require (9) 1141:3,20;1142:5, 19;1158:6;1195:14; 1244:16;1248:25; 1302:21 required (10) 1164:6;1241:10, 14,15;1243:13; 1244:10;1247:3; 1268:12;1280:4; 1283:14 requirement (3) 1145:24;1160:19; 1172:7 requires (2) 1143:2;1268:25 requiring (1) 1144:2 reread (2) 1197:24;1204:10 rereview (1) 1198:17 rereviewed (1) 1205:25 research (8) 1170:4,9;1174:2, 24;1188:19; 1195:19;1208:4; 1212:16 resell (6) 1167:12,19; 1168:4,14;1169:16; 1219:14 reserved (1) 1299:23 reserves (2) 1141:19,20 resolution (7) 1142:6;1162:22; 1276:13,23;1277:5, 24;1289:21 resolve (9) 1140:4,9,19; 1142:2,9;1156:19; 1162:19;1276:10,18 resolved (4) 1158:4;1276:9; 1278:21;1298:17 resolves (1) 1140:3 resolving (5) 1130:25;1190:10, 11;1277:8;1297:2	respect (8) 1187:17;1212:10; 1224:10;1228:23; 1234:19;1238:23; 1243:14;1244:6 respective (1) 1296:25 respond (3) 1133:20;1201:18; 1292:20 responded (1) 1259:2 respondent (1) 1282:25 responding (2) 1294:20,22 response (4) 1122:15;1166:7; 1178:15;1206:18 responses (1) 1296:17 responsibility (1) 1173:19 responsible (3) 1136:21;1222:13; 1254:23 rest (5) 1120:2;1189:17; 1235:20;1302:4; 1305:6 restate (1) 1253:7 Reston (1) 1123:22 restricted (1) 1244:9 restriction (2) 1168:2,3 result (4) 1130:24;1166:16; 1206:11;1247:18 resulted (3) 1197:20;1246:12; 1248:3 resume (2) 1164:11;1211:9 retain (1) 1184:21 retry (1) 1298:24 return (2) 1123:25;1221:7 returned (5) 1123:12;1132:17; 1216:3;1221:21; 1232:16 reveal (3) 1134:13,19; 1256:11 revenue (2) 1136:22;1263:19 revert (1) 1304:7	reverting (1) 1281:22 Review (21) 1118:24;1119:15; 1138:15;1144:14; 1145:9,19;1155:7; 1161:6;1168:25; 1170:1;1175:25; 1185:18;1187:19; 1196:13;1197:14,22; 1198:11,13;1203:19, 19;1204:5 reviewed (13) 1122:10,12; 1145:19;1146:21; 1185:11;1195:3; 1196:23;1203:9; 1204:9;1238:21; 1264:20;1265:15; 1279:23 reviewing (10) 1137:22;1142:1; 1156:1;1165:15; 1168:24;1188:3; 1195:1,5;1198:6; 1202:11 revised (3) 1206:6,12,17 revving (1) 1188:4 rewording (1) 1153:11 Richard (1) 1118:21 Right (113) 1120:9;1121:9; 1122:6;1123:8; 1125:19;1126:21; 1130:17;1131:9,22; 1132:20;1136:8,23; 1140:24,25;1141:4, 11,19,20,22; 1142:25;1144:13; 1145:12;1146:16; 1147:22;1149:4,17; 1151:19;1153:6; 1154:16;1156:5,6, 21;1159:8;1161:9; 1165:4;1169:2; 1170:18;1177:3,19; 1180:4;1184:21; 1187:22;1190:9,14; 1192:6;1197:10; 1198:20;1199:25; 1201:12;1205:8; 1208:15;1209:6; 1211:11;1214:15; 1216:21;1218:16; 1219:20;1220:10; 1221:8;1222:14; 1223:11;1225:7; 1227:10,18,18,22; 1228:12,15,22;	1229:23,24;1231:22; 1232:8;1233:1,16, 22;1234:14,24; 1235:18;1236:4,8; 1237:3,15;1239:6, 13,18;1240:9; 1242:3,18;1243:4; 1246:7;1249:19,20, 22;1251:13;1252:1, 14;1257:9,14; 1258:22;1259:1; 1260:19,20;1262:19; 1266:1;1267:18; 1271:24;1280:16; 1287:10,24;1298:3; 1300:6;1303:16 right-hand (1) 1121:17 rightly (1) 1287:22 rights (17) 1135:11,15; 1136:4;1167:13,20; 1168:5,15;1174:16, 18;1185:2;1199:5; 1241:16;1243:14; 1244:6;1286:18; 1287:14;1298:13 rigors (1) 1305:7 risk (12) 1130:17,22; 1222:5,7,11,14; 1229:11;1230:6,9; 1231:1,21;1277:17 Ristau (2) 1129:13,16 Road (6) 1170:24;1171:5, 14,20,25;1172:1 Rob (1) 1129:13 role (4) 1179:21;1181:17; 1183:7;1285:15 rolled (1) 1128:16 Roman (3) 1184:4,4;1243:9 room (6) 1164:12,22; 1211:8;1280:22; 1281:17,19 rough (1) 1160:21 roughly (3) 1255:2,17;1274:4 round (13) 1235:1,7,20; 1236:1,3,13,20; 1237:1,10,16; 1238:1,3;1291:14 rounds (1)
---	--	---	---	---

1234:24 row (2) 1236:24,25 Ruby (7) 1172:19,23; 1173:4,17,19,24; 1209:4 Rule (13) 1139:19;1141:7, 25;1142:1;1155:9; 1156:12;1157:19,23; 1159:5,7,16;1167:1; 1289:25 rules (37) 1137:10,12,15,17, 25;1138:1,9,11,14, 15;1139:1;1141:4; 1144:15;1145:8; 1151:7,18;1154:22; 1155:7;1156:14; 1157:17;1158:1; 1161:5;1165:17; 1166:8;1170:2; 1233:10;1243:3; 1248:24;1250:10; 1269:18;1272:4; 1287:23,24;1289:23; 1291:4;1295:24; 1296:13 run (3) 1137:1;1138:23; 1231:9 running (3) 1135:3,8;1270:23 run-up (1) 1137:15	1150:9;1154:12, 13;1281:24 satisfy (1) 1153:20 saw (3) 1156:16;1185:22; 1198:14 saying (20) 1138:21;1143:11; 1145:11;1154:9; 1161:8;1168:1; 1172:22;1180:7; 1181:15;1186:22; 1197:23;1212:12; 1225:17;1232:25; 1237:13;1260:23; 1261:8;1285:14,17; 1303:2 scenario (8) 1220:11;1221:20; 1222:21;1226:15,16; 1229:6;1239:7; 1248:5 scenarios (4) 1217:6;1218:11; 1222:12;1227:21 Schedule (6) 1217:3,14,16; 1219:7,8;1240:2 scheduled (1) 1283:9 scratch (1) 1132:15 screen (11) 1121:21,23; 1139:11;1145:13; 1156:6;1161:10; 1177:5;1225:2; 1236:23;1265:22; 1303:19 screens (2) 1304:13;1305:4 scrutiny (1) 1139:3 se (1) 1261:19 seamless (1) 1285:2 second (30) 1147:13;1178:14; 1185:19;1193:20; 1195:21;1198:2; 1210:19;1211:6; 1213:17;1218:9; 1223:15,18,25; 1239:10,12,15,18,23, 24;1240:5,14,20,24; 1243:19;1249:6; 1267:19;1268:16; 1280:23;1294:10; 1303:22 secondary (4) 1170:5;1212:14;	1226:1;1269:15 secret (5) 1173:24;1174:1; 1178:23;1179:20; 1180:23 Secretary (1) 1227:12 secretly (1) 1278:16 section (25) 1139:21;1141:12; 1143:2,12;1144:5; 1146:19;1147:10; 1148:9;1161:17; 1162:10;1166:19; 1171:24;1173:4,16; 1209:4;1217:21; 1218:10;1224:17; 1238:20;1242:7,16; 1243:3,8;1253:23; 1254:12 Sections (2) 1224:19;1232:17 secure (2) 1215:25;1264:14 secures (1) 1225:10 security (9) 1132:4;1224:9,23; 1225:11,17,18; 1227:5;1228:2; 1263:14 seeing (6) 1173:14,15; 1185:21;1257:7; 1266:12;1267:4 seek (4) 1135:21;1140:8; 1219:14;1220:24 seeking (4) 1142:2;1220:14; 1246:22;1272:1 seeks (1) 1231:6 seem (4) 1159:1;1208:6; 1231:18;1277:18 seemed (10) 1142:14,21; 1145:22;1190:23; 1208:11;1233:3; 1277:3,11;1278:9,25 seemingly (2) 1229:11;1232:18 seems (18) 1142:8;1149:17; 1159:3;1168:16; 1169:14;1179:3; 1181:8;1191:6; 1195:13;1205:13; 1215:21;1226:15; 1231:10;1232:25; 1233:5;1275:24;	1278:11;1297:20 Self-Resolution (2) 1139:21;1167:1 sell (7) 1135:7;1219:14; 1221:8,16;1226:17; 1229:24;1264:10 Seller (1) 1193:21 selling (5) 1195:14;1197:19; 1261:22,23;1275:6 send (4) 1176:25;1266:2,7; 1300:14 sending (1) 1266:1 sense (18) 1128:10,19; 1170:12;1210:22; 1213:23;1216:12; 1224:1,12,13; 1225:15;1238:4; 1240:13;1257:24; 1272:17;1273:22; 1284:8;1288:5; 1292:13 sensitive (1) 1203:10 sent (7) 1166:22,23; 1193:6;1200:25; 1251:7;1253:16; 1257:5 sentence (7) 1138:25;1167:24; 1169:13;1215:18; 1226:20;1267:17; 1268:24 sentences (1) 1266:15 separate (5) 1135:4,8;1164:12; 1217:2;1296:21 separated (1) 1123:24 separately (1) 1295:4 September (1) 1301:17 sequentially (1) 1242:15 sequestration (1) 1164:6 serious (1) 1285:23 served (2) 1224:22;1234:13 serves (1) 1225:16 service (2) 1179:22;1180:22 services (8)	1178:15,18; 1179:18;1180:20; 1182:24;1264:14; 1306:15,19 session (1) 1185:24 set (45) 1120:11;1142:6; 1153:20;1154:4,5; 1157:17;1165:17; 1167:3,16,23; 1169:8,9,14,15,17; 1183:12;1184:22; 1185:16;1188:15,23; 1189:18,20,25; 1190:2,11,14; 1191:18;1193:16; 1195:20;1198:15; 1205:3;1218:18; 1235:21;1248:11; 1275:18,19;1276:17; 1277:7,10;1278:8; 1279:15;1283:8; 1287:24;1295:13; 1298:21 sets (7) 1138:23;1140:19; 1142:9;1158:3; 1168:1;1276:9,15 setting (3) 1228:12,19; 1290:17 settle (1) 1202:10 settlement (1) 1140:2 seven (12) 1147:11,15,19; 1149:5;1155:5; 1156:7;1283:14,19; 1284:7,24;1292:3; 1304:22 seven-day (1) 1297:14 several (6) 1135:18;1209:25; 1234:24;1274:17; 1283:2,5 severe (1) 1124:2 Shall (8) 1161:24;1204:14; 1242:17;1243:11,19; 1250:19;1296:20,22 share (4) 1223:12,14,20; 1242:19 shared (2) 1174:18;1222:18 shedding (1) 1263:2 shell (2) 1170:20;1173:1
S				
sadly (2) 1257:11;1259:2 safe (1) 1306:21 Sale (11) 1194:8;1222:8,18, 23;1223:5,8;1225:6; 1228:25;1229:18; 1230:5,10 SALON (1) 1176:9 same (26) 1124:1;1130:8; 1139:10;1151:19,25; 1152:2;1165:9; 1181:23;1190:20,21; 1194:23;1211:7,14; 1230:15;1240:1; 1250:14;1251:13,24; 1265:16;1281:6; 1282:24;1290:4; 1292:17;1293:2; 1295:3,18 satisfied (4)				

shoes (1) 1228:14	1278:8;1292:20	1184:21;1190:7; 1233:21;1242:18; 1243:4	1130:5;1132:13; 1144:3;1206:10; 1208:15;1209:15; 1213:25;1235:10	1270:19;1278:10
shook (1) 1233:6	simultaneous (2) 1293:14;1294:21	solemn (2) 1165:9;1211:14	source (2) 1138:22;1207:4	start (4) 1216:10;1230:20; 1280:15,16
short (2) 1193:10;1266:10	simultaneously (1) 1303:9	solemnly (1) 1119:8	sourced (1) 1254:15	start- (1) 1236:7
shorter (2) 1292:15;1298:10	single (3) 1136:18;1196:23; 1274:21	solution (1) 1276:20	Spanish (1) 1273:6	started (8) 1123:13;1125:21; 1226:7;1252:2; 1256:14;1294:6; 1298:6;1301:2
shortly (1) 1175:7	SINGLES (1) 1176:9	somebody (3) 1126:9;1131:2; 1265:22	speak (4) 1118:10;1182:5; 1282:15;1286:3	starting (3) 1273:5;1293:5; 1297:23
show (8) 1171:11,13,15,16; 1176:18;1214:21; 1231:17;1265:20	singular (1) 1299:10	somehow (5) 1189:10;1222:4; 1226:16;1277:3; 1278:3	speaking (2) 1189:6;1273:9	start-of-round (5) 1235:8,13; 1236:14;1237:1,18
showed (2) 1232:4;1283:19	sit (3) 1163:1;1200:12; 1202:1	someone (17) 1228:19;1237:6; 1255:11,15,23,25; 1256:2;1266:7; 1269:14,25;1270:13, 14;1272:17,18; 1277:1;1278:9; 1286:16	special (4) 1170:18;1171:3; 1173:25;1210:16	starts (4) 1214:18;1217:14; 1230:22;1257:13
showing (4) 1176:20;1181:18, 20;1223:9	Sitting (5) 1189:5;1210:12; 1212:4,18;1256:7	someplace (1) 1305:14	special-purpose (2) 1170:11,13	state (7) 1137:6;1181:9; 1207:1;1212:22; 1216:15;1227:12; 1300:18
shown (1) 1183:1	situate (2) 1168:20;1271:7	something's (1) 1143:18	Specifically (12) 1129:12;1133:13; 1163:8;1173:23; 1187:17;1210:8; 1241:10;1255:14; 1256:20;1259:12; 1270:12;1271:17	statement (58) 1118:24;1119:2,4, 16;1120:7,14; 1121:11;1122:9; 1137:7;1138:5; 1139:20;1142:13; 1165:19;1166:2; 1170:5,16;1174:7; 1176:2;1183:16,17; 1185:12,14;1186:12; 1188:12;1192:5; 1195:17;1202:18; 1204:2,6,8;1206:21; 1207:14;1209:24; 1211:19;1212:5,21; 1214:19,22;1217:15; 1218:19;1219:24; 1224:8,16;1232:1; 1241:6,17;1246:10; 1247:12;1248:21; 1249:4;1251:6,13; 1254:21;1265:15,17; 1267:23;1268:16; 1289:19
shows (2) 1181:20;1217:4	situation (18) 1154:21;1155:3; 1193:17;1195:6; 1198:7;1213:24; 1220:21;1222:6; 1223:7;1227:14,17; 1228:24;1238:6,11, 17;1248:15;1277:2; 1295:17	sometimes (5) 1170:19,21,22; 1186:11;1298:12	spell (1) 1126:18	
side (11) 1128:9;1132:5,6; 1133:23;1139:7; 1218:23;1251:21; 1282:8,19;1284:6; 1304:11	situations (6) 1181:10;1216:18, 24;1218:12; 1219:11;1269:4	somewhat (2) 1282:7;1286:24	spend (2) 1160:11;1302:23	
sign (8) 1124:7,12; 1199:21;1202:12; 1228:22;1231:6; 1246:20;1279:9	six (1) 1147:19	somewhere (1) 1215:9	spending (2) 1160:5;1304:22	
signed (10) 1124:11;1129:16; 1136:7;1157:4; 1184:14;1187:13; 1204:6;1233:6; 1251:16,25	sixteenth (3) 1236:13,20,25	soon (1) 1284:10	split (5) 1219:15;1222:19; 1223:3,24;1226:18	
significant (2) 1139:13;1282:12	size (1) 1298:22	Sorry (36) 1127:5;1128:12; 1129:23;1135:13; 1148:7;1154:9; 1161:19;1163:12; 1168:17;1177:7,13; 1186:7;1200:3; 1201:4;1209:7,9; 1218:23;1229:9; 1230:4;1232:21; 1237:5,6;1240:9; 1245:16;1246:8; 1247:3;1252:4; 1253:21;1255:21,24; 1262:14;1263:21; 1271:2;1273:1; 1299:14;1300:3	splitting (1) 1274:8	
signing (6) 1135:24;1137:23; 1187:7;1239:14; 1240:23;1265:15	SKI (2) 1210:2,11	sort (4) 1124:7;1201:13; 1269:16;1288:22	spoke (3) 1190:13;1191:7, 19	
Silicon (2) 1123:21;1247:24	skip (1) 1151:20	sought (4) 1135:10,14; 1136:2;1246:16	squarely (3) 1268:2,18,19	
similar (3) 1226:22;1232:2; 1269:4	Sky (1) 1178:1	sound (2) 1173:13;1270:7	staff (1) 1306:2	statements (4) 1119:3;1196:12; 1212:19;1268:5
similarly (1) 1288:4	slimmed (2) 1263:16,22	sounds (8)	stage (6) 1127:19,20,22; 1179:10;1279:3; 1300:21	states (3) 1147:22;1153:3; 1227:11
simple (2) 1267:25;1268:15	slowdown (3) 1133:3,9;1134:22		stand-alone (1) 1174:12	stating (1) 1120:9
simply (16) 1120:9;1134:3; 1135:6;1142:10; 1148:15;1150:7; 1165:22;1179:10; 1180:17;1197:23; 1227:15;1232:17; 1233:2;1261:8;	small (7) 1126:10;1127:7,8, 14,24;1178:13; 1215:24		standard (1) 1156:9	status (2) 1152:15;1244:11
	smoothly (1) 1306:16		standards (1) 1158:23	stay (2) 1283:17;1306:21
	Snow (1) 1178:1		standpoint (6) 1215:23;1216:5; 1230:18;1237:24;	stayed (1) 1290:23
	sold (10) 1123:9;1221:21; 1222:8,15;1228:17; 1229:13;1263:11; 1264:1,12,13			
	sole (5)			

step (9) 1137:12;1149:4; 1190:5;1203:16; 1215:11;1216:10; 1228:13;1253:25; 1290:21	stuff (10) 1124:4,6,22; 1125:22,23;1127:17; 1129:7;1251:19; 1259:19;1278:7	1240:4	1297:12	18,22;1193:3,13,14, 15;1194:2,4,5,12,16, 19,20,21;1195:21, 22;1196:14;1197:1; 1198:24;1199:1,3,5; 1200:23;1201:3; 1204:16,17;1205:8, 15,17,22,23;1206:1, 3,5,8,16;1268:21
steps (3) 1135:18,22; 1272:10	stuff's (1) 1254:16	successfully (2) 1157:4;1231:6	surprised (5) 1260:15,18; 1261:2;1277:20; 1289:11	
stick (1) 1218:14	Sub (1) 1184:4	successor (2) 1231:9;1246:25	survive (1) 1273:4	T-e-c-h (2) 1192:13,15
still (11) 1189:5;1212:4; 1241:17;1244:7; 1251:23;1273:4,7; 1277:21;1280:4; 1286:15;1295:20	subject (3) 1139:2;1140:14; 1291:25	sufficient (1) 1295:12	suspect (1) 1288:4	technically (1) 1270:24
Stop (5) 1159:25;1177:19; 1186:14;1268:4; 1286:7	subjects (1) 1211:4	suggest (6) 1159:15;1180:3; 1201:19;1210:13; 1216:7;1294:15	suspicion (1) 1251:21	technologists (1) 1282:18
straight (1) 1279:1	sub junctive (1) 1150:4	suggested (1) 1285:21	swamp (1) 1259:20	technology (3) 1283:24;1285:7, 11
straightforward (1) 1168:16	submission (10) 1141:17;1143:3, 16;1144:2;1146:25; 1147:17;1150:23; 1151:14;1299:4; 1301:12	suggesting (2) 1215:9;1287:8	swampy (1) 1226:5	TECHs (1) 1192:9
strategic (1) 1174:13	submissions (6) 1288:20,22; 1291:9,14;1292:7; 1293:14	suggestion (4) 1287:10;1296:15; 1297:6;1300:13	swearing (1) 1119:3	telling (1) 1128:2
strategy (4) 1123:2;1125:22; 1128:15;1273:18	submit (6) 1151:5;1157:14; 1291:19;1295:9,11; 1304:3	suggests (4) 1157:10;1158:5; 1162:18;1286:20	Symantec (4) 1123:7;1132:1; 1263:12;1264:1	template (1) 1188:16
strict (1) 1224:12	submitted (25) 1141:15;1143:14; 1144:6;1146:23; 1149:15;1150:3,4, 24;1151:10,13; 1156:7;1157:13; 1159:10;1163:19; 1178:22;1182:25; 1191:8;1206:6,17, 18;1208:17;1236:1; 1237:12;1299:5; 1303:9	suit (1) 1185:23	system (4) 1289:18,18; 1290:1,21	tend (1) 1202:14
strike (4) 1137:3;1193:11; 1248:18;1271:11	submitting (5) 1206:12;1291:23; 1294:23,24,25	suits (1) 1249:22	T	tens (1) 1261:9
striking (3) 1161:15;1162:8; 1197:19	subparagraph (2) 1203:12;1204:20	summarized (2) 1196:20;1290:10	Tab (14) 1121:12;1138:5; 1139:5;1141:7,10; 1166:20,24;1167:7; 1170:16;1174:6; 1183:15;1192:23; 1207:18;1256:23	term (8) 1201:11,12; 1213:13;1214:1,23; 1232:21;1251:13; 1270:7
String (10) 1139:22;1140:5,9; 1156:21;1162:21; 1167:2;1171:11; 1247:4;1248:9; 1276:9	subparagraphs (1) 1149:23	summarizes (1) 1196:20	table (2) 1225:22;1232:5	termination (2) 1124:7;1218:3
strings (1) 1158:3	subsections (1) 1254:13	summary (1) 1189:3	talk (2) 1215:11,12	terms (38) 1138:24;1155:10; 1167:9;1168:21; 1170:18;1196:7; 1201:22;1202:14; 1203:13,15,20; 1212:9;1216:14; 1217:4;1222:5,15, 16;1223:5;1225:18; 1240:2;1241:9,22; 1242:2,9,19;1243:5; 1244:13;1245:11; 1253:19,22;1254:5, 6;1269:4;1271:4; 1279:7;1288:20; 1291:3;1298:7
strongly (1) 1294:16	subsequent (1) 1230:9	summer (1) 1305:13	talked (6) 1120:10,12; 1170:25;1191:1; 1226:24;1276:14	
struck (1) 1210:14	subsequently (1) 1188:15	superb (1) 1298:2	talking (12) 1127:8;1143:22; 1160:23;1173:9; 1189:7;1192:10; 1196:15;1197:1,5; 1219:18;1240:1,20	
structure (6) 1155:10;1193:19; 1194:2;1212:13; 1271:15;1302:5	substance (2) 1134:13;1256:8	support (3) 1282:18;1306:2, 18	talks (2) 1214:14;1215:7	
structured (3) 1193:19;1209:21; 1247:2	substantively (1) 1286:12	support (3) 1282:18;1306:2, 18	targeted (1) 1302:2	
studied (6) 1137:7,14;1138:7; 1145:7;1161:5; 1166:8	succeeded (1) 1240:15	supposed (2) 1201:18;1222:17	targeting (2) 1169:7,8	testified (8) 1149:11;1150:25; 1175:8;1192:2; 1198:3;1217:9; 1223:4;1237:11
study (2) 1137:25;1139:1	successful (3) 1193:22;1205:23;	sure (47) 1124:9,10; 1126:11;1127:1,12; 1128:13;1129:19,22; 1130:18;1153:23; 1155:12;1167:17,25; 1168:13;1173:21; 1187:14;1190:1; 1191:4;1192:9; 1198:16;1207:15; 1213:5,14;1214:2; 1215:3;1216:2,9; 1220:8;1231:25; 1232:13;1239:21,25; 1245:14,21;1247:11; 1250:1;1251:23; 1253:9;1258:6; 1270:25;1271:20; 1276:7,7;1277:15; 1280:23;1296:16;	team (5) 1176:24;1266:1; 1282:15;1300:24; 1306:14	testifying (1) 1185:12

1264:21;1265:3; 1275:23;1279:3; 1281:4;1284:24; 1285:20 thanks (3) 1305:8,16;1307:6 theirs (2) 1196:19;1294:25 theory (1) 1276:18 therefore (3) 1175:11;1208:7; 1288:12 thinking (3) 1155:10;1226:5; 1238:13 third (10) 1152:7,10,19; 1153:5;1168:7; 1196:1;1201:13; 1215:19;1225:23; 1267:17 thoroughly (1) 1202:15 though (2) 1128:17;1298:4 thought (10) 1131:1,2;1155:18; 1185:11;1210:25; 1245:24;1261:1; 1287:18;1289:7; 1294:2 thoughtful (1) 1289:7 thoughts (1) 1291:8 threat (1) 1263:13 three (4) 1147:17;1239:13; 1253:18;1266:15 throughout (3) 1289:24;1306:11, 15 throw (1) 1217:19 thunderstorm (1) 1284:1 thus (1) 1142:5 timing (3) 1147:19;1199:16; 1300:17 tired (1) 1273:3 title (3) 1129:4;1173:10, 14 titled (2) 1167:1;1242:7 TLD (15) 1172:13,25; 1183:22;1196:2;	1221:21;1224:23; 1228:17;1262:20; 1263:4,12,17,19,22; 1264:5,8 TLDs (7) 1132:23;1181:10; 1210:9;1226:1; 1260:20;1261:9; 1270:23 today (17) 1119:8;1122:11; 1149:11;1163:1; 1164:2;1185:13; 1189:5;1197:12; 1202:1;1210:12; 1212:4,18;1256:8; 1264:15,21;1281:9; 1299:20 together (5) 1184:4;1205:14; 1283:20;1292:18; 1302:6 told (4) 1157:21;1177:2; 1255:10,13 Tom (1) 1126:1 tonight (3) 1279:4,4;1284:2 took (5) 1156:25;1238:17; 1246:2;1248:17; 1298:5 top (3) 1147:12;1236:2; 1241:7 topic (3) 1135:2;1223:2; 1299:24 Topics (1) 1299:11 total (1) 1189:20 totally (2) 1227:9;1231:15 towards (1) 1125:20 trade-off (3) 1229:14,20; 1232:17 traditional (3) 1231:13,15; 1287:4 transaction (14) 1123:10;1144:17; 1155:11;1166:13; 1194:2;1205:12; 1206:22;1208:3,9; 1247:13;1254:24; 1264:1;1269:18; 1271:14 transactions (13) 1139:2;1156:15;	1166:16;1167:2,16, 22;1169:7,8; 1209:25;1212:10; 1246:12;1247:17; 1248:3 transcript (3) 1160:22;1192:11; 1198:2 transfer (32) 1167:12,19; 1168:5,15;1169:16; 1181:11;1196:5; 1199:11;1217:22,25; 1218:1,9,16,18; 1219:17;1223:15,18, 25;1239:10,12,14, 18,22,23,24;1240:3, 5,14,17,20,24; 1241:1 transfers (1) 1277:9 transparency (1) 1277:9 transpired (1) 1219:2 trapped (1) 1203:8 treated (2) 1228:8;1235:14 Treatment (2) 1242:8;1295:1 tree (1) 1233:1 trial (5) 1297:14,18,19; 1298:5,23 TRIALanywhere (2) 1285:10;1305:2 trials (2) 1285:5,6 Tribunal (2) 1201:6;1202:4 tried (2) 1232:1;1233:4 tries (2) 1199:9;1200:6 trigger (9) 1142:12;1161:16; 1162:9,15,16,20,23; 1195:10,10 triggering (1) 1162:19 triggers (1) 1241:1 troubling (2) 1277:4,12 true (27) 1119:4;1136:24; 1146:14;1166:18; 1182:17;1187:23; 1210:3;1211:16; 1222:24;1225:13; 1229:5,22;1230:11;	1240:22;1244:3; 1246:14;1247:16; 1248:4;1249:17,18; 1250:11;1268:17,24; 1275:4;1286:2; 1287:11;1296:8 truly (1) 1306:7 trustworthy (1) 1215:21 truth (3) 1119:9,9,10 try (12) 1135:5;1142:11; 1157:2;1162:18; 1186:14;1200:20; 1221:9;1230:12; 1242:14;1262:16; 1289:20;1304:6 trying (32) 1127:4;1128:25; 1144:13;1149:13; 1153:23,25;1156:3; 1157:12,16;1169:20; 1186:11;1197:2; 1198:15;1199:10; 1200:5;1201:7; 1209:9;1214:2; 1216:9;1225:20; 1227:20;1231:25; 1244:19;1247:5; 1257:24;1259:9; 1262:3;1265:9; 1277:15,21;1290:7; 1293:17 tunnel (1) 1306:25 turn (14) 1121:11;1138:5; 1141:6,24;1159:5; 1166:19;1167:6; 1184:12,19;1195:18; 1221:3;1233:7; 1242:5;1245:8 turning (6) 1150:22;1159:14; 1204:20;1234:8,16; 1251:5 two (39) 1126:5,13; 1147:16;1162:20; 1163:15;1173:18; 1185:14;1188:16; 1190:22,22;1191:8, 12,16,20;1192:8; 1193:9;1197:13; 1213:7;1224:20; 1229:20;1234:24; 1239:12;1240:13; 1251:25;1252:5; 1261:16;1263:4,7,9; 1273:24;1274:8; 1278:3;1280:17,18;	1297:13;1298:6,8; 1300:20;1302:13 type (3) 1230:7,21; 1268:13 types (1) 1270:16 typical (1) 1254:16 typo (2) 1245:1,3
U				
ultimate (2) 1136:1;1154:24 ultimately (5) 1123:24;1284:8; 1290:8;1293:6; 1295:15 umbrage (1) 1287:16 unable (4) 1220:6,22; 1221:13;1229:25 unanswered (1) 1260:8 unbalanced (2) 1288:5,10 unclear (2) 1139:12;1189:17 uncommon (1) 1248:2 under (23) 1141:3;1161:17; 1162:9;1165:9; 1178:8;1188:22; 1211:14;1217:17; 1219:10;1220:21; 1222:16;1223:6; 1230:6;1238:20; 1241:11;1248:23; 1253:23;1254:11,12; 1287:5,23,24;1295:1 underage (2) 1228:15,16 underperformance (1) 1230:9 understandings (1) 1251:12 Understood (9) 1124:5;1140:7; 1186:19;1189:4; 1193:16,18;1200:10, 21;1304:9 undertaken (2) 1285:7,7 undoing (1) 1290:17 undue (1) 1282:10 uneven (1) 1288:10				

<p>unfair (4) 1153:9;1159:17; 1197:22;1203:17</p> <p>unfairness (1) 1153:6</p> <p>unique (2) 1121:13,15</p> <p>uniquely (1) 1231:10</p> <p>unit (1) 1135:4</p> <p>unknown (1) 1283:18</p> <p>unknowns (1) 1278:25</p> <p>Unless (2) 1134:6;1254:11</p> <p>Unlike (2) 1229:17;1243:24</p> <p>unlikely (3) 1151:23;1152:4; 1217:7</p> <p>unmute (1) 1165:3</p> <p>unnecessary (1) 1282:10</p> <p>unrepresented (1) 1290:5</p> <p>unsecured (1) 1215:24</p> <p>unsigned (3) 1184:8,11; 1185:19</p> <p>untrue (9) 1141:15;1143:6, 15,18;1144:7,12; 1146:24;1159:10,22</p> <p>unusual (5) 1159:1;1229:11; 1276:21;1277:11; 1305:13</p> <p>unwinding (1) 1220:13</p> <p>unworkable (1) 1200:17</p> <p>up (49) 1120:2;1121:23; 1128:16;1132:19; 1139:11;1144:18,25; 1145:13,16;1147:14, 23;1148:12;1157:3; 1161:11;1171:13,18; 1177:3,5,15,21,23; 1181:12;1184:10; 1189:13;1190:10; 1193:16;1198:15; 1203:24;1204:22; 1208:12;1223:8,24; 1224:1;1225:2; 1228:2;1230:19; 1231:5;1232:4,12; 1235:19;1236:18; 1239:8;1242:14;</p>	<p>1265:10;1277:19; 1279:9;1287:24; 1295:15;1298:7</p> <p>upon (9) 1193:14,22; 1194:4;1212:1; 1240:3;1241:22; 1243:4;1250:19; 1299:4</p> <p>upsetting (3) 1248:9;1279:10, 17</p> <p>upside (1) 1229:15</p> <p>uptime (1) 1261:24</p> <p>use (14) 1131:8;1135:23; 1150:4;1155:5; 1156:8;1213:13; 1226:25;1251:13; 1270:7,22;1279:7; 1295:18;1296:24; 1299:22</p> <p>used (9) 1138:21;1154:15; 1216:1;1224:11; 1225:22;1227:16; 1232:14;1285:22; 1291:5</p> <p>useful (2) 1302:6;1304:3</p> <p>using (5) 1214:2;1231:14, 17;1232:21;1268:9</p>	<p>ventures (4) 1140:8,12,24; 1141:2</p> <p>verify (1) 1234:10</p> <p>VeriSign (152) 1122:23;1123:1,6, 12,21;1124:8,13,17, 19,23;1125:8,11,18; 1127:11;1130:6,16, 20;1131:12;1132:2, 6,8,17;1133:23; 1134:19;1135:10,14; 1136:2,7,19,22; 1137:20;1142:24; 1161:15;1162:7; 1165:16;1166:14; 1184:5,13,14; 1185:1,17;1190:18; 1191:17,24;1209:25; 1211:22;1212:3,23; 1213:2,11;1214:5, 24;1216:16; 1217:10;1219:1; 1220:6,23;1221:3,8, 14,16;1222:6,13,25; 1223:6,13,20,24; 1224:5,24;1225:1,6; 1226:13;1228:6,8; 1230:5;1231:11; 1233:16;1234:10,13, 19;1235:23;1238:2, 23;1239:4;1241:13; 1242:22;1243:4,16, 17,24;1244:22; 1245:19;1246:3,10, 16;1247:14,19,21; 1248:2;1249:13; 1250:21,22;1251:2; 1252:17,22,25; 1253:10,13;1254:8; 1255:1,3,4,11,16,16, 18,23,25;1256:2,5,9, 17;1261:11,14,22; 1262:1,9,20,21; 1263:14;1264:14; 1269:12;1270:1,23; 1272:7;1273:18; 1275:5,8,24;1276:5; 1277:1;1278:16; 1279:4,5,13,14; 1284:6;1286:3,11; 1288:4;1297:4</p> <p>VeriSign's (17) 1123:3,7;1131:15; 1139:2;1189:24; 1222:5;1226:22; 1233:21;1234:5; 1242:18,23;1243:21; 1244:1,7;1250:20; 1251:16;1252:16</p> <p>versa (1) 1239:25</p>	<p>version (1) 1139:17</p> <p>versus (1) 1219:17</p> <p>veterans (1) 1174:15</p> <p>via (4) 1141:17;1143:3, 16;1146:25</p> <p>vice (9) 1122:23;1123:2; 1173:5,11;1178:5; 1239:25;1273:17; 1294:10,11</p> <p>video (1) 1182:7</p> <p>view (10) 1157:19;1195:6; 1197:8,13;1198:7; 1248:18;1286:4; 1289:18;1297:15,15</p> <p>views (1) 1250:14</p> <p>vigorous (1) 1283:4</p> <p>violate (3) 1248:23;1250:4, 10</p> <p>violated (2) 1267:24;1268:8</p> <p>Virginia (1) 1123:22</p> <p>virtual (2) 1283:16;1285:1</p> <p>virtually (3) 1160:6;1164:12; 1290:8</p> <p>virtue (1) 1289:23</p> <p>volume (2) 1118:11,15</p> <p>VOYAGE (1) 1176:10</p>	<p>1157:24,25;1158:6; 1159:3;1163:24; 1169:17;1170:23; 1188:25;1189:8,10, 12;1190:23;1191:10, 11,25;1193:16,18; 1195:7;1196:21; 1198:8,23;1205:13, 24;1221:11; 1223:22;1225:23; 1226:7,18;1227:16, 17;1228:11,19; 1230:15;1231:24; 1232:14;1233:5; 1238:12;1240:15; 1247:2,6;1248:12; 1250:12;1268:19,20; 1271:14;1273:6; 1276:24;1278:21; 1279:18;1286:22,25; 1289:18,20;1290:8, 20;1291:4;1294:3; 1295:7;1297:1; 1299:16;1301:2; 1302:5,20</p> <p>ways (9) 1135:5;1140:22; 1185:22;1215:25; 1226:8;1227:15; 1230:17;1240:13; 1264:10</p> <p>WEB (59) 1124:14;1125:12, 15;1135:11,15; 1136:4,6;1142:24; 1183:25;1184:16; 1185:2;1189:14,25; 1190:8,17;1191:16; 1211:23,25;1212:2; 1214:7,11;1216:16; 1217:11;1220:6; 1221:8,14,16; 1222:8;1224:23,25; 1228:8;1233:15; 1234:5,14,23; 1236:13;1237:23; 1238:6;1246:2; 1248:25;1251:18; 1252:1,10;1257:16; 1258:5;1259:17,17; 1260:17,24;1261:5, 8,13,19;1273:15; 1274:20,22;1275:3; 1276:15;1290:18</p> <p>Webcom (4) 1191:19,21,21,22</p> <p>WEB's (1) 1260:25</p> <p>website (10) 1138:10,17,21; 1145:2;1160:24; 1163:20;1166:6; 1175:22,24;1237:21</p>
	V			
	<p>vacation (1) 1305:14</p> <p>Valley (2) 1123:21;1247:25</p> <p>valuable (2) 1261:14;1262:1</p> <p>varied (1) 1170:24</p> <p>variety (1) 1185:22</p> <p>various (4) 1142:10;1196:12; 1292:21;1293:19</p> <p>vary (2) 1254:4,6</p> <p>VAUGHAN (3) 1177:22;1249:8; 1266:4</p> <p>VC (6) 1230:14,24,25; 1231:4,11;1232:10</p> <p>vehicles (2) 1170:11,13</p> <p>VENTURE (1) 1176:9</p>			
			W	
			<p>wait (2) 1147:13;1235:20</p> <p>waiting (1) 1164:21</p> <p>walk (2) 1228:21;1290:18</p> <p>wants (4) 1160:9;1201:15; 1227:2;1298:22</p> <p>warranties (1) 1250:24</p> <p>watching (2) 1260:19,23</p> <p>way (69) 1125:10;1142:4, 11;1145:16; 1150:12;1153:12;</p>	

week (6) 1123:14,23; 1275:15,23;1282:6; 1283:9	willing (3) 1202:4;1295:20, 20	14;1163:6;1164:9, 13;1165:4;1166:2; 1168:19,24;1169:5, 12,22;1170:4,16; 1174:7;1176:2,15; 1177:9,10;1182:15; 1183:16,17;1185:12, 14;1186:6,11,19,23; 1188:12;1192:4; 1195:17;1200:4,9; 1202:3,8,17,19; 1203:1,5,22;1204:2, 6,7;1206:21; 1207:13;1211:11,16, 19;1212:21;1214:19, 22;1217:15; 1218:19;1219:23; 1224:8,16;1241:6; 1246:9;1247:12; 1248:21;1249:11; 1251:5,13;1253:2,7; 1254:21;1260:18; 1261:7,15;1262:15; 1263:25;1264:24; 1265:7,15,17,19; 1266:11,17;1267:5, 18;1268:6;1269:6, 19;1270:6;1271:16, 24;1272:5;1273:11, 20,23;1274:13,25; 1276:7;1278:19,24; 1279:18;1281:10,16, 18;1287:18	1188:7;1189:4,11, 12;1196:18;1221:7; 1264:6;1280:3; 1283:10,20,23; 1284:22;1296:3; 1304:6,15;1305:20; 1306:8	1175:5;1178:7,7,11, 11;1183:20; 1190:15;1191:14; 1193:25;1205:6; 1214:20;1219:25; 1220:2;1221:11; 1241:8;1242:12,12; 1243:1,23;1258:2
weekly (1) 1127:3	Wilson (2) 1129:13,17	win (7) 1135:19;1157:2; 1229:12;1240:25; 1246:19;1252:5; 1260:16	worked (12) 1123:1;1126:5; 1128:14;1136:11; 1195:2;1221:16; 1227:1;1236:11; 1247:24;1262:8; 1274:6;1284:10	yes-or-no (1) 1253:5
weeks (4) 1251:20;1283:2,5; 1298:6	window (6) 1130:11,13,16; 1175:7;1209:22; 1262:12	winning (11) 1157:3;1199:2; 1204:17;1209:12; 1213:16;1217:11; 1219:5,9;1239:15; 1240:21,25	working (7) 1124:20;1127:15, 23;1128:6;1225:25; 1260:15;1269:11	Z
weigh (2) 1150:13;1153:10	winner (1) 1276:24	wish (5) 1119:20;1120:7; 1282:2;1305:14; 1306:14	works (2) 1227:7;1300:15	zero (1) 1231:5
weight (2) 1150:10,18	wishing (1) 1306:21	wishing (1) 1306:21	world (5) 1132:3;1155:3; 1247:24;1274:9; 1281:11	zones (1) 1283:21
weighted (1) 1152:17	withdraw (10) 1140:6;1183:22, 25;1184:16;1185:4; 1188:24;1189:14,25; 1191:22;1286:8	witness' (1) 1182:19	worry (1) 1285:4	1
weird (4) 1276:25;1277:23; 1278:7,9	withdrawal (1) 1216:25	witnesses (9) 1282:13;1286:6,8, 10,14;1287:3,5; 1296:10;1302:7	worth (1) 1238:7	1 (18) 1121:12;1138:5; 1170:16;1174:7; 1183:16;1184:19; 1192:23;1194:16; 1207:18;1217:3,14, 16;1219:7,8;1233:7, 18;1240:2;1285:15
welcome (1) 1267:15	withdrawn (1) 1287:6	won (5) 1218:1;1219:12; 1220:11,22;1222:15	wow (1) 1278:6	1,300 (1) 1132:20
well-formed (1) 1282:22	withdrew (4) 1184:6;1286:9; 1287:3;1296:10	wondering (2) 1245:1;1278:7	write (12) 1138:7;1171:3; 1172:6;1188:11; 1195:19;1211:20; 1212:8;1224:22; 1226:20;1247:11; 1248:21;1254:23	1,900 (2) 1131:18;1132:10
well-represented (1) 1306:6	Within (8) 1127:21;1130:19, 19;1169:7,14; 1270:8;1275:13; 1290:24	word (12) 1154:4,13; 1156:21;1178:25; 1192:13;1216:10; 1232:25;1237:19; 1256:21;1260:19; 1270:22;1274:21	writing (1) 1127:7	1.2.7 (10) 1141:7,12;1143:2, 12;1144:5;1146:21; 1159:16;1161:17; 1162:10;1163:7
weren't (3) 1128:24;1144:1; 1148:18	without (12) 1156:19;1162:19; 1210:21;1234:20; 1238:23;1243:21; 1244:13;1248:8; 1266:12;1279:6; 1291:2;1299:6	words (17) 1151:18,25; 1152:2,5;1153:8,13, 22;1154:25;1155:1; 1173:1;1194:23,24; 1201:17;1214:2,3; 1239:2;1279:10	worth (1) 1238:7	1,38 (1) 1307:8
whatnot (1) 1124:11	WITNESS (129) 1118:7,12,16,24; 1119:1,4,5,11,16,17, 21;1120:7,9; 1121:11;1122:9; 1133:12,16,25; 1134:3;1137:6; 1138:5;1139:20; 1145:18;1155:16; 1160:1,7,11; 1161:21;1162:2,11,	wondering (2) 1245:1;1278:7	wow (1) 1278:6	10 (16) 1131:13;1167:8; 1171:1;1220:15; 1223:3;1224:19; 1226:11,12;1232:17; 1241:7;1243:3,8; 1253:23;1254:12,13; 1256:23
what's (4) 1209:7;1248:12; 1267:20;1270:16	whereas (3) 1193:9,20;1230:7	word (12) 1154:4,13; 1156:21;1178:25; 1192:13;1216:10; 1232:25;1237:19; 1256:21;1260:19; 1270:22;1274:21	writing (1) 1127:7	100 (13) 1222:6,14,17,23; 1223:7,10;1224:5; 1228:7;1229:5; 1261:24;1296:23,25; 1297:5
whatsoever (1) 1158:19	whereby (3) 1140:5;1181:9; 1191:22	won (5) 1218:1;1219:12; 1220:11,22;1222:15	written (4) 1148:4;1149:8; 1265:3;1277:14	10.7 (10) 1141:7,12;1143:2, 12;1144:5;1146:21; 1159:16;1161:17; 1162:10;1163:7
wheel (1) 1297:23	whereup on (5) 1164:15;1211:12; 1258:14;1280:24; 1307:7	wondering (2) 1245:1;1278:7	wrong (3) 1260:21;1264:19; 1279:20	1.38 (1) 1307:8
whereas (3) 1193:9,20;1230:7	wherever (1) 1203:24	word (12) 1154:4,13; 1156:21;1178:25; 1192:13;1216:10; 1232:25;1237:19; 1256:21;1260:19; 1270:22;1274:21	wrote (2) 1189:2;1246:9	10 (16) 1131:13;1167:8; 1171:1;1220:15; 1223:3;1224:19; 1226:11,12;1232:17; 1241:7;1243:3,8; 1253:23;1254:12,13; 1256:23
whereby (3) 1140:5;1181:9; 1191:22	white (1) 1149:18	word (12) 1154:4,13; 1156:21;1178:25; 1192:13;1216:10; 1232:25;1237:19; 1256:21;1260:19; 1270:22;1274:21	Y	100 (13) 1222:6,14,17,23; 1223:7,10;1224:5; 1228:7;1229:5; 1261:24;1296:23,25; 1297:5
whereup on (5) 1164:15;1211:12; 1258:14;1280:24; 1307:7	Whois (1) 1209:13	word (12) 1154:4,13; 1156:21;1178:25; 1192:13;1216:10; 1232:25;1237:19; 1256:21;1260:19; 1270:22;1274:21	year (4) 1125:3,4;1204:3; 1277:19	10.7 (10) 1141:7,12;1143:2, 12;1144:5;1146:21; 1159:16;1161:17; 1162:10;1163:7
wherever (1) 1203:24	whole (7) 1119:9;1145:16; 1148:12;1266:17,18; 1267:16;1298:4	word (12) 1154:4,13; 1156:21;1178:25; 1192:13;1216:10; 1232:25;1237:19; 1256:21;1260:19; 1270:22;1274:21	years (6) 1163:9;1185:10; 1197:23;1198:20; 1202:5;1246:7	10a (4) 1242:6,13,16; 1244:21
white (1) 1149:18	whose (1) 1287:13	work (26) 1118:6;1124:23; 1126:25;1129:25; 1132:15;1135:1; 1146:4,9;1185:16;	yep (34) 1137:9,11,18; 1139:24;1140:17; 1141:11;1147:3,9; 1154:6,9;1167:10; 1169:5;1172:5,18;	10aii (1) 1244:19
Whois (1) 1209:13	wife (1) 1123:24	work (26) 1118:6;1124:23; 1126:25;1129:25; 1132:15;1135:1; 1146:4,9;1185:16;	yes-or-no (1) 1253:5	10b (1)
whole (7) 1119:9;1145:16; 1148:12;1266:17,18; 1267:16;1298:4	Wi-Fi (1) 1284:2	work (26) 1118:6;1124:23; 1126:25;1129:25; 1132:15;1135:1; 1146:4,9;1185:16;	yes-or-no (1) 1253:5	
whose (1) 1287:13	Willett (1) 1255:10	work (26) 1118:6;1124:23; 1126:25;1129:25; 1132:15;1135:1; 1146:4,9;1185:16;		

1223:11 11 (6) 1118:1;1171:24; 1208:18,23;1209:1,4 111 (1) 1207:18 114 (1) 1251:5 11b (1) 1173:16 11th (2) 1175:3;1181:4 12 (1) 1130:14 120 (1) 1168:19 124 (1) 1167:6 13 (1) 1188:12 135 (8) 1213:16;1222:16, 19;1223:19;1224:2; 1228:18;1239:8; 1261:1 14 (13) 1125:20,21; 1131:22,24;1195:18; 1196:13,20;1197:4; 1212:22;1223:20,20; 1224:1,16 142 (2) 1213:16;1237:12 149 (3) 1224:1,2;1229:4 15 (7) 1163:2;1164:5,11; 1211:9;1245:23,24; 1254:21 150 (2) 1292:19;1296:1 15th (1) 1301:3 16 (2) 1237:1;1245:24 16.8 (1) 1278:4 16th (1) 1301:3 17 (2) 1198:4;1229:6 17.02 (1) 1278:5 18 (3) 1174:6;1198:4; 1211:19 19 (1) 1198:4 1a (7) 1194:17,18; 1198:22;1199:7; 1201:2;1204:13; 1233:20	1b (3) 1194:17;1198:22; 1199:7 1h (2) 1234:17;1238:20 1st (8) 1118:25;1204:3; 1255:19,25;1256:9, 17;1265:17;1266:25 2 2 (4) 1154:5;1183:24; 1251:9,11 20 (2) 1198:4;1212:7 2009 (2) 1263:6;1273:19 2009-2010 (1) 1123:2 2010 (3) 1123:6;1264:2; 1273:19 2012 (3) 1175:3,8;1181:4 2013 (5) 1131:14,16; 1132:25;1133:5; 1134:20 2014 (21) 1122:24;1123:11, 14;1125:17; 1130:10;1131:17; 1132:2,9,14,25; 1134:20;1136:12; 1137:4;1170:3; 1208:16,23;1262:11, 17;1263:15;1264:7; 1274:11 2015 (20) 1135:10,14; 1136:12;1137:21; 1170:3;1185:20; 1196:15;1202:9; 1207:9,23;1208:14; 1244:22;1245:10,11, 13,18,20;1246:16; 1247:20;1248:10 2016 (7) 1136:14;1137:15; 1207:1;1245:2; 1246:2;1251:3,7 2017 (1) 1123:24 2018 (5) 1122:24;1123:15, 18,20;1124:24 2020 (3) 1118:1,25; 1291:19 20th (2) 1244:22;1245:2	21 (2) 1198:5;1249:9 22 (2) 1183:16;1256:18 23 (3) 1178:12;1179:16; 1180:18 23rd (1) 1257:2 24 (3) 1217:20;1241:6; 1291:10 25 (1) 1260:22 25th (1) 1245:10 26 (2) 1174:11;1251:7 27th (1) 1252:2 29 (1) 1299:13 2b (1) 1217:21 2bi (2) 1218:3,15 2e (1) 1234:9 3 3 (2) 1163:17;1184:3 30 (1) 1192:24 31st (1) 1255:10 32 (5) 1141:7,10; 1160:21;1193:9; 1212:21 33 (2) 1224:17,18 350 (1) 1296:2 38 (1) 1254:22 3a (1) 1184:3 3b (1) 1218:10 4 4 (7) 1139:5;1141:7,10; 1166:20,24;1167:7; 1184:13 4.1.3 (4) 1139:19;1141:25; 1142:1;1166:20 450 (1) 1296:2	4b (1) 1218:19 4k (1) 1250:18 5 5 (5) 1138:7,25;1166:2; 1170:17;1246:9 50 (9) 1223:12,13; 1274:2;1292:19; 1295:11,11;1296:21; 1297:4,4 57.5 (1) 1237:2 6 6 (4) 1167:9;1168:22; 1173:4;1178:2 60/40 (1) 1274:4 65 (1) 1238:10 67 (1) 1250:18 6f (1) 1178:8 7 7 (4) 1211:20;1223:25; 1224:2;1239:10 70 (1) 1242:6 71.9 (6) 1236:15;1237:2,7; 1238:3,8;1239:8 75 (2) 1295:8,9 78 (1) 1245:8 79 (4) 1214:18,22; 1233:12;1234:4 8 8 (7) 1176:1;1211:20; 1249:8,9;1291:19; 1301:5,19 8:00 (1) 1291:21 80 (1) 1234:16 81 (2) 1198:4;1234:9 82 (3)	1218:19;1267:13, 18 83 (2) 1219:23;1223:4 84 (1) 1223:4 86 (1) 1217:15 87 (1) 1217:20 8th (1) 1291:15 9 9 (10) 1170:17;1172:19; 1219:21,22;1220:20, 23;1221:12; 1224:19;1226:11; 1232:17 9:38 (1) 1273:4 90s (1) 1262:24 95 (8) 1139:19,19; 1141:24;1166:20,24, 25;1207:18;1263:18 96 (1) 1208:20 9a (1) 1218:5 9th (1) 1301:4
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EXHIBIT PC-5

INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTER FOR DISPUTE RESOLUTION

AFILIAS DOMAINS NO. 3 LTD.,

Claimant,

and

INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS,

Respondent,

and

VERISIGN, INC. and NU DOTCO, LLC.

Amicus Curiae.

ICDR CASE NO: 01-18-0004-2702

WITNESS STATEMENT OF JOSE IGNACIO RASCO III

1 June 2020

HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY

Steven A. Marenberg
Josh B. Gordon
April Hua
PAUL HASTINGS LLP
1999 Avenue of the Stars, 27th Floor
Los Angeles, California, 90067

Counsel to *Amicus Curiae*
Nu Dotco, LLC

I, Jose Ignacio Rasco III, declare as follows:

1. My full name is Jose Ignacio Rasco III, and I reside in Miami, Florida. I am currently the Chief Financial Officer and a Manager of Nu Dotco, LLC (“NDC”), a company founded to submit applications and acquire rights for new generic top level domains (“gTLD”) as part of the Internet Corporation for Assigned Names and Number’s (“ICANN”) New gTLD Program.

I. Biography

2. In 2001, I graduated from the University of Pennsylvania’s Wharton School with a Bachelor of Science Degree in Economics with concentrations in Accounting and Real Estate. In 2003, I earned a Master’s Degree in Taxation from Florida International University.

3. In 2005, I saw an opportunity to enter the domain name industry after I began working with Juan Diego Calle, an entrepreneur working within the internet space. In 2007, the Colombian government announced the release of the .CO geographic top level domain (“TLD”) for public auction. In 2009, I, Mr. Calle, Nicolai Bezsonoff, and a few others co-founded .CO Internet S.A.S. (“dotCO”) to acquire, develop, and operate the .CO TLD. I served as dotCO’s Chief Financial Officer, while Mr. Calle and Mr. Bezsonoff served as dotCO’s Chief Executive Officer and Chief Operating Officer, respectively. We operated dotCO as a joint venture with Neustar, Inc. (“Neustar”), an American technology company that served as our technical partner. In 2009, dotCO successfully bid for the .CO TLD, which we then operated with considerable success. Under our leadership, for example, we increased registrations and revenue to the point where .CO operated on par with top-echelon domains. Following that success, we sold dotCO to Neustar in 2014.

4. In 2012, while still at dotCO, Mr. Calle, Mr. Bezsonoff, and I began to strategize the future of our domain industry business. During this time, we closely followed ICANN’s

announcement of its New gTLD Program, under which ICANN promised to introduce numerous new gTLDs to the domain name system. As a complement to our existing dotCO business, we decided to participate in the New gTLD Program by applying to be operators of certain new gTLDs. We focused on those potential gTLDs that could occupy a corporate space similar to .CO and had the greatest potential for commercial success.

II. NDC's Management and Ownership

5. The business organization we used to pursue our interest in participating in ICANN's New gTLD Program was NDC, a name ("Nu Dotco") that is a takeoff on our then-existing business "dotCO." On March 19, 2012, Mr. Calle, Mr. Bezsonoff, and I founded NDC, a company organized under the laws of Delaware with its principal place of business in Florida. Maintaining the same positions and roles we served at dotCO, I served as NDC's Chief Financial Officer, Mr. Calle served as NDC's Chief Executive Officer, and Mr. Bezsonoff served as NDC's Chief Operating Officer.

6. At its formation, NDC was owned by two entities as follows: Domain Marketing Holdings, LLC ("DMH") owned 85% of NDC; Nuco LP, LLC ("Nuco") owned the other 15%. That ownership structure remained the same until December 2017, at which time Nuco distributed its 15% ownership interest in NDC to Nuco's members. As a result of that distribution, as of December 2017, DMH continued to hold 85% of NDC and the three other entities that had comprised Nuco collectively held the remaining 15% (with each necessarily owning less than 15%).

7. Accordingly, other than DMH and Nuco, no other entity or person has ever owned at least 15% of NDC. Similarly, there have been no changes or amendments to NDC's management since 2012. Mr. Calle, Mr. Bezsonoff, and I remain the sole officers of NDC and continue to perform the duties associated with those positions.

8. Formed for the specific purpose of submitting applications to ICANN to acquire gTLDs, NDC ultimately applied for thirteen (13) gTLDs through ICANN's New gTLD Program, including .WEB.¹

III. NDC's Application for .WEB

9. On June 13, 2012, NDC submitted an application to ICANN to acquire the right to operate the .WEB gTLD (the "Application"). Exhibit A attached hereto is a true and correct copy of the Application, together with the exhibits to that Application.² NDC timely paid the required \$185,000 application fee.

10. NDC's Application satisfied all of ICANN's requirements. For example:

- **Corporate Information**

11. Mr. Bezsonoff and I completed NDC's .WEB Application. In that regard, as specified by Sections 1 and 8 of the ICANN gTLD application form, we identified NDC as the applicant and as a Delaware limited liability company. Ex. A.1, §8(b). As specified by Sections 6 and 7 of the form, we listed me as NDC's "Primary Contact" and listed Mr. Bezsonoff as NDC's "Secondary Contact." *Id.* at §§6-7. And as specified by Sections 11(a) & (b), we listed three people as NDC's directors and officers: me as CFO, Mr. Calle as CEO, and Mr. Bezsonoff as COO. *Id.* at §§11(a), (b). This information was accurate at the time NDC's Application was prepared and submitted and this information remains accurate today.

12. To comply with the requirements of Section 11(c) of the gTLD application form, we identified "all shareholders holding at least 15% of shares" in NDC. As was accurate at the time, we listed Domain Marketing Holdings, LLC and Nuco LP, LLC as entities that held at least

¹ NDC applied for the following 13 gTLDs: .INC, .LLC, .GROUP, .LTD, .DESIGN, .MOVIE, .BOOK, .WEB, .CORP, .GMBH, .APP, .LAW, and .TECH.

² Exhibit A.1 contains publicly available portions of the Application. Exhibit A.2 contains non-public, confidential portions of the Application. Exhibits Aa-Ap contain exhibits submitted with the Application.

a 15% ownership interest in the LLC. *Id.* at §11(c). As stated above, these two entities are the only entities or persons that have ever held at least 15% of NDC.

- **Mission/Purpose of Proposed .gTLD**

13. Consistent with other gTLD applications NDC had submitted, in Section 18(a) of the Application we stated that the “mission/purpose” of .WEB was “to provide the internet community at-large with an alternative ‘home domain’ for their online presence. We envision that through strategic marketing campaigns designed to brand the domain, it will become a premium online namespace for a variety of businesses and websites. This general domain will provide new registrants with better, more relevant alternatives to the limited options remaining for current commercial TLD names.” *Id.* at §18(a).

14. Sections 18(b) and 18(c) of the ICANN gTLD application ask applicants, respectively, to describe how the “proposed gTLD will benefit registrants, Internet users, and others” and to describe “operating rules ... to eliminate or minimize social costs.” *Id.* at §§18(b), (c). In answering these questions, NDC provided its general vision of new gTLDs in the marketplace and its general strategy at the time as to how .WEB might be successfully and productively introduced and used to benefit consumers. *Id.* Although NDC used its experience with .CO as an *example* of how .WEB might accomplish these goals, we understood, and we stated in our answers, that specific plans would depend on market conditions and thus were not fully described in the Application. Nonetheless, we repeatedly stated NDC’s intent to follow ICANN’s policies, rules, and recommendations in connection with .WEB.

15. With slight modifications to reflect the specific gTLD at issue, NDC’s statements in Section 18 of its .WEB Application were largely identical to corresponding statements in all of NDC’s other ICANN gTLD applications. We understood Section 18 to request general

descriptions of marketing and other business intent, not binding commitments of future actions. In fact, as described in more detail below, I understand that ICANN does not use Section 18 to evaluate gTLD applications and does not take any interest in any distinctions that might arise between statements made in Section 18 of a gTLD application and how a domain is ultimately operated. To the best of my knowledge, other applicants—including Claimant Afilias Domains No. 3 Ltd. (“Afilias”)—similarly responded to Section 18 (and other sections) of the ICANN gTLD application form with near-identical statements in each of their applications, irrespective of how they operated domains they ultimately acquired or whether they subsequently transferred the domains to another entity. And, also to the best of my knowledge, ICANN has never policed any distinctions between Section 18 statements and such subsequent actions.

16. Nonetheless, I understand that Afilias has alleged that NDC’s answers to the application form’s “mission/purpose” inquiries in Section 18 were made false or misleading, thereby requiring an update to NDC’s Application, by NDC’s entry into the Domain Acquisition Agreement (“DAA”) with Verisign over three years later. *See* Part VI, *infra*. That is incorrect. First, NDC’s subjective views as to the “mission/purpose” of gTLDs, including .WEB, and how .WEB might benefit consumers and others have not changed, irrespective of who operates .WEB. Second, NDC’s Section 18 responses expressly stated that NDC’s marketing and other business plans were not final and were subject to market conditions. In all of my experience with ICANN applications, I have never updated, nor known any applicant to update, an application to reflect new and different marketing and business plans for a gTLD.

17. Third, given that NDC’s marketing and business plans were subject to change, as a baseline position NDC stated that it planned to follow ICANN’s policies, rules, and recommendations in connection with .WEB. Nothing in the DAA required an update to that

statement, including because I understood that Verisign, a longstanding registry owner and operator with whom ICANN was very familiar, would also follow those policies, rules, and recommendations. As a baseline, therefore, I did not believe anything about our Section 18 responses had materially changed on account of the DAA and I did not believe any amendment to NDC's Application was required or warranted. Among other things, in

Redacted - Third Party Designated Confidential Information

18. Moreover, as stated above, it has always been my understanding that the Section 18 "mission/purpose" inquiry is intended to provide ICANN with certain New gTLD Program statistics and is not part of the evaluation criteria. Rather, when evaluating whether an applicant is qualified to participate in a new gTLD contention set, ICANN has always been most concerned with whether that applicant has the financial ability and technical infrastructure to successfully operate the gTLD registry. For example, the ICANN Guidebook states that responses to Section 18 are "not used as part of the evaluation or scoring of the application, except to the extent that the information may overlap with questions or evaluation areas that are scored."³

19. Instead, the Guidebook explains that Section 18 responses are used in connection with *ex-post* reviews of the gTLD program in general and not in connection with any specific application:

The information gathered in response to Question 18 is intended to inform the post-launch review of the New gTLD Program, from the perspective of assessing the relative costs and benefits achieved in the expanded gTLD space. For the application to be considered complete, answers to this section must be fulsome and

³ Afiliis C-3 (*gTLD Applicant Guidebook*, Attachment to Module 2, A-11, A-12, available at <https://newgtlds.icann.org/en/applicants/agb>).

sufficiently quantitative and detailed to inform future study on plans vs. results. The New gTLD Program will be reviewed, as specified in section 9.3 of the Affirmation of Commitments. This will include consideration of the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion. *Id.*

20. As a result, while helpful for ICANN to assess the New gTLD Program in general, Section 18 responses are not a material part of evaluating a particular application and, moreover, are not subject to subsequent enforcement by ICANN in the event those responses differ from how or by whom a domain is ultimately operated. Accordingly, for this additional reason, I again did not believe that NDC was obligated to update any such response in its .WEB Application.

- **Technical Capabilities**

21. In Sections 23-44, NDC provided a robust description of its technical ability to operate the .WEB gTLD. For example, NDC explained that it had partnered with Neustar, an experienced domain registry company with proven and scalable infrastructure. Ex. A.2, §§23-27. NDC further provided detailed information regarding the specific services Neustar would provide, including the necessary security, abuse prevention, and rights protection services. *E.g., id.* at §§28-44.

- **Financial Information**

22. Redacted - Third Party Designated Confidential Information

This financial information is considered confidential by ICANN, and is not disclosed by ICANN in its public posting of new gTLD applications. Therefore, only ICANN would have had access to this information about NDC's financial ability to operate the .WEB gTLD. Other members of the Contention Set, including those who might bid at auction for .WEB, would not have had access to such financial information.

23. Notably, the ICANN application form did not call for, and therefore NDC did not provide, any information regarding NDC's financial capability to acquire the .WEB gTLD in an auction or sources of financing for that auction. In more than a dozen ICANN applications I have overseen for NDC, ICANN has never requested and NDC has never provided such information.

24. As NDC's primary contact for the Application, I received confirmation from ICANN that our .WEB Application had been accepted—meaning that the Application had satisfied all applicable ICANN criteria and evaluations—in June 2013.

25. Pursuant to the ICANN Guidebook, if more than one applicant applies for a gTLD, then the approved applicants are grouped together into a "Contention Set," with the competing applications resolved either through (i) a private auction or other negotiated settlement conducted by agreement of the applicants or, if all members of the Contention Set do not agree to a private auction, (ii) a public auction conducted under the auspices of ICANN.

26. In addition to NDC, there were six other approved applicants for the .WEB gTLD: Web.com Group, Inc., Charleston Road Registry Inc. (Google), Schlund Technologies GmbH, Dot Web Inc. (Radix), Ruby Glen LLC ("Donuts"), and Afilias. In February 2014, ICANN officially formed a Contention Set for .WEB comprising these seven applicants, including NDC.

27. It was not until April 2016, however, that ICANN sent notice to the Contention Set that ICANN would issue the .WEB gTLD and, therefore, that ICANN had scheduled a public

auction for .WEB to take place on July 27, 2016. Until ICANN sent that formal notice, there was no guarantee that ICANN would hold an auction for .WEB. Rather, as had occurred with other domain strings (such as .CORP), ICANN had the right to decline to issue the .WEB gTLD and thus not to hold an auction.

28. As a result, between June 2013, when ICANN approved NDC's application, and April 2016, when ICANN scheduled the public auction, there was no clarity as to how NDC's application for .WEB might ultimately be resolved.

IV. Changes to the gTLD Marketplace and the Emergence of New Participants

29. Following NDC's successful acquisition and operation of the .CO domain in 2010 and ICANN's introduction of the New gTLD Program in or around 2012, NDC decided to focus its gTLD acquisition strategy on similar company-type domains. For example, because "CO" is short for "Company," NDC applied for domain strings such as .INC, .LLC, .CORP, .LTD, and others in this corporate short identifier space. NDC also applied for domain strings related to high traffic Internet searches, including .MOVIE, .BOOK, and, of course, .WEB. In total, NDC submitted 13 ICANN applications for these and similar domains.

30. Between 2012 and 2015 several other companies emerged as repeat participants in the ICANN New gTLD Program. Prominent among these was Donuts. On information and belief, Donuts raised funds through private equity transactions to finance ICANN applications and auction bids. With that money, it is my understanding that Donuts applied for and bid on at least 300 gTLD domain strings, far more than NDC or, I believe, most other companies.

31. Donuts also emerged as a driving force behind the private auctions permitted by ICANN. As briefly described above, ICANN does not specify how applicants might privately resolve the Contention Set, and applicants may mutually agree to resolve the Contention Set through a private auction or other means. In fact, ICANN encourages applicants to resolve

Contention Sets on their own terms—viewing a public auction as a last resort—and historically has neither participated in nor policed those private resolutions.

32. To the contrary, once ICANN has determined that a gTLD application satisfies the requirements of the Guidebook and placed the various applicants into a Contention Set, to the best of my knowledge, ICANN has effectively fulfilled any gatekeeping function that it might undertake: ICANN has determined that the applicant is qualified and capable of operating the gTLD if that applicant emerges from the Contention Set and secures the rights to operate the domain. Beyond that, to the best of my knowledge, ICANN takes no position *on which* applicant in a Contention Set subsequently becomes eligible to sign a registry agreement with ICANN for the domain in question *or how* they do so. In fact, the Auction Rules expressly state that applicants within a Contention Set may discuss and negotiate, among other things, “settlement agreements or post-Auction ownership transfer arrangements” for the domain in question so long as the Contention Set is not within a designated Blackout Period shortly before a public auction.⁴

33. Accordingly, over the years, applicants have considered and employed numerous means to resolve Contention Sets. For example, when NDC first considered participating in the New gTLD Program, we researched the program rules and considered various means of resolving Contention Sets, including trading domains with other applicants who might have a greater interest in a particular domain string than NDC, cross-selling percentage interests in different domains, and buying various applicants out of their applications before any auction was held. Although NDC has never used these means in practice, I have never considered, and am not aware of anyone who does consider, such means of resolving Contention Sets to be prohibited by the ICANN rules.

⁴ Afiliias C-4 (*Auction Rules for New gTLDs: Indirect Contentions Edition*, 68(a)-(b), available at <https://newgtlds.icann.org/en/applicants/auctions>).

34. Following the disclosure by ICANN of the various entities that had submitted gTLD applications, NDC and those entities engaged in numerous discussions regarding how we might resolve Contention Sets without proceeding to a public ICANN auction. Most of the ideas discussed were variations on private auctions, and private auctions have since become the most prominent means to resolve Contention Sets. Although the terms of those auctions may vary depending on the agreement reached by members of the Contention Set, a common form of private auction—which Donuts was heavily involved in creating—is resolved in favor of the highest-bidding applicant. Unlike a public auction under the auspices of ICANN, however, the money offered by the *highest* bidder is often divided equally among the *losing* bidders, not paid to ICANN. As a result, each member of the Contention Set stands to benefit from a private auction as long as the “losers’ share” exceeds expenses, including the ICANN \$185,000 application fee.

35. As another example, in July 2016, Oliver Mauss, the CEO of 1&1 Internet, which owns the Schlund entity that had applied for .WEB and was in the .WEB Contention Set, emailed Mr. Calle with a proposal for an “alternative private auction.” Exhibit C attached hereto is a true and correct copy of that email, which Mr. Calle forwarded to me on July 5, 2016. In his email, Mr. Mauss described the “basic principles” of his proposal: “It divides the participants into groups of strong and weak;” “the weak players are meant to lose and are compensated for this with a pre-defined sum;” “the strong players bid for the asset;” and “the highest bid wins, but the winner pays a lower price than the 2nd highest bid.” *Id.* According to Mr. Mauss, this proposal had several advantages over a typical private auction (which he called an “Applicant Auction”) and an ICANN public auction. *Id.* For example, “the winning party pays less for the asset in comparison to both” an ICANN public auction or an “Applicant Auction;” “the losing strong players receive a higher return than in the Applicant Auction;” and “the losing weak players receive a lower return than in

the Applicant Auction.” *Id.* Essentially, Mr. Mauss concluded, the “benefit for the strong bidders comes from a lower share of proceeds for the weak bidders than in the Applicant Auction.” *Id.* We did not agree to participate in Mr. Mauss’s proposal, but it was yet another example of means through which participants in the New gTLD Program attempted to resolve Contention Sets without proceeding to a public ICANN auction.

36. Following ICANN’s publication of the Guidebook in 2012, Donuts made significant efforts to coordinate private auctions between gTLD applicants. For example, Donuts hired a mathematician to develop models for operating such auctions, developed tutorials, and hosted meetings and mock auctions so participants could experience and evaluate how private auctions might work. I participated in at least one such meeting, which was held during an ICANN conference (but was not on the official conference schedule) and which I understood had been arranged by Donuts. At that meeting, a mathematician and a private auction company provided information to gTLD applicants about how a private auction might work.

37. Other companies, including Afiliis, similarly prioritized private auctions, ultimately treating gTLD applications as a form of arbitrage in which each application was an asset to be leveraged for profit without ever intending to actually operate any, or most, of the gTLDs. Based on my active participation in the domain industry for over 12 years and numerous conversations with other participants, it is my understanding that such practices were commonly known in the industry. I believe that ICANN was aware of these practices and, to my knowledge, did not object to them. I believed that these practices were acceptable to ICANN, which sought only to ensure that the ultimate operator was qualified and technically and financially capable of operating each respective gTLD.

38. By 2015, Donuts had become a well-financed, major force in the New gTLD Program. In addition, large companies such as Amazon and Google also began to participate in the Program, including by participating in private and public auctions.

39. As private auctions proliferated and the value of gTLD domain strings increased, including as a result of the influx of money from participants such as Donuts, Amazon, and Google, the market expectations for the .WEB domain and other new gTLDs increased.

40. Given these changes in the marketplace, ^{Redacted - Third Party Designated Confidential Information}

V. The Domain Acquisition Agreement and Confirmation of Understandings

A. The Domain Acquisition Agreement

41. In or around May 2015, I received a phone call from Verisign expressing interest in working with NDC to acquire the rights to .WEB. As noted above, by that date ICANN had formed the Contention Set for .WEB (meaning no new applicants could join) and

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In addition, as also noted above, by that date ICANN had yet to schedule a public auction for .WEB, and thus the domain was still on hold, so there was no clarity as to a resolution by either a public *or* a private auction. Consequently, because

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42. As stated above, based on my experience and discussions with others in the industry, it was common industry knowledge by 2015-2016 that gTLD applicants used various means to resolve Contention Sets and monetize their applications. In addition to private auctions, it was common knowledge that interested parties had monetized successful gTLD applications by assigning interests in domain strings after securing the rights from ICANN. And it was commonly understood that ICANN approved of these assignments. In fact, when NDC first developed its strategy in connection with the New gTLD Program, we considered the possibilities presented by these secondary market opportunities to acquire others' rights in domains, and we came to understand that other gTLD applicants had utilized such opportunities and entered into registry agreements with ICANN based on those opportunities.

43. For example, in or around 2013-2014 I knew that Donuts and Rightside Media had entered into an arrangement whereby certain gTLD applications were potentially financed by the other party in exchange for an interest in the domains in question if and when the domains were acquired. To the best of my knowledge, more than twenty (20) domains have been assigned under this arrangement without any update to ICANN applications disclosing the underlying arrangement. Later on, I knew that the .BLOG gTLD had been acquired by WordPress, or an affiliated entity, after another entity, Primer Nevel S.A, prevailed at auction and executed a registry agreement with ICANN.

44. In addition, I have reason to believe that Radix Registry ("Radix") acquired the rights to the .TECH gTLD through an agreement with Dot Tech, LLC. Dot Tech, LLC was in the .TECH Contention Set with NDC. At no time in the auction process for .TECH did NDC think or know that Radix was participating in any way in the auction and Dot Tech LLC did not update its ICANN application prior to the auction to reveal any agreement with Radix. Dot Tech, LLC won

the .TECH auction on or around September 17, 2014. Thereafter, on October 23, 2014, Dot Tech, LLC updated its application to, among other things, add Radix personnel (including Brijesh Joshi, a Radix Director) as officers and as the new Primary and Secondary Contacts and to reflect that a Radix entity was the only party holding 15% or more of the shares of Dot Tech, LLC. Attached hereto as Exhibits D and E, respectively, are Dot Tech, LLC's original June 2012 application and the revised application dated October 23, 2014. On November 7, 2014, less than two months after Dot Tech, LLC won the auction, **Radix** issued a press release stating that “**Radix** made the winning bid of \$6.7 million for rights to .TECH, competing with Google, Donuts, and other industry players.” (Emphasis added.) Indeed, based on the unsigned .TECH Registry Agreement available on ICANN's website, that agreement was set to be signed for Dot Tech LLC by Brijesh Joshi, the Radix Director whose name appeared on the Dot Tech LLC application for the first time after the auction was held, not anyone from Dot Tech LLC who had participated in the .TECH Contention Set. Attached hereto as Exhibits F and G, respectively, are true and correct copies of Radix's press release and the publicly available, unsigned, .TECH Registry Agreement.

45. It was in this context—our knowledge of these transactions, and our interest in maximizing NDC's return from our .WEB Application—that we began to consider any type of contact with Verisign about .WEB. In the spring and summer of 2015 NDC engaged in discussions with Verisign about the .WEB domain. Those discussions culminated in the August 25, 2015 “Domain Acquisition Agreement” between NDC and Verisign. Ex. B.

46. In the DAA, Redacted - Third Party Designated Confidential Information

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47. Redacted - Third Party Designated Confidential Information

48. Redacted - Third Party Designated Confidential Information

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53. **Redacted - Third Party Designated Confidential Information**

Not only in the past did any transfer depend on ICANN determining to delegate a .WEB TLD (as noted above), and not only must ICANN consent to an assignment of a .WEB registry agreement to Verisign, but the DAA further provides that **Redacted - Third Party Designated Confidential Information**

B. The Confirmation Of Understandings

54. In July 2016, Verisign requested that NDC confirm the parties' understanding regarding NDC's .WEB Application in light of allegations by Donuts that NDC had transferred control of NDC to a third party or assigned the .WEB Application to a third party. *See* Part VII.C,

infra. Because those allegations were unequivocally false, and because

Redacted - Third Party Designated Confidential Information, NDC readily agreed to Verisign's request, and the parties subsequently executed a letter agreement dated July 26, 2016 (the "Confirmation of Understandings"). Exhibit H attached hereto is a true and correct copy of the Confirmation of Understandings. Redacted - Third Party Designated Confidential Information

55. I understand that Afilius has alleged that the Confirmation of Understandings contained "false 'talking points'" provided to me by Verisign that I "duly signed" because I was "instructed" to do so by Verisign. Reply Memorial ¶79. That is false. I did not view the Confirmation of Understandings as "talking points," let alone as something to be used in coordinating any response to ICANN, but instead as an accurate statement of NDC's rights and obligations that protected NDC. As a result, I signed the Confirmation of Understandings of my own accord, for NDC and not for Verisign, because it was a true and accurate description of certain facts and understandings between NDC and Verisign, each of which is consistent with NDC's intent in executing the DAA. In addition, Redacted - Third Party Designated Confidential Information

56. For example, in the Confirmation of Understandings, Redacted - Third Party Designated Confidential Information

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57. Fully agreeing that the Confirmation of Understandings set forth NDC's rights as the applicant for .WEB and its rights and obligations under the DAA, each of which I understood to be consistent with and in compliance with ICANN rules and procedures, I signed the Confirmation of Understandings as of July 26, 2016. Importantly, the Confirmation of Understandings in no way contradicted what I told ICANN in June and July 2016—that NDC had not experienced any changes in its organizational management or control. *See* Part VII.C, *infra*.

As explained in detail below, my statements to ICANN were truthful, and I never deceived or misled ICANN or anyone else regarding NDC's .WEB Application.

VI. Neither the DAA Nor the Confirmation of Understandings Warranted an Update to NDC's .WEB Application

58. As discussed in Part III, *supra*, I did not believe that the DAA warranted or required any update to NDC's .WEB Application. The same is therefore true of the Confirmation of Understandings. For example, I address in Part III, *supra*, why I disagree with Afilias' assertions that the DAA rendered NDC's "mission/purpose" responses false or misleading. Simply put, nothing in the DAA changed NDC's view of the "mission/purpose" of .WEB or changed how NDC might operate .WEB or NDC's technical or financial capability to operate .WEB. Because nothing in those responses became false or misleading, I did not believe any update to the Application was necessary.

59. Indeed, Afilias assumes that, as of August 2015, there was no scenario in which NDC itself might operate .WEB. That is incorrect, including because
Redacted - Third Party Designated Confidential Information and, as of August 2015, ICANN had yet to even conclude whether or how the .WEB Contention Set would be resolved. There was no guarantee, therefore, that the DAA would be in effect when the Contention Set was resolved.

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These facts informed my belief that NDC was under no obligation to update its .WEB application upon execution of the DAA.

60. I understand that Afilias has emphasized two provisions of the DAA in support of its argument that the DAA required an update to NDC's .WEB Application. First, Afilias repeatedly quotes the following: Redacted - Third Party Designated Confidential Information

61. Redacted - Third Party Designated Confidential Information

In fact, in the context of private auctions, there is no disclosure of interested parties or planned transfers of acquired domains, and I am not aware of any applicant, including Afiliias, questioning or challenging the results of a private auction on any basis, let alone on the basis that the winner of the auction subsequently transferred its rights in the domain to another, previously unknown party. Redacted - Third Party Designated Confidential Information

62. Second, Afilias also relies on language

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VII. Pre-Auction Communications with the .WEB Contention Set and ICANN

A. NDC Did Not Agree to a Private Auction for .WEB

63. As noted above, in April 2016, eight months after NDC and Verisign executed the DAA, ICANN informed the .WEB Contention Set that it had scheduled a public auction for July 27, 2016. Thereafter, members of that Contention Set began to discuss the private and public auction options for .WEB.

64. For example, between April and June 2016, I and Mr. Calle (the CEO of NDC) had various phone, email, and text conversations with other members of the Contention Set regarding both .WEB and other outstanding TLDs for which we had pending applications. In the course of those conversations, other members of the Contention Set, including Donuts and Afilias, attempted to persuade NDC to participate in a private auction for .WEB.

65. Because there is no obligation under the ICANN Guidebook or otherwise to participate in a private auction, NDC declined to do so in connection with .WEB. Not only did

Mr. Calle and I repeatedly decline requests from Donuts, Afiliias, and others, but we also never signed any agreement committing NDC to a private auction for .WEB. To be plain, NDC was not required to participate in a private auction for .WEB and never agreed to do so.

66. Nor would NDC Redacted - Third Party Designated Confidential Information

B. Other Contention Set Members Sought to Pressure NDC to Agree to a Private Auction

67. At the time, I understood that other members of the .WEB Contention Set were unhappy that NDC would not agree to a private auction. Recall that a private auction requires the consent of all members of the Contention Set. And recall that, in a private auction, the winner secures the rights to the gTLD at issue and the winning bid is shared among the losing parties. In contrast, in a public auction, the winning bid is retained by ICANN (for investment in the Internet infrastructure) and the losing bidders recover nothing.⁵ Accordingly, other members of the Contention Set stood to lose the opportunity to “earn” significant amounts of money as the losers in a private auction were .WEB to proceed to a public auction.

⁵ Applicants can recover portions of their application fee depending on if and when they exit the auction process, but recover nothing if they complete the auction but do not prevail.

68. One such party was Donuts. On June 6, 2016, I received an email from Jon Nevett, a co-founder of Donuts, regarding .WEB. Exhibit I attached hereto is a true and correct copy of an email string containing Mr. Nevett's June 6 email and our subsequent communications. In his June 6 email, Mr. Nevett said that he was unsure if I, Mr. Calle, and Mr. Bezsonoff were "still the Board members of your applicant" and asked us to agree to a two-month delay of the public auction for .WEB while the Contention Set tried "to work this out cooperatively." *Id.* Based on prior communications with Mr. Nevett, I understood him to be asking to discuss further NDC's participation in a private auction. On June 7, I replied to Mr. Nevett's email and informed him that NDC would not agree to a private auction (maintaining its intention to proceed to a public auction administered by ICANN) and would not agree to a postponement of the public auction. *Id.* In particular, I told Mr. Nevett that, based on his request, "I went back to check with all the powers that be and there was no change in the response and [NDC] will not be seeking an extension." *Id.*

69. In addition, in response to Mr. Nevett's inquiry about whom at NDC he should contact regarding .WEB, I stated that "Nicolai [Bezsonoff] is at [Neustar] full time and no longer involved with our TLD applications. I'm still running our program and Juan [Calle] sits on the board with me and several others." *Id.* Mr. Nevett responded with "Thanks Jose," and asked a follow-up question about unrelated domains. He did not ask for any other information or for any clarification about what I had written. *Id.*

70. I am aware that my reply to Mr. Nevett is being mischaracterized and used as the basis to withhold the award of .WEB to NDC following our successful auction bid in July 2016. My email to Mr. Nevett was an informal email between colleagues who, though also competitors, had a cordial, and even friendly relationship. In that context, I sought to politely respond to Mr.

Nevett's inquiry and deflect further questions. I never intended to suggest any of the changes to the ownership or control of NDC that have been alleged. Nor did I have any obligation or intention to provide detailed, formal information about our company or its management to Donuts.

71. To the contrary, as I have previously attested, I intended the following by the statements in my June 7 email:

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72. Again, I did not intend my June 7 email to a competitor to convey formal information about NDC's corporate organization, let alone to communicate some change to NDC's management that warranted an update to our .WEB Application, as there had been no such change since NDC submitted its .WEB Application. Rather, the language I used was intended to politely dissuade Mr. Nevett from continuing to pursue the issue of a private auction but, at the same time, not to create any ill will between us. I viewed the email as a polite "stiff-arm" response to a competitor to whom neither I nor NDC had any duty to provide either information or explanations for our decisions.

73. On the same day that Jon Nevett of Donuts emailed me, June 7, 2016, Steve Heflin of Afilius contacted Mr. Calle by text message to similarly ask if NDC would reconsider its decision to forego a private auction for .WEB. Exhibit J attached hereto is a true and correct copy of those text messages, which Mr. Calle forwarded to me on June 7, 2016. In those messages, Afilius offered to "guarantee [NDC] score[s] at least 16 mil if you go into the private auction and

lose.” Mr. Calle declined Afiliast’s offer. *Id.* Afiliast then offered to increase the guaranteed payment to “\$17.02” million. Mr. Calle again declined. *Id.*

74. John Kane of Afiliast also texted me to make the same request. I again declined. Exhibit K attached hereto is a true and correct copy of my text messages with Mr. Kane.

C. ICANN Investigated and Dismissed Complaints by the Other Contention Set Members

75. Unable to persuade NDC to participate in a private auction for .WEB, and, in my opinion, motivated entirely by a desire to delay the upcoming *public* auction so as to preserve the possibility that they might profit from the losers’ share in a *private* auction, on June 23, 2016, Donuts and Ruby Glen (which is owned and operated by Donuts) complained to ICANN that NDC had changed its ownership and/or management structure but had not reported the change to ICANN as allegedly required. Donuts and Ruby Glen requested that ICANN investigate those allegations and requested that the public auction for .WEB be delayed during that investigation. Exhibit L attached hereto is a true and correct copy of Donuts’ and Ruby Glen’s June 23, 2016 complaint to ICANN (the “Donuts Complaint”).

76. Signed by Jon Nevett of Donuts—with whom I had emailed between June 6-8, 2016—the Donuts Complaint was entirely premised on the misconception that my statements to Mr. Nevett on June 7 revealed a change in “ownership or control” of NDC that NDC had not communicated to ICANN through an update to NDC’s .WEB Application. *See id.*

77. On June 27, 2016, I received an email message from a member of ICANN’s New gTLD Operations department stating that ICANN “would like to confirm that there have not been changes to [NDC’s] application or the [NDC] organization that need to be reported to ICANN. This may include any information that is no longer true and accurate in the application, including changes that occur as part of regular business operations (e.g., changes to officers and directors

[and/or] application contacts).” Exhibit M attached hereto is a true and correct copy of ICANN’s June 27, 2016 email and subsequent communications on that day between me and ICANN. ICANN’s email requested that, if “there have been any such changes,” NDC submit the changes to ICANN via ICANN’s customer portal. *Id.*

78. I responded to ICANN’s email on the same day, confirming that “there have been no changes to the [NDC] organization that would need to be reported to ICANN.” *Id.* ICANN responded that same day, informing me that no further action was required at the time. *Id.* I believed—and still believe—that my answer to ICANN’s inquiry was accurate and fully responsive. It most certainly was not an “outright lie” as Afilias accuses it to be. *Cf.* Reply Memorial, ¶73. To the contrary, as shown on Exhibit M, ICANN’s June 27 emails to me did not reference any complaint received by ICANN from any other party or any specific information that ICANN or any other party believed might be incorrect. Rather, given the type of potential changes highlighted in ICANN’s email—“changes that occur as part of regular business operations (*e.g., changes to officers and directors [and/or] application contacts*)” (my emphasis)—I understood ICANN to be making a routine inquiry of the Contention Set members given that many years had passed since the .WEB applications had been submitted and that the public auction date had been set and was rapidly approaching. That is, in the context of this very specific inquiry, I understood ICANN to be asking whether the identifying information set forth in NDC’s application, (*e.g.*, management, ownership, and contacts) had changed, not whether *any aspect of NDC’s business had changed*. As such, it never occurred to me that ICANN’s routine inquiry might require disclosure of NDC’s financing arrangement with Verisign in general or the DAA in particular, especially given the well-known industry practice of transferring domains, with ICANN’s consent, after the auction process concluded.

79. The next I heard from anyone at ICANN about any potential concerns regarding NDC's .WEB Application was July 6-7, 2016, when I received emails from ICANN ombudsman Chris LaHatte informing me that "one or more" of the other applicants for .WEB had complained that NDC's .WEB Application had not been properly updated due to changes in NDC's board. Exhibit N attached hereto is a true and correct copy of Mr. LaHatte's emails to me and my response.

80. In particular, Mr. LaHatte referenced an email "which suggests that one of [NDC's] directors is no longer taking an active part in the application, and that there are other directors now involved." *Id.* And he informed me that the "complainant also suggested that NDC's shareholders have changed since the original application." *Id.* In the communications with ICANN that followed, I endeavored to be as thorough and responsive as possible, and I provided accurate and what I thought were clear answers to the questions I was asked. For example:

81. I responded to Mr. LaHatte on July 8, 2016, telling him that there had "been no changes to the [NDC] application. Neither the governance, management nor the ownership in [NDC] has changed." *Id.* I further explained that, in an LLC like NDC, "there are no directors, it is a manager managed company, as designated by the Members of the LLC within the Operating Agreement of the Limited Liability Company." *Id.* And in the case of NDC, I explained that there "has never been an amendment to that operating agreement. There are no new 'directors,' nor have any left the company." *Id.* Finally, I explained that, "while the managers are ultimately responsible for the LCC, as a manager, I take my duties very seriously and for major decisions, I confer with the Members (i.e. shareholders), which again for clarification, have never changed." *Id.*

82. My July 8 email was accurate at the time and remains accurate today. Mr. LaHatte asked if other NDC directors were involved with the .WEB application and if any shareholders had changed. I truthfully answered that neither was true. Moreover, in stating that I confer with other Members regarding “major decisions,” I only meant to clarify our general practice at NDC and not to represent anything specifically about .WEB. Cf. Reply Memorial, ¶81.

83. Also on July 8, 2016, I received an email from Christine Willett, whom I understand to be a Vice President, gTLD Operations, Global Domains Division, at ICANN. Ms. Willett asked me to call her regarding NDC’s .WEB Application and I did so the same day.

84. During that July 8, 2016 telephone conversation with Ms. Willett, I reiterated what I had explained to Mr. LaHatte, which was that neither the ownership nor the control of NDC had changed Redacted - Third Party Designated Confidential Information

85. During that same telephone conversation, I also explained that Redacted - Third Party Designated Confidential Information

86. Realizing that Donuts had misconstrued my June 7 response to Mr. Nevett and that my email was now the basis for the complaint to ICANN, I further explained to Ms. Willett that Redacted - Third Party Designated Confidential Information

87. I understand that Afilias now contends that my statements to the other applicants were intentionally misleading. However, I was under no obligation to be completely forthcoming about our internal operations or plans with parties who were competing for the same gTLD. Nor did I expect the same candor from the other applicants. My statements to Donuts were an attempt at politely deflecting a competitor. Nothing in ICANN's rules prohibits doing so. To be clear, nothing I said to Donuts or to ICANN was a "blatant falsehood" or any attempt to "affirmatively conceal" anything from anyone. *Cf.* Reply Memorial, ¶78. Afilias' assertions to the contrary are simply not true.

88. In fact, on July 11, 2016, I wrote to Ms. Willett to make sure the statements I made in our conversation on July 8 were clear. Exhibit O attached hereto is a true and correct copy of my July 11, 2016 email to Ms. Willett. In addition to reiterating what I had told her about the lack of any changes to the ownership or control of NDC, I also reiterated that I shared her understanding that other applicants had raised the complaint "in order to get more time to convince us to resolve the contention set via a private auction, even though we have made it very clear to them (and all other applicants) that we will not participate in a private auction and that we are committed to participating in ICANN's auction as scheduled." *Id.* In addition, I noted that under ICANN's rules every member of the Contention Set was required to join in a request for the postponement of a public auction, but as of July 11, 2016, the deadline to make such a unanimous request for .WEB had passed. *Id.*

89. On July 13, 2016, Ms. Willet informed the Contention Set that, among other things, ICANN had investigated the complaints of “potential changes of control” of NDC and, “to date we have found no basis to initiate the application change request process or postpone the auction.” Exhibit P attached hereto is a true and correct copy of Ms. Willett’s letter dated July 13, 2016.

90. Although my June 7, 2016 email to Mr. Nevett was taken entirely out of context, my responses to ICANN’s inquiries were unequivocal and accurate. In particular, as described above, I repeatedly told Ms. Willett and Mr. LaHatte in July 2016 that there had been no change to NDC’s management, control, or ownership since the filing of NDC’s .WEB Application, including because the LLC Operating Agreement had not been amended. *See, e.g.*, ¶¶ 81, 84, *supra*. Those statements were unequivocally true.

91. Moreover, the only changes to NDC’s ownership structure (pursuant to which Nuco distributed its shares in NDC to its shareholders) that have ever been made did not occur until December 2017, more than five years *after* NDC submitted its .WEB Application in 2012 and more than one year *after* both my communications with ICANN and the .WEB Auction in 2016. And in any event, that change to NDC’s ownership structure did not result in any new person or entity having more than a 15% interest in NDC, the threshold required to be disclosed in the ICANN application form. *See*, ¶12, *supra*. As such, even today, nearly eight years after NDC submitted its .WEB Application, the information therein remains accurate.

D. Afilias Attempted to Arrange a Private Auction for .WEB During the ICANN Blackout Period

92. As noted above, ICANN informed the parties in April 2016 that a public auction for .WEB had been scheduled for July 27, 2016.

93. Under the ICANN Auction Rules and Bidder Agreement, upon the commencement of a “Blackout Period,” “all applicants for Contention Strings within the Contention Set are

prohibited from cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other's, or any other competing applicants' bids or bidding strategies, or discussing or negotiating settlement agreements or post-Auction ownership transfer arrangements with respect to any Contention Strings in the auction.”⁶ Violations of the Blackout Period can result in disqualification from the Contention Set.

94. The Blackout Period for .WEB commenced on July 20, 2016, when the deposit deadline for the .WEB auction expired. In particular, on July 20, 2016, I received an email from Larry Ausubel of Power Auctions LLC (the administrator appointed by ICANN to conduct the .WEB auction) advising me—as every other member of the Contention Set was also advised—that “the Deposit Deadline for .WEB/.WEBS has passed and we are now in the Blackout Period.” Exhibit Q attached hereto is a true and correct copy of the July 20, 2016 email from Mr. Ausubel.

95. On July 22, 2016, two days after Mr. Ausubel notified the Contention Set that the Blackout Period had begun, I received a text message from John Kane of Afilias asking: “If ICANN delays the auction next week would you again consider a private auction? Y-N.” Exhibit R attached hereto is a true and correct copy of that July 22, 2016 text message.

96. I did not respond to Afilias' text message, as it was sent within the Blackout Period in violation of the Auction Rules and Bidder Agreement. Specifically, I understood that message to be an attempt to discuss resolution of the .WEB Contention Set by settlement during the Blackout Period and thus viewed it as a direct inquiry regarding NDC's strategy for the upcoming auction, in violation of the Blackout Period.

⁶ Afilias C-4 (*Auction Rules for New gTLDs: Indirect Contentions Edition*, 68(a), available at <https://newgtlds.icann.org/en/applicants/auctions>).

97. I also understood Afiliás' text message to refer back to a proposal made by Afiliás to Mr. Calle in June 2016 under which Afiliás attempted to induce NDC to agree to a private auction for .WEB by guaranteeing NDC over \$17 million if NDC lost that auction. Because we were in the Blackout Period and the public auction was scheduled for five days later, July 27, I ignored Afiliás' improper contact.

VIII. The .WEB Public Auction

98. The public auction for .WEB took place on July 27, 2016, continuing into the morning of July 28, 2016. I participated in that auction from Verisign's offices in Reston, Virginia.

Redacted - Third Party Designated Confidential Information

99. Redacted - Third Party Designated Confidential Information

100. Similarly, I believed that it was reasonable for

Redacted - Third Party Designated Confidential Information

Given the significant interest in the .WEB domain, there were numerous rounds of bidding across the two auction days. In an ICANN auction, a price is set in each round and applicants must enter a bid amount that is equal to or greater than the set price to continue to the next round. Although applicants know *how many* parties are participating in each round, they do not know *which* parties remain at any time or the limits of each party's financing or interest in the gTLD.

101. The .WEB auction concluded on July 28

Redacted - Third Party Designated Confidential Information

Apart from that statement, I have never possessed any information regarding the terms of Afiliias' financing, which I believe remains confidential.

102. Financing arrangements secured by the .WEB Contention Set were not disclosed by NDC or other bidders, as any such arrangements are commonly confidential. Nor is there any ICANN or other requirement that the Contention Set disclose available financing to ICANN or other members of the Contention Set. To the contrary, doing so would provide an unfair advantage to bidders that, upon such disclosure, would know the limits of their competitors' funds and thus know what amount of money would secure the winning bid. Such disclosure would thus be counterintuitive to a competitive auction, and I am not aware of any auction, ICANN or otherwise, that proceeds in such a manner. As a result, I did not know (and could not have known) that Afiliias

Redacted - Third Party Designated Confidential Information Nor would it have been appropriate for others to know the amount NDC could or might bid.

103. Having secured the winning bid, NDC

Redacted - Third Party Designated Confidential Information I understand that ICANN has retained the entire notwithstanding that it has not yet agreed to execute a Registry Agreement with NDC for the .WEB gTLD.

IX. Post-Auction Communications with ICANN Regarding .WEB

104. On September 16, 2016, I received an email from Ms. Willett at ICANN stating that Ruby Glen and Afiliias had continued to complain that NDC should not have participated in the .WEB public auction and that NDC's Application should be rejected. That letter was a surprise to me, as prior to receiving it I had not heard from or communicated with Ms. Willett or anyone else at ICANN about .WEB since confirming our payment for .WEB in August 2016.

105. In her letter, Ms. Willett requested that NDC provide responses to 20 questions posed by ICANN so that ICANN could evaluate those complaints. Ms. Willett's email also invited Ruby Glen, Afiliias, and Verisign to respond to the same questions, and I understand that each of those entities received the same request from ICANN. Exhibit S attached hereto is a true and correct copy of Ms. Willett's September 16, 2016 email.

106. NDC provided responses to ICANN's 20 questions on October 10, 2016. Exhibit T attached hereto is a true and correct copy of the October 10, 2016 email I sent to ICANN attaching those responses and the responses themselves.

107. Since submitting those responses in October 2016, NDC has periodically made inquiries to ICANN through the ICANN customer service portal regarding the status of .WEB. ICANN has never responded beyond a statement that the resolution of .WEB is on hold due to the pendency of accountability mechanisms or similar processes.

108. I understand Afilius has suggested that NDC somehow colluded with Verisign and ICANN regarding ICANN's investigation of Afilius' complaints. That is false. NDC does not have any ability to direct or control ICANN's investigation and has not remotely attempted to do so. NDC was not consulted by ICANN about its investigation and has no more insight into ICANN's investigation than any other party.

109. What is true, however, is that it is now June 2020, nearly four years after the public auction for .WEB. NDC has been seriously injured by the delays caused by the various—and in my opinion entirely unfounded—complaints and objections by Donuts and the pursuit of this proceeding by Afilius. Among other things, Redacted - Third Party Designated Confidential Information

110. Redacted - Third Party Designated Confidential Information by members of the .WEB Contention Set, including Afilius, following their unsuccessful attempts to either (i) coerce NDC to participate in a private auction for .WEB—thus ensuring a profit even if they lost that auction—or, (ii) when those efforts failed, to obtain the rights to .WEB themselves. Having accomplished neither, it is my belief that Afilius' continued complaints are no more than a transparent attempt to profit at NDC's and Verisign's expense. I respectfully submit that, as set forth in this statement, there is no factual basis for those complaints.

I swear under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge and belief.

Executed on this 30th day of May, 2020 at Miami, Florida.



Jose Ignacio Rasco III

EXHIBIT PC-6

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INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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AFILIAS DOMAINS NO. 3 LTD.,)
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 Claimant,)
)
 vs.)
)
 INTERNET CORPORATION FOR)
)
 ASSIGNED NAMES AND NUMBERS,)
)
 Respondent.)
)

ICDR Case No.
01-18-0004-
2702

VOLUME V

ARBITRATION

AUGUST 7, 2020

BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR
465536



(310) 207-8000 Los Angeles	(415) 433-5777 San Francisco	(949) 955-0400 Irvine	(858) 455-5444 San Diego
(310) 207-8000 Century City	(408) 885-0550 San Jose	(760) 322-2240 Palm Springs	(800) 222-1231 Carlsbad
(916) 922-5777 Sacramento	(800) 222-1231 Martinez	(702) 366-0500 Las Vegas	(800) 222-1231 Monterey
(951) 686-0606 Riverside	(818) 702-0202 Woodland Hills	(702) 366-0500 Henderson	(516) 277-9494 Garden City
(212) 808-8500 New York City	(347) 821-4611 Brooklyn	(518) 490-1910 Albany	(914) 510-9110 White Plains
(312) 379-5566 Chicago	00+1+800 222 1231 Paris	00+1+800 222 1231 Dubai	001+1+800 222 1231 Hong Kong

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INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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AFILIAS DOMAINS NO. 3 LTD.,)
)
 Claimant,)
)
 vs.) ICDR Case No.
) 01-18-0004-
 INTERNET CORPORATION FOR) 2702
 ASSIGNED NAMES AND NUMBERS,)
)
 Respondent.)
)

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FRIDAY, AUGUST 7, 2020
ARBITRATION HEARING HELD BEFORE

PIERRE BIENVENU
RICHARD CHERNICK
CATHERINE KESSEDJIAN

VOLUME V
(Pages 788-1008)

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REPORTER: BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR

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A-P-P-E-A-R-A-N-C-E-S

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FOR THE CLAIMANT AFILIAS DOMAINS NO. 3 LTD.:

DECHERT LLP
1900 K Street, NW
Washington, DC 20006-1110
BY: ARIF HYDER ALI, ESQ.
ALEXANDRE de GRAMONT, ESQ.
ROSEY WONG, ESQ.
DAVID ATTANASIO, ESQ.
MICHAEL LOSCO, ESQ.
TAMAR SARJVELADZE, ESQ.
(202) 261-3300
arif.ali@dechert.com
alexandre.degramont@dechert.com
rosey.wong@dechert.com
david.attanasio@dechert.com
michael.losco@dechert.com

CONSTANTINE CANNON
335 Madison Avenue, 9th Floor
New York, New York 10017
BY: ETHAN E. LITWIN, ESQ.
(212) 350-2700
elitwin@constantinecannon.com

FOR THE RESPONDENT THE INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS:

JONES DAY
555 California Street, 26th Floor
San Francisco, California 94104
BY: STEVEN L. SMITH, ESQ.
DAVID L. WALLACH, ESQ.
PAUL C. HINES, ESQ.
(415) 626-3939
ssmith@jonesday.com
dwallach@jonesday.com
phines@jonesday.com

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FOR THE RESPONDENT THE INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS:

JONES DAY
555 South Flower Street, 50th Floor
Los Angeles, California 90071
BY: JEFFREY A. LeVEE, ESQ.
ERIC P. ENSON, ESQ.
KELLY M. OZUROVICH, ESQ.
(213) 489-3939
jlevee@jonesday.com
eenson@jonesday.com
kozurovich@jonesday.com

FOR NDC AMICI:

PAUL HASTINGS
1999 Avenue of the Stars
Los Angeles, California 90067
BY: STEVEN A. MARENBERG, ESQ.
JOSH GORDON, ESQ.
APRIL HUA, ESQ.
(310) 620-5700
stevenmarenberg@paulhastings.com
joshgordon@paulhastings.com
aprilhua@paulhastings.com

FOR VERISIGN AMICI:

ARNOLD & PORTER
777 South Figueroa Street, 44th Floor
Los Angeles, California 90017
BY: RONALD L. JOHNSTON, ESQ.
RONALD BLACKBURN, ESQ.
OSCAR RAMALIO, ESQ.
MARIA CHEDID, ESQ.
JOHN MUSE-FISHER, ESQ.
HANNAH COLEMAN, ESQ.
(213) 243-4000
ronald.johnston@arnoldporter.com
ronald.blackburn@arnoldporter.com
oscar.ramalio@arnoldporter.com
maria.chedid@arnoldporter.com
john.musefisher@arnoldporter.com
hannah.coleman@arnoldporter.com

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THE TRIBUNAL:

Pierre Bienvenu,
pierre.bienvenu@nortonrosefulbright.com
Richard Chernick,
richard@richardchernick.com
Catherine Kessedjian, ckarbitre@outlook.fr

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INDEX OF EXAMINATION

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JOSE IGNACIO RASCO	PAGE
CROSS-EXAMINATION BY MR. DE GRAMONT	797
REDIRECT EXAMINATION BY MR. MARENBERG	901
CHRISTOPHER DISSPAIN	PAGE
CROSS-EXAMINATION BY MR. LITWIN	914
CROSS-EXAMINATION BY MR. ALI	970
REDIRECT EXAMINATION BY MR. LeVEE	992
SUPPLEMENTARY EXAMINATION BY MR. LITWIN	1002

1 CALIFORNIA, CALIFORNIA, AUGUST 7, 2020

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3 ARBITRATOR BIENVENU: Good day, everyone.
4 It is an early morning on the West Coast. We have
5 a big day ahead of us.

6 I'll ask if there are preliminary matters
7 that the parties or Amici would like to raise.

8 MR. ALI: Just very briefly, Mr. Chairman.
9 Mr. LeVee had asked me earlier today to provide an
10 estimate regarding the cross-examination times for
11 Mr. Rasco and Mr. Disspain.

12 All I can say is that we worked pretty
13 much late into the night and all night to cut back
14 our examinations of both as much as we could to
15 allow the Panel time to ask questions and for
16 Mr. LeVee and Mr. Marenberg to conduct their
17 respective redirects of the witnesses.

18 I can't say much more than that because I
19 think we have done what we can. We hope that the
20 witnesses will be efficient in their responses and
21 that the redirects will be efficient as well to
22 allow you sufficient time to question the
23 witnesses.

24 I did make a commitment to Mr. LeVee, and
25 we will do everything that we can to abide by the

1 commitment that we made to do our part to get both
2 witnesses done today.

3 ARBITRATOR BIENVENU: Excellent. Thank
4 you, Mr. Ali, for that.

5 Mr. LeVee, will you be introducing -- no,
6 Mr. Marenberg will be introducing the witness this
7 morning, correct?

8 MR. MARENBERG: Correct.

9 MR. LeVEE: Yes.

10 ARBITRATOR BIENVENU: Good morning,
11 Mr. Marenberg.

12 MR. MARENBERG: Good morning.

13 ARBITRATOR BIENVENU: Do you have any
14 preliminary matters that you would like to raise,
15 or can we bring the witness in the hearing room?

16 MR. MARENBERG: Nope, I think we can bring
17 the witness in. The only thing I would say is --
18 and probably Mr. LeVee would echo this -- we have
19 gotten a commitment to finish both witnesses today.
20 That is obviously dependent on the length of the
21 cross-examination, and I think we should monitor it
22 as we are going forward carefully because we can
23 easily get off time.

24 ARBITRATOR BIENVENU: Yes, I think we are
25 all conscious of these constraints.

1 Mr. English, if you could bring the
2 witness in.

3 Morning, Mr. De Gramont.

4 MR. De GRAMONT: Morning.

5 MR. ENGLISH: The witness is now in the
6 meeting.

7 ARBITRATOR BIENVENU: Good morning,
8 Mr. Rasco. Can you hear me?

9 THE WITNESS: I can. Good morning.

10 ARBITRATOR BIENVENU: My name is Pierre
11 Bienvenu. I serve as Chair of the Panel. My
12 colleagues are Professor Catherine Kessedjian, who
13 is joining us from Paris, and Mr. Richard Chernick,
14 who is in Los Angeles.

15 Can you see all three of us on your
16 screen?

17 THE WITNESS: Yes. Good morning. I
18 believe I can, yes.

19 ARBITRATOR BIENVENU: Excellent. So,
20 Mr. Rasco, welcome and thank you for participating
21 in this hearing.

22 You have signed a witness statement in
23 relation to this case dated 30 May 2020?

24 THE WITNESS: That's correct.

25 ARBITRATOR BIENVENU: And at the end of

1 your witness statement, you swear that the content
2 of this statement is correct to the best of your
3 knowledge and belief, correct?

4 THE WITNESS: That's correct.

5 ARBITRATOR BIENVENU: May I ask you, sir,
6 in relation to the evidence that you will give to
7 the Panel today, likewise solemnly to affirm that
8 it will be the truth, the whole truth and nothing
9 but the truth?

10 THE WITNESS: I do.

11 ARBITRATOR BIENVENU: Thank you, sir.

12 Mr. Marenberg, any introductory questions?

13 MR. MARENBERG: Mr. Rasco, is there
14 anything that you would like to change or augment
15 to your witness declaration before
16 cross-examination starts?

17 THE WITNESS: Sure. Thanks, Steve.

18 Just in reviewing my witness statement, I
19 just wanted to point out a clarification. I
20 believe it is Paragraph 107 where I mentioned that
21 I communicated with ICANN primarily -- I
22 communicated with ICANN through the portal, and I
23 didn't mean that to be an exhaustive list. I also
24 did initiate communications with ICANN, I believe,
25 by email, and I think I attempted by phone call.

1 So I just wanted to clarify that. By no means was
2 I trying to exclude the fact that there was other
3 means of communications, but primarily ICANN
4 communications have been through the portal.

5 MR. MARENBERG: Mr. Rasco, what period of
6 time do the communications referenced by Paragraph
7 107 infer?

8 THE WITNESS: After the auction.

9 MR. MARENBERG: I have nothing further,
10 Mr. Chairman.

11 ARBITRATOR BIENVENU: Thank you,
12 Mr. Marenberg.

13 Mr. De Gramont, you will be conducting the
14 cross on behalf of the claimant?

15 MR. De GRAMONT: I will, Mr. Chairman.

16 ARBITRATOR BIENVENU: Morning to you.

17 MR. De GRAMONT: Morning to you. Thank
18 you, Mr. Chairman.

19 CROSS-EXAMINATION

20 BY MR. De GRAMONT

21 Q. Good morning, Mr. Rasco. My name is Alex
22 de Gramont. I represent Afiliias. Thank you very
23 much for being with us this morning.

24 You should have a package that has a
25 binder of documents, and I would ask you to open it

1 now.

2 A. Okay.

3 MR. MARENBERG: May I open mine as well?

4 MR. De GRAMONT: I don't know about that,
5 Mr. Marenberg. Yes, please go ahead.

6 Q. Mr. Rasco, you have a binder in front of
7 you. We have included your witness statement
8 behind Tab 1, and then behind that are various
9 documents that we're going to discuss with you.

10 The good news is we are going to skip a
11 lot of them in an effort to speed up the
12 examination, but we will be asking you about some
13 of them. You will see that we have put brackets at
14 the bottom of the page that has page numbers, and
15 that's because sometimes the PDF and the hardcopies
16 had different page numbers. Just so everyone can
17 follow, we will be looking at the bracketed page
18 numbers, okay?

19 A. Thank you.

20 Q. Okay. So, Mr. Rasco, you are still one of
21 the managers and the chief financial officer of NU
22 DOT CO, or NDC; is that correct?

23 A. That's correct.

24 Q. Are you currently employed in any other
25 capacity?

1 A. Yes, I am.

2 Q. And can you tell me in what other capacity
3 or capacities?

4 A. Sure, yeah, I have multiple -- multiple
5 jobs. I am the CEO and founder of the .HEALTH
6 top-level domain. I also operate a coworking space
7 here in Miami, so -- and also a real-estate-related
8 business.

9 Q. Okay. Thank you. You testify in your
10 witness statement that you and Juan Diego Calle and
11 Nicolai Bezsonoff founded NDC in 2012; is that
12 correct?

13 A. That's correct.

14 Q. And in Paragraph 6 of your witness
15 statement, you explain that at its founding, NDC
16 had two shareholders, the first was Domain
17 Marketing Holdings, LLC, or DMH, which owned 85
18 percent of NDC; is that correct?

19 A. That's right.

20 Q. And then Nuco LP, which owned the other 15
21 percent; is that right?

22 A. That's correct.

23 Q. And who owned DMH?

24 A. Redacted - Third-Party Designated Confidential Information

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Q. Can you tell us who owns STRAAT Investments?

A. Redacted - Third-Party Designated Confidential Information

Q. And then who owned Nuco?

A. Redacted - Third-Party Designated Confidential Information

Q. And do you know if that information was provided to ICANN?

A. I don't believe so. I believe the application only asked you who owned more than 15 percent.

Q. Now, you and Mr. Calle and Mr. Bezsonoff had previously launched the .CO ccTLD; is that correct?

A. That's correct, along with Lori Anne Wardi and Eduardo Santoyo.

Q. And the term "ccTLD" is an abbreviation for "country code TLD," correct?

1 A. That's correct.

2 Q. For ccTLDs each country decides how to
3 choose the registry for its own country TLD; is
4 that right?

5 A. That's right. They generally set up the
6 guidelines for running it.

7 Q. So Colombia had a public auction, and your
8 company .CO won the auction; is that correct?

9 A. It wasn't an auction; it was an RFP.

10 Q. And that took place under the procurement
11 laws of the Republic of Colombia, I assume?

12 A. That's correct.

13 Q. So it is a different process than the one
14 that ICANN used for issuing gTLDs in the new gTLD
15 Program, correct?

16 A. Yeah, that's right, that's right.

17 Q. Okay. So NDC was formed in 2012 for the
18 purpose of applying for new gTLD strings in the new
19 gTLD Program; is that right?

20 A. That's right.

21 Q. And NDC ultimately applied for 13 gTLD
22 strings, including .WEB, correct?

23 A. Thirteen, yes.

24 Q. And the one -- and the one gTLD that NDC
25 acquired was .HEALTH; is that right?

1 A. No, that's not correct. .HEALTH was
2 applied for by a different entity, so NDC has
3 nothing to do with .HEALTH.

4 Q. With respect to the 13 gTLD strings, I
5 assume that NDC paid the 185,000 application fee
6 for each application, right?

7 A. That's right.

8 Q. When you applied for .WEB and the other
9 strings in 2012, were you hoping to obtain the
10 Registry Agreement and operate the registries for
11 all of those gTLDs?

12 A. Redacted - Third-Party Designated Confidential Information
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16 Q. And did you envision in 2012 that there
17 would be private auctions and other settlement of
18 contention sets to, quote, "monetize," unquote, the
19 applications?

20 A. Well, we speculated, but there was no way
21 to be sure at that time.

22 Q. Okay. And you and Mr. Bezsonoff completed
23 NDC's .WEB application; is that correct?

24 A. Primarily. We might have had help from
25 other folks in several sections. It was a very

1 long application times 13 times. It was a pretty
2 long process.

3 Q. Did you hire consultants or proposal
4 writers to assist you?

5 A. No. We hired a young man by the name of
6 David McCombie who kind of helped us kind of
7 theorize about different outcomes and try to come
8 up with valuations for the different strings.

9 Q. And what kind of consultant was
10 Mr. McCombie?

11 A. David is a -- I guess like a management
12 consultant, McKinsey kind of background, or Bain,
13 one of those.

14 Q. Okay. Thank you.

15 You understood that the public portions of
16 the application would be publicly posted for public
17 comment, correct?

18 A. Yes. I can't recall which exact portions,
19 but yes, I remember that there was -- there were
20 definitely many aspects of the application that
21 were to remain public.

22 Q. Okay. And that was so the public could
23 see who was applying for each particular gTLD; is
24 that your understanding?

25 A. I believe so, yes.

1 Q. Okay. Skipping ahead to 2015, you state
2 in your witness statement that by 2015 market
3 conditions had changed and

4 Redacted - Third-Party Designated Confidential Information

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6 Do you recall that testimony?

7 A. I recall that section in my testimony,
8 yes.

9 Q. And you recall that given changing
10 market -- given what you described as changing
11 market conditions, you thought that

12 Redacted - Third-Party Designated Confidential Information

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14 A. My experience to that point is that in the
15 auctions that we participated in, just our
16 competitors were willing to bid a lot more than we
17 were.

18 Q. Okay. And you reached the same conclusion
19 with respect to .WEB; is that right?

20 A. That's correct.

21 Q. And you state that the, quote, "market
22 expectations for .WEB were high."

23 Do you recall that testimony?

24 A. Yes, I do.

25 Q. And that means that you believe that .WEB

1 was going to command a high price whether at an
2 ICANN auction or a private resolution of the
3 contention set; is that correct?

4 A. Yeah. Mostly in -- going back all the way
5 to 2011, when all of us potential applicants would
6 talk about the gTLD Program, .WEB was frequently
7 mentioned as one of the more attractive strings.

8 Q. Okay. And you knew who all the members of
9 the .WEB contention set were?

10 A. Not all of them personally, but yes, in
11 general I knew the organizations.

12 Q. And based on that knowledge, NDC was able
13 to consider how best to develop a strategy that
14 would allow for a return on your investment in
15 preparing the .WEB application; is that accurate?

16 A. Well, I don't necessarily think that
17 knowing who all the applicants were really affected
18 us. I think the market conditions are the things
19 that kind of drove our decision-making.

20 Q. Well, you mentioned in your witness
21 statement that there were some big players in the
22 .WEB contention set, Google, et cetera, so that
23 must have helped you assess the likely price at
24 which the contention set was going to be resolved,
25 whether privately or through an ICANN auction; is

1 that fair?

2 A. Well, it definitely influenced. However,
3 you know, Google had -- we had participated in
4 auctions with Google, and Google didn't value
5 everything very highly. They didn't bid up a lot
6 of things. So it really depended on the individual
7 string.

8 Q. On the individual string and on the
9 individual companies in the particular contention
10 set?

11 A. That's right.

12 Q. Okay. And you state in your witness
13 statement that in around May 2015 you, quote,
14 "received a phone call from VeriSign expressing
15 interest in working with NDC to acquire the rights
16 to .WEB," unquote. It is at Paragraph 41 of your
17 witness statement if you want to take a look.

18 A. I remember that.

19 Q. You remember that.

20 So who at VeriSign called you?

21 A. I believe the first contact that I had was
22 with Pat Kane. I don't know his exact title, but
23 he's generally the face of their registry program
24 and someone who I was friendly with and familiar
25 with.

1 Q. Okay. Do you recall what Mr. Kane said to
2 you?

3 A. He was trying -- he wanted me to have --
4 he didn't explain too much, but he wanted me to
5 have a conversation with a colleague of his at
6 VeriSign.

7 Q. And who was that colleague?

8 A. That was Paul Livesay.

9 Q. And we have been arguing about whether it
10 is pronounced Livesay or Livesay. Is it Livesay?

11 A. I think it is. I haven't spoken to Paul
12 in many years, but I think that's what it is.

13 Q. How long after your call with Mr. Kane did
14 you make -- did it take for you to make contact
15 with Mr. Livesay?

16 A. I can't recall exactly, sir, but I don't
17 believe it was the same day. It might have been
18 the next day or it could have been a few days. I
19 really don't recall.

20 Q. It was soon thereafter, soon after the
21 call with Mr. Kane?

22 A. That's probably accurate, yeah.

23 Q. And do you recall what Mr. Livesay said?

24 A. I think just speaking generally, you know,
25 I think the message was, Redacted - Third-Party Designated
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Q. Did he mention that VeriSign had failed to timely make applications for the gTLDs itself?

A. I am not sure that he told me that. I knew that they had applied and participated in the program to a certain extent, but obviously he was asking me about strings that they didn't apply for.

Q. So after that phone call, did you enter into negotiations with VeriSign that led to the Domain Acquisition Agreement, or the DAA?

A. Yeah, I can't recall the exact timeline, but yes, after that phone call we started talking. We started discussing what they would be interested in doing and went through various different thoughts as to how to work out some kind of a deal, which consummated in the DAA, I think in August of that year.

Q. Was he interested in any other gTLDs, or was the focus only on .WEB?

A. Well, when we first started talking, we were talking about our applications in general, our

1 gTLDs in general, and we were negotiating primarily
2 the three -- so at that moment we had four
3 applications remaining, I believe it was .WEB,
4 obviously, .INC, .LLC and .CORP, all four of those
5 applications -- yeah, all four of those
6 applications were on hold.

7 So mine and my partners' attitude was, all
8 right, if we are going to end up doing a deal,
9 let's try to do a deal for all our applications and
10 all these strings and then we're done with this
11 program. So we first started talking about all of
12 them.

13 Q. Did you reach an agreement on any of those
14 TLDs other than .WEB?

15 A. We didn't end up signing anything, no.

16 Q. And do you know why that is? How did it
17 come to be that only .WEB was the subject of your
18 agreement with VeriSign?

19 A. So we were actually negotiating on the
20 three primaries, which I would call .WEB, .INC and
21 .LLC. .CORP, there was some significant
22 questioning as to whether .CORP would ever see the
23 light of day, and that ended up being true.

24 So we actually were negotiating on those
25 three. The negotiations became difficult and

1 complicated, and at some point in those
2 negotiations, rather than breaking down completely,
3 I think we said, "Look, let's do this one at a
4 time."

5 Q. And did you have to enter into a
6 nondisclosure agreement in connection with the
7 negotiations, do you recall?

8 A. I don't recall. I wouldn't be surprised
9 if I did.

10 Q. Okay.

11 A. But I don't recall.

12 Q. And who conducted the negotiations for
13 NDC?

14 A. I was the primary point of contact with
15 VeriSign. And when it came down to actually
16 structuring the agreement, my attorney, Brian
17 Leventhal.

18 Q. And who conducted the negotiations for
19 VeriSign?

20 A. Mr. Livesay.

21 Q. Anyone else at VeriSign?

22 A. I met with several lawyers a few times,
23 again, I think more in the course of structuring
24 the agreement, but in terms of hard-nose
25 negotiations, it was myself and Mr. Livesay.

1 Q. Do you recall the names of the VeriSign
2 lawyers with whom you met?

3 A. I don't. I think one was Kevin, Kevin R.,
4 if I recall his initials.

5 Q. Did VeriSign send you the first draft of
6 the DAA?

7 A. I can't recall.

8 Q. Do you recall how many drafts were
9 exchanged over time?

10 A. No, not exactly, no.

11 Q. And were you, meaning you, Mr. Rasco,
12 focused on the substantive terms of the DAA or were
13 you focused primarily on the payment terms or both?

14 A. Well, you know, as in any negotiation, you
15 have stages. So first we tried to figure out what
16 we were all dealing with and then you try to come
17 to terms on the financial portion and then how you
18 execute it.

19 So I was involved in all of it, but
20 really, obviously, when it comes down to the legal
21 matters, I defer those, the legalities to Brian
22 Leventhal.

23 Q. Had Mr. Leventhal helped you on other
24 application issues?

25 A. Brian's been our corporate attorney for

1 many years, so he's well aware of all of our
2 businesses.

3 Q. Did you and Mr. Livesay meet in person to
4 negotiate or were the negotiations by phone?

5 A. Both.

6 Q. Do you recall how many times you met in
7 person?

8 A. We met one time in my office in Miami, and
9 we met one time definitely in VeriSign's office in
10 Virginia.

11 Q. And the DAA was executed on August 25th,
12 2016; is that correct?

13 A. That sounds correct.

14 Q. Was it executed in person?

15 A. I believe so, yes. I think Paul -- I
16 think Mr. Livesay was in my office.

17 Q. Let's take a look at the DAA, which is at
18 Tab 2 of your agreement. It is Exhibit C-69. And
19 you'll see that throughout NDC is referred to as
20 "the Company" and VeriSign is referred to as
21 "Verisign"; is that correct?

22 A. I see that, yes.

23 Q. Redacted - Third-Party Designated Confidential Information
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1 Do you see that?

2 A. Yes.

3 Q. And that's NDC, correct?

4 A. Yes.

5 Q. And if you turn to

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10 Do you see that?

11 A. I see that, yes.

12 Q. So you understood that after signing this

13 agreement, entering into this agreement,

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17 A. Well, I don't necessarily agree with that.

18 I think, Redacted - Third-Party Designated Confidential Information

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22 Q. In spite of what this says.

23 Okay. Let's look at some of the other

24 provisions. Let's take a look at

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A. I believe that's correct.

Q. In fact, it is more detailed than that.

Let me just read some of the language.

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So if I understand that correctly, you had

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A. Yes.

Q. And you had to

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Do you recall those requirements?

A. Yes, I do. I recall their

Redacted - Third-Party Designated Confidential Information so I felt that
these provisions were appropriate.

Q. I am not asking whether they are
appropriate. I am just asking if -- if my
understanding of them is consistent with yours,
which is that

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A. Correct.

Q. Redacted - Third-Party Designated Confidential Information

A. You know, I believe I did. There may be

1 an occasion or two where I didn't think about some
2 of these. For the most part, I don't think I was
3 trying to conceal anything from VeriSign.

4 Q. And if you turn to
5 Redacted - Third-Party Designated Confidential Information

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12 A. That's correct.

13 Q. But it also provides that
14 Redacted - Third-Party Designated Confidential Information

15 A. That's correct.

16 Q. So Redacted - Third-Party Designated Confidential Information

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18 A. Redacted - Third-Party Designated Confidential Information

19 Q. Is that your understanding?

20 A. I believe that's about accurate, I think,
21 yes.

22 Q. Okay. Let's take a look at
23 Redacted - Third-Party Designated Confidential Information

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So here's the proviso.

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12 I am going to stop there. I know that's a

13 lot, but what this provision is saying is that

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17 A. I think, as you've mentioned, there's some

18 provisos, as you call them, but yes, in general,

19 that's correct.

20 Q. Okay. And that's true even if

21 Redacted - Third-Party Designated Confidential Information

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25 A. I think, as you read, as long as we

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Q. Okay Redacted - Third-Party Designated Confidential Information

A. Correct. Redacted - Third-Party Designated Confidential Information

Q. And you think that if the DAA had been disclosed, it would have affected the outcome of the auction?

A. I can't pretend to know what might have happened.

Q. So if Redacted - Third-Party Designated Confidential Information

A. I don't think that the DAA Redacted - Third-Party Designated Confidential Information

A. That's correct.

Q. Now, you have testified in your witness

1 statement that you thought this arrangement with
2 VeriSign was acceptable under the guidebook,
3 correct?

4 A. I did.

5 Q. Did you wonder why

6 Redacted - Third-Party Designated Confidential Information

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8 A. No, not really. As I just mentioned, I

9 think Redacted - Third-Party Designated Confidential Information

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14 Q. And you thought that it was prudent not to

15 let anyone know that NDC -- strike that.

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Do I understand that correctly?

A. That's correct. My experience working with public companies, they are pretty quirky about Redacted - Third-Party Designated Confidential Information

Q. Was it your understanding that under the guidebook a nonapplicant was permitted to indirectly participate in the resolution of the contention set or otherwise seeking to become the registry operator through an applicant's application?

A. I'm sorry, can you kind of rephrase that question? I don't understand.

Q. Yeah. What this provision states, if I understand it correctly, is that

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A. Well, I believe what this says is -- not
what this says, but they Redacted - Third-Party Designated
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Q. Yeah. That's not what this says, though,
is it, sir?

A. It is contingent on a lot of things.

Q. Yeah. And so your view is that when they
say they were

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A. I think in terms of
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So yeah,
that's the way I viewed it.

Q. Redacted - Third-Party Designated Confidential Information So what was the
interest rate on the loan that VeriSign was
providing you with?

A. Redacted - Third-Party Designated Confidential Information

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Q. But NDC effectively

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A. I don't -- I don't see how you come to that. Redacted - Third-Party Designated Confidential Information

Q. You basically

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A. No, I disagree.

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

At that point, when we signed the DAA, there was not even any clarity as to whether or not the .WEB TLD would ever be delegated. It was on hold and had been on hold for years. So I don't...

Q. Redacted - Third-Party Designated Confidential Information

A. If that's the way you want to phrase it.

1 Q. The answer is yes, that's what you
2 thought?

3 A. Well, the DAA, Redacted - Third-Party Designated
4 Confidential Information

5 Q. Did you ever ask Mr. Livesay why
6 Redacted - Third-Party Designated Confidential Information

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9 A. I don't believe I did. As I mentioned, I
10 have been fortunate to do a few deals with public
11 companies, so I didn't think anything was strange
12 in terms of confidentiality. I don't even know how
13 many people within VeriSign knew about our
14 arrangement.

15 Q. And did you ever discuss with Mr. Calle or
16 Mr. Bezsonoff why
17 Redacted - Third-Party Designated Confidential Information

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19 A. Did I speak about that particularly with
20 Mr. Calle or Mr. Bezsonoff, I don't believe that I
21 did.

22 Q. Let's turn to Exhibit A
23 Redacted - Third-Party Designated Confidential Information

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A. I believe so. It looks like it is part of the original agreement.

Q. Redacted - Third-Party Designated Confidential Information

Do you see that?

A. I do, yes.

Q. And by the way,

Redacted - Third-Party Designated Confidential Information

A. I mean, if you're saying it is. I don't recall, but sounds fair.

Q. Okay. I think that will become evident as we go through the provisions.

A. Okay.

Q. So you understood that

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1 that correct?

2 A. Yes, that was for -- in my mind,
3 Redacted - Third-Party Designated Confidential Information

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6 Q. And let's look at some of the terms and
7 conditions. Redacted - Third-Party Designated Confidential Information

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20 A. I think this section
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Q. Yeah, we'll come to that, sir.
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Do you see that?

A. I do.

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

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Q. Redacted - Third-Party Designated Confidential Information

A. Well, I wouldn't phrase it that way.
VeriSign was not the bidder. NDC was the bidder.
NDC always retained control. As the one putting up
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Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

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A. Yes, that's correct.

Q. Did you arrive two business days prior to the start of the auction?

A. I believe it was one business day. I don't think it ended up being two, but I can't be certain. I think it was just one business day.

Q. Redacted - Third-Party Designated Confidential Information

Do you see that?

A. I do, yes.

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

1 Q. So how did this work, you and
2 Mr. Leventhal were sitting in a conference room at
3 VeriSign's offices; is that right?

4 A. That's correct.

5 Q. And who from VeriSign was there with you?

6 A. Mr. Livesay was there, and people would
7 come in and out. I am not sure who was there.
8 There might have been an IT support person that was
9 around. I am not sure exactly who else, but
10 obviously my relationship and my primary contact
11 was always Mr. Livesay.

12 Q. And do you recall how many bids you put in
13 during the bidding process?

14 A. No. The bid last -- the auction lasted
15 two days, so there were several rounds. I don't
16 recall exactly how many rounds. It is public, so
17 that information is available.

18 Q. And did Mr. Livesay tell you each bid to
19 make?

20 A. Well, the way the auction works is that I
21 believe you have a continue price. So the auction
22 provider generally provides a threshold for
23 continuing the auction. You have to bid something
24 above that amount in order to continue or that
25 amount to continue, and I believe that's how it

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worked. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

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Q. Redacted - Third-Party Designated Confidential Information

A. Well, as our funding source, we were kind of limited as to what we were going to bid, just as I'm sure my competitors who were financed by outside sources were limited as to how much they were going to bid.

Q. And you think that your competitors had their financing sources sitting with them, telling them whether they could bid on each specific round?

A. I can't pretend to know how they handled it.

Q. Did VeriSign provide any financial-modeling people for the bidding process?

1 A. I never participated in anything like
2 that.

3 Q. Okay. So you are not aware whether they
4 had financial-modeling people to figure out how
5 much to bid or not?

6 A. I don't know.

7 Q. Okay.

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18 A. Redacted - Third-Party Designated Confidential Information

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22 Q. Redacted - Third-Party Designated Confidential Information

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Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. How did you know that?

A. We had discussions.

Q. Redacted - Third-Party Designated Confidential Information

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A. Redacted - Third-Party Designated Confidential Information

Q. And they did that during the negotiations?

A. I believe so, yes.

Q. Okay. We are going to come back to that point, but let me just ask you this: If that was VeriSign's position,

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A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Yes, I am there.

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Q. Redacted - Third-Party Designated Confidential Information

A. That's correct.

Q. Redacted - Third-Party Designated Confidential Information

A. Yes.

Q. Redacted - Third-Party Designated Confidential Information

Do you recall that?

A. I do, yes.

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Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. But if you disclosed -- strike that.
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A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

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A. You know, I don't know what I would have done in that circumstance.

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

MR. De GRAMONT: Mr. Chairman, I am going to suggest that we take our break earlier today. It might enable me to cut down on some of the questions. Would that be acceptable to the Panel?

ARBITRATOR BIENVENU: It would certainly be acceptable to us, and I don't expect Mr. Marenberg would have any difficulty with that.

MR. MARENBERG: No objection, Mr. Chairman.

ARBITRATOR BIENVENU: Excellent. So let's break for 15 minutes.

And, Mr. Rasco, sorry, we have to -- you still there, Mr. Rasco?

THE WITNESS: I am still here.

ARBITRATOR BIENVENU: Yes. I am going to instruct you during our break, and that holds true

1 until the end of your evidence, not to discuss your
2 evidence with anyone during the break.

3 THE WITNESS: Understood.

4 ARBITRATOR BIENVENU: Thank you, sir.

5 THE WITNESS: Thank you.

6 (Whereupon a recess was taken.)

7 ARBITRATOR BIENVENU: Mr. Rasco, good
8 morning again.

9 THE WITNESS: Good morning.

10 ARBITRATOR BIENVENU: We will continue
11 with your cross-examination.

12 Mr. De Gramont, please proceed.

13 MR. De GRAMONT: Thank you, Mr. Chairman.

14 Q. Welcome back, Mr. Rasco.

15 A. Thank you.

16 Q. Now, there are various scenarios set forth
17 in the rest of Exhibit A as to what happens
18 depending on the outcome of the contention set. I
19 am going to focus primarily on the scenario which
20 actually happened, which was NDC winning the ICANN
21 auction.

22 So I'd like to direct you to
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A. That is correct.

Q. Redacted - Third-Party Designated Confidential Information

A. That's correct.

Q. Do you see that, sir?

A. Yes.

Q. Redacted - Third-Party Designated Confidential Information

A. That seems accurate, yes.

Q. Redacted - Third-Party Designated Confidential Information

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A. That's what it says.

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Yeah. But, I mean, look, as a
businessperson, I don't know that anything is that
simple when you're talking about something of this
magnitude.

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Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Yes.

Q. Redacted - Third-Party Designated Confidential Information

A. What do you mean by that?

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Do you recall that?

A. I do recall.

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A. That's correct.

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A. That seems likely, yes.

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A. That's correct.

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A. Yes, it did.

Q. Redacted - Third-Party Designated Confidential Information

A. That is correct.

Q. Redacted - Third-Party Designated Confidential Information

A. We did receive that, yes.

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A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. That's correct.

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A. We have.

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A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

1 A. Right, correct.

2 Q. Redacted - Third-Party Designated Confidential Information

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5 A. Not technically, no.

6 Q. Do you have a rough estimate?

7 A. Redacted - Third-Party Designated Confidential Information

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13 Q. Pretty good return on investment, right?

14 A. It was a fantastic deal.

15 Q. Okay. Congratulations for that.

16 A. It is not done yet, unfortunately.

17 Q. Okay. You write in your witness statement

18 that in April 2016 ICANN sent notice to the

19 contention set that ICANN had scheduled the ICANN

20 auction for .WEB on 27 July 2016; is that correct?

21 A. That's correct.

22 Q. Do you recall this?

23 A. Yes, I do.

24 Q. And certain members of the contention set

25 commenced discussions about a private resolution of

1 the contention set, right?

2 A. I believe so, yes. It was a general
3 practice, in my experience, in general, when a
4 string became available at the auction, then you'd
5 start talking.

6 Q. Do you recall when you advised the other
7 members of the contention set that NDC was not
8 willing to participate in a private auction?

9 A. I don't know -- I don't know if I actively
10 or affirmatively told them at some point other than
11 probably some of the correspondence that we are
12 going to speak of here today.

13 Q. Do you know if anyone else at NDC,
14 Mr. Calle or anyone else, advised the other members
15 of the contention set that it was not going to
16 participate in a public auction?

17 A. Other than some of the exhibits that were
18 kind of in front of us here today, I don't believe
19 so.

20 Q. Okay. Let's take a look at what's behind
21 Tab 6. It's Exhibit C-33. And if we look at the
22 last page, Page 4, we see that on October 12th,
23 2015, Mr. Jon Nevett of Donuts sent an email to you
24 and other members of the contention set advising
25 that the Vistaprint decision had been issued and

1 asking if everyone was available to discuss next
2 steps.

3 Do you see that?

4 A. I see that, yep.

5 Q. Okay. And do you remember receiving that
6 email?

7 A. I see that I am a recipient here. I don't
8 remember this email specifically, but it looks like
9 I most likely received it.

10 Q. And then if you look up a couple emails on
11 October 18, 2015, you replied all, quote, "All, I
12 won't be joining you in Dublin, but I'll support
13 however I can. Just let me know. Have a great
14 meeting. Jose."

15 Do you recall writing that email?

16 A. Yeah, this recalls my memory, yeah, sure.

17 Q. And this is a couple months after you've
18 entered the DAA, correct?

19 A. Correct. That would have been August, so
20 yes.

21 Q. And under the DAA Redacted - Third-Party Designated
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24 A. I guess we read that, yeah, sure.

25 Q. And do you recall if you forwarded this to

1 VeriSign?

2 A. I don't recall doing so.

3 Q. Yeah, okay. Let's turn to Page 2, and
4 this is skipping forward to May of 2016, and if you
5 look at the second email from the bottom, May 5th,
6 2016, at 11:44 p.m., Mr. Sandeep Ramchandani of
7 Radix wrote, "The GDD is just around the corner.
8 If most of us are going to be there, would be a
9 good opportunity to catch-up face to face,"
10 unquote.

11 What was GDD?

12 A. GDD is an industry meeting put on by
13 ICANN. GDD stands for the Global Domains Division.
14 Outside of the regular ICANN meetings there's
15 usually -- or there had been for a few years a GDD
16 meeting, which was really for the registry
17 operators primarily and the registrars.

18 So a lot less policy, you know, high-level
19 ICANN policy and more registry/registrar-related
20 policy and business.

21 Q. And if you go up a couple of emails to the
22 middle of the page, you'll see that on May 6, 2016,
23 Jon Nevett writes, quote, "I'm free for a call at
24 that time, but it shouldn't be that hard to
25 schedule the auction and decide what to do about

1 .WEBS."

2 And then right above that, on May 9th, you
3 write, Jose Ignacio Rasco writes, "Sandeep, I am
4 available for a call tomorrow if needed. Regards,
5 Jose," end quote.

6 Do you recall if that call took place?

7 A. I don't believe it did. I don't remember
8 being a part of a call like that.

9 Q. Do you recall if you forwarded this on to
10 VeriSign, Redacted - Third-Party Designated Confidential Information

11 A. I don't recall, no.

12 Q. If you turn to Page 1, at the bottom
13 you'll see a May 11, 2016, email from John Kane at
14 Afiliias, and he writes, quote, "Good news! I have
15 spoken directly with most members of the contention
16 set and/or saw confirmation in email that everyone
17 is willing to participate in a .WEB only auction.
18 If for any reason anyone's position has changed,
19 please let the group or the auction house know
20 ASAP. If we are going to keep it on track, I
21 suggest to do an auction the week of June 13th,"
22 unquote.

23 Do you recall receiving this email?

24 A. I don't particularly recall, but, yeah, it
25 is likely that I saw this as part of the contention

1 set.

2 Q. Do you recall if you or anyone else at NDC
3 had indicated that NDC would be willing to
4 participate in a private auction?

5 A. No. I remember speaking to the auction
6 providers and them giving the updates, but other
7 than that, I don't believe I ever committed
8 affirmatively or negatively.

9 Q. Okay. Redacted - Third-Party Designated Confidential Information
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13 A. No, no. My assumption all along was that
14 my default position was we are going to an ICANN
15 auction. If anything changed, I assumed we'd
16 discuss it.

17 Q. And then why were you talking to the
18 private auction providers if you knew that you were
19 going to an ICANN auction?

20 A. Just to stay informed.

21 Q. Just to stay informed?

22 A. Just to stay informed, yeah.

23 Q. And I assume you were passing that
24 information on to VeriSign?

25 A. I was probably updating VeriSign on what

1 was happening with the contention set, most likely,
2 yes.

3 Q. If you knew that you were not going to a
4 private auction, why didn't you just tell the other
5 members of the contention set of that fact?

6 A. Honestly, I didn't feel obligated to do
7 so. ICANN had set the public auction, and outside
8 of that, that's what was going to be next.

9 Q. Well, if all the members were talking
10 about privately resolving the contention set, you
11 felt no obligation to tell them that they shouldn't
12 be wasting their time because you were going to
13 insist on an ICANN auction?

14 A. No. I mean, at some point I do
15 communicate clearly that I am not changing my mind.

16 Q. Well, when you say changing your mind,
17 have you ever advised the members of the contention
18 set that NDC was likely going to seek an ICANN
19 auction as opposed to a private auction?

20 A. I don't recall, but honestly, the history
21 of NDC, we had participated in both. So one could
22 assume, you know, that we would participate in a
23 private auction.

24 Q. If you look up to the next email in
25 Exhibit C-33, you'll see there's a Jon Nevett email

1 dated July 7. He says, quote, "Hi guys. Just so
2 you are not surprised, we are seeking a
3 postponement of the .WEB ICANN auction. I don't
4 want to get into the details yet, but I don't want
5 you guys to be surprised if a postponement was
6 announced."

7 You are not copied on this email. I
8 assume by this point you had informed the other
9 members of the contention set that you were not
10 going to participate in the private auction?

11 A. No, I hadn't. I definitely had an
12 exchange with Jon Nevett in June where I told him
13 that we were not going to participate in the
14 private auction.

15 Q. Okay. Let's take a look at that. It is
16 behind Tab 8 of your email -- I'm sorry. It's
17 behind Tab 8 of your binder. It is Exhibit C-35.

18 A. Got it.

19 Q. And Mr. Nevett writes on June 6, "Hi guys.
20 Jose and I corresponded last week, but I wanted to
21 take another run at the three of you. Not sure if
22 you three are still the Board members of your
23 applicant, but I wanted to reach out to discuss a
24 couple of ideas," unquote.

25 And he asks for a two-month delay of the

1 ICANN auction and whether you would be agreeable to
2 that.

3 Do you recall receiving that email, that's
4 what you just referred to?

5 A. I do, yes.

6 Q. Okay. And do you recall whether you
7 forwarded it to anybody at VeriSign?

8 A. I don't believe I did, no.

9 Q. Okay. And then on June 7th you respond,
10 quote, "Thanks for the message. Sorry for the
11 delay. The three of us" -- and there you're
12 referring to yourself, Mr. Calle and Mr. Bezsonoff?

13 A. That's correct, yes.

14 Q. "The three of us are still technically the
15 managers of the LLC, but the decision goes beyond
16 just us. Nicolai is at NSR full time and no longer
17 involved with our TLD applications. I'm still
18 running our program and Juan sits on the Board with
19 me and several others. Based on your request, I
20 went back to check with all the powers that be and
21 there was no change in the response and will not be
22 seeking an extension."

23 So I have a few questions about this.

24 A. Sure.

25 Q. When you stated that "the decision goes

1 beyond just us," that was accurate, right? The
2 decision was really in the hands of VeriSign?

3 A. No, not at all. Really what I was
4 referring to there is that, you know, as an LLC, as
5 a company, you know, yes, while Juan, Nicolai and I
6 are the managers in general for major decisions, we
7 speak about it with the shareholders. So that's
8 what I was referring to.

9 Q. You were referring to the shareholders,
10 even though you had signed an agreement with
11 VeriSign Redacted - Third-Party Designated Confidential Information

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14 A. Well, no, as I previously stated,
15 Redacted - Third-Party Designated Confidential Information

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17 Subject to anything changing, that was
18 going to be our position.

19 Q. So your reasoning is -- sorry, I didn't
20 mean to cut you off, sir.

21 A. No, that's okay.

22 Q. So your thinking is that since you made
23 the decision to enter into an agreement which

24 Redacted - Third-Party Designated Confidential Information

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3 A. Well, I kind of disagree with your
4 premise. I don't believe there's any rights to
5 participate in a private auction. ICANN says you
6 can try to resolve these contention sets however
7 you want, and if you can't, you come to an ICANN
8 auction of last resort. So that's really what we
9 were doing.

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14 Q. Well, the question, sir, isn't whether
15 there's an obligation to participate in a private
16 auction, but all applicants have the choice as to
17 whether to participate in a private or ICANN
18 auction, Redacted - Third-Party Designated Confidential Information

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20 A. Well, I believe you said that

21 Redacted - Third-Party Designated Confidential Information

22 There's no right to participate in a
23 private auction, so I don't think I was obliged to
24 explain to any of my competitors how I was going to
25 resolve our contention set.

1 Q. Well, there's no obligation to participate
2 in a private auction, but every applicant had a
3 right to do so, correct?

4 A. Well, no, ICANN says if there's a
5 contention set, figure it out. If you can't figure
6 it out, then you come to an auction. I didn't want
7 to figure it out. I already knew what I was doing.

8 Q. Right. Redacted - Third-Party Designated Confidential Information

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10 A. No, I disagree.

11 Q. All right. Then you say, "Nicolai is at
12 NSR full time and no longer involved with our TLD
13 applications."

14 What is "NSR"?

15 A. "NSR" is Neustar.

16 Q. And you say, "I'm still running our
17 program and Juan sits on the Board with me and
18 several others."

19 Who were the other Board members to whom
20 you were referring?

21 A. Well, I was referring there to our other
22 shareholders, the Board members. As you probably
23 are aware, LLCs don't have a Board of Directors.
24 They have managers and members. So there I was
25 just referring to our members.

1 Q. Sir, there were three members in the LLC,
2 correct?

3 A. No, there's three managers.

4 Q. Three managers. Oh, and when you say the
5 members, you're talking about the owners of the
6 other shares?

7 A. Shareholders.

8 Q. I see. Why didn't you simply say other
9 shareholders?

10 A. I mean, I was just writing an email. I
11 wasn't intending this to be some kind of official
12 document describing the inner workings of NU DOT
13 CO. I was really just trying to redirect and put
14 off Mr. Nevett, who I had a friendly relationship,
15 and, I mean, how many different ways could I tell
16 him we are not going to a private auction?

17 So I guess it was my fault for trying to
18 be a little polite in trying to just redirect him.

19 Q. But you certainly couldn't tell him the
20 truth, Redacted - Third-Party Designated Confidential Information

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23 A. Well, I wasn't going to tip my funding
24 sources for an ultimate auction. That would affect
25 the outcome of the auction.

1 Q. So you knew who all the other applicants
2 were, but they didn't know that VeriSign was behind
3 your application?

4 A. Well, VeriSign was not behind my
5 application. NU DOT CO is and always was in
6 control of our application. There was never --
7 VeriSign never controlled our application and never
8 controlled NU DOT CO.

9 Q. Well, I think the Panel will have to
10 determine that based on the terms of the DAA, sir.

11 Let me point you to the last sentence of
12 your June 7th email. It says, quote, "It pains me
13 personally to stroke a check to ICANN like this,
14 but that's what we're going to have to do just like
15 others did on .APP and .SHOP."

16 Now, it couldn't have been that painful to
17 stroke a check to ICANN since VeriSign was paying
18 for it, right?

19 A. Well, no matter what, yes, it was painful.

20 Q. How so?

21 A. Figuratively speaking it was just sending
22 ICANN \$135 million wasn't -- actually, at this time
23 I didn't know how much it was going to be, but I
24 was just speaking figuratively.

25 Q. But it was VeriSign's money, but it pained

1 you to take VeriSign's money and pay it to ICANN as
2 opposed to --

3 A. It was my application. Again, I was
4 trying to be polite and just get this guy off my
5 back, quite frankly.

6 Q. In any event, you're aware now that
7 Mr. Nevett contacted ICANN about a potential change
8 in control in NDC, right?

9 A. I later learned of that, yes.

10 Q. And you can see why based on your email he
11 thought there might have been a change in the
12 ownership or control; isn't that fair?

13 A. I mean, I can't pretend to understand what
14 he was thinking, but I see how he took my email out
15 of context and tried to create a barrier, a delay
16 to moving forward with the ICANN auction.

17 Q. When you say "out of context," you mean
18 that he thought you were being truthful?

19 A. I mean, yes, I probably told him a little
20 white lie in order to get him off my back, and yes.
21 Again, I was not trying to tell him how exactly
22 things operated internally at NU DOT CO. But most
23 clear to me is that NU DOT CO hadn't had any
24 changes to our organization, to our application or
25 anything else.

1 Q. Now, on June 27th you received an email
2 from Jared Erwin.

3 Do you recall that?

4 A. Yes.

5 Q. It is behind Tab 10 of your binder. It is
6 Exhibit M to your witness statement. And the
7 bottom email is from Mr. Erwin. He writes, quote,
8 "We would like to confirm that there have not been
9 changes to your application or the NU DOT CO LLC
10 organization that need to be reported to ICANN.
11 This may include any information that is no longer
12 true and accurate in the application, including
13 changes that occur as part of regular business
14 operations (e.g., changes to officers and
15 directors, application contacts)," unquote.

16 You appear to have responded very quickly
17 to that email, although I can't tell whether
18 there's a time change in this because you were in a
19 different time zone.

20 Do you recall responding very quickly?

21 A. I honestly don't. Just for your context,
22 this is not an email. This is a message system
23 within the customer service portal. So yeah, just
24 based on the time stamps, yeah, it looks like I got
25 to him pretty quickly, but I can't tell if I opened

1 that message at 12:45 or at 12:05.

2 Q. And you say, quote, "I can confirm that
3 there have been no changes to the NU DOT CO LLC
4 organization that would need to be reported to
5 ICANN."

6 Do you recall that?

7 A. Yes, I do.

8 Q. But you didn't answer the part of his
9 question asking you to confirm that there had not
10 been changes to the application.

11 Do you see that?

12 A. Yeah. As I testified, I honestly thought
13 this was a routine inquiry one month out from the
14 auction, considering the fact that it had been four
15 years since we submitted our application. I just
16 read it and fired off an answer.

17 I mean, I don't think anything was
18 inaccurate or misleading here. Nothing did change
19 in our application and nothing did change in NU DOT
20 CO.

21 Yeah, I see that I direct the answer, the
22 part of the organization, but I never intended to
23 withhold anything. There was no changes that I
24 felt I needed to report.

25 So I really just, again, as a routine

1 inquiry, I was like, okay, I guess they are getting
2 ready for the auction.

3 Q. And you state that other members of the
4 contention set were putting pressure on you to do a
5 private auction and you had your conversation with
6 Mr. Nevett re: the additional Board members, et
7 cetera, but it never entered into your mind that
8 this communication from ICANN had anything to do
9 with that?

10 A. No, at this point, no. I hadn't heard
11 back from Jon. I don't believe I heard back from
12 Jon after our exchange, and I don't recall having
13 heard from anyone, so no, it didn't spark anything
14 at that point.

15 Q. Notwithstanding the terms of the DAA that
16 we just reviewed, your view was that nothing about
17 your application had changed whatsoever; is that
18 your testimony, sir?

19 A. Nothing in the application changed that
20 would require any kind of disclosure to ICANN.

21 Q. Redacted - Third-Party Designated Confidential Information

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24 A. Redacted - Third-Party Designated Confidential Information

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8 Do you recall that?

9 A. Correct. Redacted - Third-Party Designated Confidential Information

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11 Q. Okay. You had several exchanges of emails
12 with the ombudsman on July 6, 7 and 8.

13 Do you recall that?

14 A. I do. I recall one email that I responded
15 to him, but yes.

16 Q. Okay. And then on July 8th, Ms. Willett
17 emailed you and asked you to call her.

18 Do you recall that?

19 A. I do, yes.

20 Q. And, in fact, you did call her, correct?

21 A. I did.

22 Q. Okay. And if you take a look behind Tab
23 13, we see the message that she sent to you on July
24 8th. It is Tab 13, "Rasco Witness Statement
25 Exhibit O." At the bottom of the page she asks you

1 to call her, and then there's an email on the top
2 that says -- well, in which you responded to her
3 after that conversation.

4 Do you recall when she sent you this email
5 or text or message?

6 A. Well, it says July 8th that she sent it to
7 me, and then the one you have in the box right now
8 is my follow-up response to her.

9 Q. I can't see a date here. You don't recall
10 when you sent that to her?

11 A. Just in reviewing for this, I don't know
12 if it was the next day or two days after. I am not
13 sure exactly.

14 Q. Okay. At the second-to-last paragraph you
15 write, quote, "I share your understanding that the
16 complaint was raised in order to get more time to
17 convince us to resolve the contention set via a
18 private auction, even though we have made it very
19 clear to them (and all other applicants) that we
20 will not participate in a private auction and that
21 we are committed to participating in ICANN's
22 auction as scheduled," unquote.

23 So did Ms. Willett tell you that she
24 thought the complaint was raised simply to get more
25 time to convince NDC in the private auction?

1 A. I don't recall if she raised that
2 possibility. I know we discussed it, and she
3 seemed to sympathize with that position.

4 Q. You mentioned that NDC had participated in
5 other ICANN auctions?

6 A. At least two that I can recall, yes.

7 Q. And do you recall in those auctions when
8 you received inquiries like that, you received from
9 Mr. Erwin about your management and control?

10 A. I don't recall, but they would have been
11 much earlier in the program.

12 Q. Okay.

13 A. There was a lot of preauction
14 correspondence getting ready for auctions, so I
15 honestly don't recall if a similar message to
16 Mr. Erwin ever came in.

17 Q. Would you take a look at what's behind Tab
18 14, which is Exhibit D to Ms. Willett's witness
19 statement. I don't know if you have seen this
20 before. Looking at Page 3, it is an email dated
21 Saturday, July 9, 2016, from Ms. Willett to Chris
22 LaHatte, who I understand was the ICANN ombudsman
23 at the time.

24 Have you ever seen this before?

25 A. I think I have.

1 Q. Let me rephrase it. Have you ever seen
2 this email outside the context of preparing for
3 your testimony?

4 A. No, I have not.

5 Q. I am going to refer you to Paragraph 5 and
6 it says, quote, "He" -- and she's referring to
7 Mr. Rasco. "He was contacted by a competitor who
8 took some of his words out of context and is using
9 them as evidence regarding the alleged change in
10 ownership. In communicating with that competitor,
11 he used language to give the impression that the
12 decision to not resolve contention privately was
13 not entirely his. However, this decision was, in
14 fact, his," end of quote.

15 Did you tell Ms. Willett that the decision
16 to skip the private auction and participate in the
17 ICANN auction was, in fact, your decision?

18 A. I told her that we as NDC had decided
19 already that we were going to the ICANN auction. I
20 don't know if I told her this was Jose Rasco's
21 decision, but collectively I told her, "Listen, we
22 had already decided that we weren't going to
23 consider a private auction."

24 Q. And, again, the decision was actually your
25 decision to enter the DAA; is that your testimony?

1 A. That's correct.

2 Q. Okay. Would you turn to Tab 15 of your
3 binder?

4 A. Yes.

5 Q. Actually, let me take a -- let's go back
6 to Willett Exhibit D for a moment. I want to ask
7 you a few follow-up questions about your saying
8 that the decision to enter the DAA was, in fact,
9 NDC's.

10 Again, you had entered the DAA a year
11 earlier in Redacted - Third-Party Designated Confidential Information

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14 MR. MARENBERG: Objection; misstates the
15 document and misstates his prior testimony.

16 Q. BY MR. De GRAMONT: Sir, do you disagree
17 that Redacted - Third-Party Designated Confidential Information

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20 A. Sorry, is that for me or for my attorney?

21 Q. It is for you, sir.

22 A. Sorry. Can you repeat it?

23 Q. Yes. We looked at the DAA,
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Do you recall that provision in the DAA?

A. I recall that there's a provision that
says Redacted - Third-Party Designated Confidential Information

Q. Let me just read to you again
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A. Redacted - Third-Party Designated Confidential Information

Q. In your witness statement you testified

1 that your communications with ICANN were as, quote,
2 "thorough and responsive as possible," unquote.

3 Do you recall that?

4 A. I mean, you'd have to point it out to me,
5 but if you're saying it is in my witness statement,
6 then I'll take that.

7 Q. It is at Paragraph 80.

8 In Paragraph 90 you testified that your
9 statements to ICANN were, quote, "unequivocally
10 true," unquote.

11 Do you recall that?

12 A. I don't, but if that's in my witness
13 statement, then I believe so.

14 Q. So when you --

15 MR. MARENBERG: Excuse me. Can you ask
16 Mr. De Gramont to put up these statements? Because
17 he's actually taking snippets of these statements
18 out of context, I believe.

19 ARBITRATOR BIENVENU: So the sentence is
20 now projected on the screen.

21 Q. MR. De GRAMONT: If you like, Mr. Rasco,
22 you can look at the hardcopy of the witness
23 statement, which is behind Tab 1 of your binder,
24 whichever you prefer.

25 Let me first read Paragraph 80.

1 MR. MARENBERG: If you could put up
2 Paragraph 80, that would be helpful, please.

3 Q. BY MR. De GRAMONT: Paragraph 80 says, In
4 particular, Mr. LaHatte referenced an email, quote,
5 "which suggests that one of [NDC's] directors is no
6 longer taking an active part in the application,
7 and that there are other directors now involved,"
8 unquote. And he informed me that the, quote,
9 "complainant also suggested that NDC's shareholders
10 have changed since the original application," close
11 quote. "In the communications with ICANN that
12 followed, I endeavored to be as thorough and
13 responsive as possible, and I provided what I
14 thought were clear answers to the questions I was
15 asked," unquote.

16 So did your testimony that you were
17 providing thorough and responsive answers extend to
18 your communication to Ms. Willett that the decision
19 as to whether to enter a private or ICANN auction
20 was NDC's decision?

21 A. I don't know. Can you rephrase that?
22 Because I am confused by what -- you're talking
23 about Ms. Willett and Mr. LaHatte in here, and I am
24 a little bit confused.

25 Q. It was a long question, and I apologize.

1 at ICANN?

2 A. I absolutely did not.

3 Q. Did you ever tell Ms. Willett or anyone
4 else at ICANN that VeriSign was funding your
5 application?

6 A. I did not.

7 Q. Prior to the auction?

8 A. Prior to the auction, I didn't mention
9 that anyone else was involved in the auction.

10 Q. Your testimony to the Panel is that when
11 you told Ms. Willett the decision to skip the
12 private auction was, in fact, NDC's, that that
13 testimony was, quote, "unequivocally true,"
14 unquote?

15 A. Yes, that's correct.

16 Q. Okay. So the auction went forward on 27
17 July 2016, correct?

18 A. That's right.

19 Q. Let's turn to what's behind Tab 15 of your
20 binder. It is Exhibit C-97. It is a letter dated
21 July 26, 2016, from Mr. Livesay to you.

22 Do you recall at this time, were you
23 already at VeriSign's headquarters in Virginia?
24 This was the day before the auction.

25 A. Was I -- was I there when?

1 Q. On July 26, when you received this letter?

2 A. Well, I'm not sure that -- I am not sure
3 when I exactly received the letter, but I know it
4 was signed on July 26.

5 Q. And do you recall if you signed it in
6 VeriSign's offices?

7 A. I believe I did, yes, in person.

8 Q. And the first paragraph says, quote,
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Did you understand Redacted - Third-Party Designated Confidential Information

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Mr. Livesay was referring to?

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A. I assume they were talking about the noise
that Donuts was making.

17

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Q. And how did -- how did Mr. Livesay become
aware of the noise that Donuts was making?

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A. Well, I can't recall precisely at this
point, but I believe Donuts tried to enjoin the
auction and get a postponement of the auction by
filing something, I don't know, in District Court
or something along those lines.

24

25

Q. Had you informed Mr. Livesay or anyone
else at VeriSign about the communications that you

1 had had with ICANN following Mr. Nevett's email
2 with you?

3 A. I can't recall precisely, but in most
4 likely circumstances, yes, I did.

5 Q. Okay. If you look at Page 2,
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17 Do you see that?

18 A. I do.

19 Q. And do you recall that there had been
20 discussions over the last several months prior to
21 this letter in which

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23

24 A. I honestly don't recall discussions. As I
25 mentioned before, I think the -- my assumption and

1 baseline position was that

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4 Q. Before we move on, just a few more
5 questions about your phone conversation with
6 Ms. Willett.

7 Did she ask about VeriSign during -- did
8 she mention VeriSign during that call?

9 A. I don't think so, no.

10 Q. Did anyone from ICANN ever mention
11 VeriSign in its preauction conversations with you?

12 A. Not that I can recall, no.

13 Q. Did she ask you any questions about the
14 email that you had sent to Mr. Nevett?

15 A. Did she ask me -- I think the basis for
16 the communication was that email and the ombudsman
17 inquiry. So I don't know -- I think that's what
18 the basis of the conversation was.

19 Q. Did she or anyone else from ICANN ask you
20 what you meant when you were referring to other
21 Board members, do you recall?

22 A. I think that was part of the communication
23 with Mr. LaHatte. I believe my phone conversation
24 with Christine, with Ms. Willett, was confirming
25 everything that I had told Mr. LaHatte.

1 Q. And so were you specifically asked about
2 what you meant when you were referring to all the
3 powers that be?

4 A. I don't know if Christine asked me about
5 that, honestly.

6 I took it as a we want to make absolutely
7 sure that there hasn't been any change in control
8 that you need to report or anything else that would
9 cause a change in your application. So that's the
10 context for which I was answering her completely.
11 As I mentioned before, the DAA was not something
12 that affected the application.

13 Q. Did either the ombudsman or Ms. Willett
14 walk you through your email to Mr. Nevett, do you
15 recall?

16 A. I don't think they did, no.

17 Q. Okay. So the auction proceeds on 27 July,
18 Redacted - Third-Party Designated Confidential Information
19 and were declared the winning bidder; is that
20 correct?

21 A. NU DOT CO won the auction, that's correct,
22 yes.

23 Q. And do you recall that on July 31st, 2016,
24 you wrote Ms. Willett

25 Redacted - Third-Party Designated Confidential Information

1 A. I do recall that, yes, I do.

2 Q. And how did you know that

3 Redacted - Third-Party Designated Confidential Information

4 A. I can't be certain, but I believe VeriSign
5 told me.

6 Q. Let's take a look at Exhibit C-100. It is
7 behind Tab 18. And at the bottom you wrote to
8 Ms. Willett on July 31st, 2016,

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14 You don't remember

15 Redacted - Third-Party Designated Confidential Information

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17 A. Like I said, my primary contact for most
18 issues was Mr. Livesay.

19 Q. Do you specifically remember Mr. Livesay
20 telling you that?

21 A. No, I don't.

22 Q. Do you recall someone from VeriSign
23 telling that you someone from VeriSign would or --
24 would soon be or already had contacted Akram
25 Atallah?

1 A. I can't remember, but if I had to assume
2 it was someone, it might have been Mr. Livesay.

3 Q. Did the person from VeriSign tell you who
4 from VeriSign would be calling Mr. Atallah?

5 A. Not that I know of, no.

6 Q. Okay. Do you know who called Mr. Atallah
7 from VeriSign?

8 A. I don't know that anyone actually did call
9 Mr. Atallah.

10 Q. So if we go up higher in this document,
11 there's an exchange of emails with Ms. Willett on
12 August 4th. You wrote

13 Redacted - Third-Party Designated Confidential Information

14

15 Tell me how this worked.

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17

18 How did that work?

19 A. Logistically you want me to go through it?

20 Q. Very briefly.

21 A. So I believe

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1 Q. And then on Friday, August 5th,
2 Ms. Willett confirmed receipt of the proceeds and
3 said you should expect to receive an invitation to
4 contracting later that day.

5 Do you recall receiving the CIR later that
6 day?

7 A. I can't recall if we received it that day.
8 I know I did receive it at some point. I just
9 don't know when it was.

10 Q. Do you recall if it was in August 2016?

11 A. I can't, no.

12 Q. Okay. Do you recall if it was in 2016 at
13 all?

14 A. I don't recall honestly, no.

15 Q. Okay. Let's take a look at your witness
16 statement again. This is Paragraph 104. Tell me
17 when you're there. It is on Page 38, almost at the
18 end of your witness statement.

19 So you're there?

20 A. Yes, yes.

21 Q. Paragraph 104 says, quote, "On September
22 16, 2016, I received an email from Ms. Willett at
23 ICANN stating that Ruby Glen and Afiliias had
24 continued to complain that NDC should not have
25 participated in the .WEB public auction and that

1 NDC's application should be rejected. This letter
2 was a surprise to me, as prior to receiving it I
3 had not heard from or communicated with Ms. Willett
4 or anyone else at ICANN about .WEB since confirming
5 our payment for .WEB in August 2016," unquote.

6 Do you see that?

7 A. Yes, I do.

8 Q. Now, were you aware that on August 23rd,
9 2016, VeriSign's outside counsel had written a
10 letter to ICANN's outside counsel forwarding the
11 DAA and various other information?

12 A. I had to have been aware.

13 Q. Let's take a look at the letter. It is
14 Tab 20 of your binder, Exhibit C-102.

15 When you say you had to be aware, do you
16 specifically remember being aware or are you
17 assuming -- I'm sorry.

18 A. I recall the existence of the letter, but
19 as it was kind of a fairly legal matter, I wasn't
20 overly involved. Probably Brian Leventhal would
21 have been running point on something like this.

22 Q. You don't recall if you read it at the
23 time?

24 A. No, it is probable that I read it, but I
25 can't recall being overly involved in this.

1 Q. Do you have any understanding of what
2 prompted this letter to be sent from Arnold &
3 Porter to Jones Day?

4 MR. MARENBERG: Objection; calls for
5 privileged communication. If we can just limit it
6 to outside privileged communications, I would have
7 no problem with this question, Mr. Chairman.

8 MR. De GRAMONT: I'll rephrase.

9 ARBITRATOR BIENVENU: Would you like to
10 rephrase your question?

11 MR. De GRAMONT: I will, Mr. Chairman.

12 Q. Outside of communications with your
13 lawyer, do you have any understanding of what
14 prompted Arnold & Porter to send this letter to
15 Jones Day?

16 A. Outside of communications with Brian, I
17 can't recall.

18 Q. Do you recall wondering at the time why
19 Jones Day, the outside counsel, was reaching out to
20 VeriSign's outside counsel about this matter?

21 MR. MARENBERG: Objection.

22 THE WITNESS: I don't.

23 Q. BY MR. De GRAMONT: Let me restate it.

24 Did it seem strange to you that Jones Day
25 had reached out to VeriSign's outside counsel

1 rather than simply having ICANN contact NDC?

2 A. Did I think it was strange that ICANN's
3 outside counsel -- I didn't -- I didn't think about
4 this, honestly.

5 Q. If you take a look at -- do you recall
6 that NDC prepared responses to the questionnaire
7 from Ms. Willett?

8 A. What we referred to as the 20 questions?

9 Q. Yes. Those are the -- I actually didn't
10 count them, but that's how many questions
11 Ms. Willett sent to you?

12 A. I believe so. I was aware of that
13 document, yes.

14 Q. And you recall that NDC provided
15 responses, right?

16 A. We did, yes.

17 Q. And did you read them?

18 A. I definitely read them, at least some sort
19 of draft of them, yes.

20 Q. And did you read VeriSign's responses?

21 A. I can't recall. Again, this was a similar
22 situation where obviously it was increasingly legal
23 and legalese in nature, so I had Brian running this
24 process.

25 Q. And are you aware that many of the answers

1 are verbatim identical in the two responses?

2 A. Identical to what?

3 Q. To each other.

4 A. Sorry, can you rephrase?

5 Q. So for example --

6 A. I just don't know what you're comparing.

7 Q. So if you take a look at NDC's answers and
8 VeriSign's answers to the questionnaire --

9 A. Oh, I understand.

10 Q. -- many of those answers are verbatim
11 identical.

12 Do you remember that?

13 A. I don't recall, but obviously we were a
14 part of the same deal. So it doesn't sound strange
15 to me that, you know, our interpretation of our
16 deal is similar.

17 Q. And in some instances,
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19 Do you recall that?

20 A. I don't particularly recall that.

21 Q. Okay. You're aware that the Antitrust
22 Division of the Department of Justice commenced an
23 investigation in late 2016 or early 2017 about the
24 transaction, right?

25 A. I'll never forget that.

1 Q. And the investigation lasted until January
2 2018?

3 A. That sounds about right.

4 Q. And was it your understanding that
5 everything regarding .WEB was on hold pending that
6 investigation?

7 A. I don't know that there was a firm policy
8 announcement by ICANN, but that was my general
9 understanding, that while the DOJ was looking at
10 this, nothing was going to happen on the ICANN
11 side.

12 Q. If you look at Paragraph 107 of your
13 witness statement, I think this is the paragraph
14 that Mr. Marenberg referred to you earlier on?

15 A. Yes. That's the one that I opened up the
16 proceedings with in adding to.

17 Q. I just wanted to make sure I understand
18 the clarification.

19 It says, quote, "Since submitting those
20 responses in October 2016, NDC has periodically
21 made inquiries to ICANN through the ICANN customer
22 service portal regarding the status of .WEB. ICANN
23 has never responded beyond a statement that the
24 resolution of .WEB is on hold due to the pendency
25 of the accountability mechanisms or similar

1 processes."

2 Could you just tell me the clarification
3 again so I make sure I understand that?

4 A. Yeah, here in the second line I said
5 "inquiries through the ICANN customer service
6 portal" -- it probably could have said "customer
7 services portal, email or phone call" -- regarding
8 the status of .WEB.

9 Q. So you do recall having communications
10 with ICANN after receiving the 2016 twenty
11 questions?

12 A. Yes, definitely.

13 Q. Do you recall that you reached out to
14 ICANN in December 2017?

15 A. I do.

16 Q. Let's take a look at that email. I think
17 we are both referring to the same thing. It is
18 behind Tab 31, Exhibit C-182, and down at the
19 bottom there's an email dated December 12th, 2017,
20 from Peg Rettino referring to a meeting that was
21 being scheduled in December of 2017.

22 Can you tell me what the meeting schedule
23 was?

24 A. If I recall correctly, I believe the
25 context of this message was around this time, just

1 prior to the holidays, I think we had received
2 maybe unofficial word from the DOJ that that
3 process was coming to an end sooner rather than
4 later.

5 So I believe I reached out to ICANN to
6 inquire as to what was next. What was going on
7 with -- at the time, besides the DOJ, there was an
8 ongoing accountability mechanism, which was the CEP
9 between Donuts and ICANN, CEP being Cooperative
10 Engagement Process.

11 So, you know, from my viewpoint, I was
12 trying to get ahead of the fact that, hey, if the
13 DOJ was going to end, I wanted to know what's going
14 on with the Donuts CEP, is that -- can that end?
15 Can we get to a signing?

16 I wanted my Registry Agreement to sign,
17 quite frankly. It had been already quite some time
18 since we had won the auction.

19 Q. And did you have a conversation with
20 people at ICANN in December 2017?

21 A. I believe we did, yes.

22 Q. Do you remember who you spoke to?

23 A. If I recall correctly, it probably would
24 have been John Jeffrey, general counsel, and Akram
25 Atallah, I believe at the time president of the

1 GDD.

2 Q. And was anyone else on the line from NDC?

3 A. I believe Mr. Marenberg was on the line
4 with me.

5 Q. And had Mr. Marenberg replaced your
6 earlier lawyer, whose name I am drawing a blank on?

7 A. Brian Leventhal. So we added
8 Mr. Marenberg to the team once we -- once we saw
9 that there was any potential litigation surrounding
10 this and for his experience handling the DOJ
11 inquiry.

12 Q. And was Mr. Marenberg recommended by
13 VeriSign?

14 A. Mr. Marenberg, I believe Brian and I had a
15 conversation about hiring an attorney and --

16 MR. MARENBERG: Objection.

17 Let me caution the witness. You should
18 not disclose your communications with
19 Mr. Leventhal.

20 I'll object to the question to the extent
21 that it calls for disclosure of those
22 communications on the grounds that it invades
23 privilege.

24 ARBITRATOR BIENVENU: Your response to the
25 objection, Mr. De Gramont?

1 MR. De GRAMONT: Let me rephrase the
2 question because I don't want to elicit any
3 client-counsel communications.

4 Q. This is just a yes-or-no question. Do you
5 know -- strike that.

6 Did VeriSign, to your knowledge, recommend
7 Mr. Marenberg for this assignment to NDC?

8 A. No. I recall VeriSign -- I recall
9 VeriSign proffering a few suggestions on law firms
10 to potentially hire, or speak to, at least.

11 Q. And do you recall if Mr. Marenberg was on
12 that list?

13 A. I can't recall. Honestly, these go to my
14 communications with Mr. Leventhal.

15 Q. I am sure Mr. Marenberg is on everyone's
16 list, but you don't recall if he was on the list
17 provided by VeriSign?

18 A. If he isn't, he should be.

19 Q. But you don't recall?

20 A. I can't recall, no.

21 Q. But you do recall that VeriSign provided
22 you with a list of possible lawyers for this
23 representation?

24 A. I believe they made some suggestions.

25 Q. Okay. So Mr. Marenberg was on the phone

1 with you. Anybody else from NDC?

2 A. No, I don't think on this call, no.

3 Q. Was anyone from VeriSign on the call?

4 A. No.

5 Q. Had VeriSign asked you to reach out to
6 ICANN?

7 A. No.

8 Q. And do you recall if anyone other than
9 John Jeffrey and Akram Atallah were on the line?

10 A. I don't believe that anyone else was on --
11 at least no one was disclosed to me if they were.

12 Q. And do you recall what you said to
13 Mr. Jeffrey and Mr. Atallah?

14 A. I think in summary, what I just previously
15 mentioned, which was, "Listen, I am sure you are
16 hearing just like we are that the DOJ investigation
17 is going to end without further action. You know,
18 I know that the Donuts CEP has been going on for a
19 very long time and can we expect that to come to an
20 end any time soon?"

21 Q. And what did they tell you?

22 A. There wasn't much of a concrete answer.
23 You know, all along I think for some time the
24 general message that we were getting was that that
25 Donuts CEP was going to end, but it never did.

1 Obviously it did eventually, but there was no real
2 concrete answer given other than when it ends and
3 if there are no accountability mechanisms, we'll
4 follow our process.

5 Q. Did they say that when it ends and when
6 there are no accountability mechanisms pending,
7 they would proceed to contract for .WEB with NDC?

8 A. I can't say that they said that verbatim,
9 but I think it was along the lines that they would
10 follow their process. As far as I knew it, the
11 process was that if there were no accountability
12 mechanisms, there was nothing standing in the way
13 from a Registry Agreement.

14 Q. A Registry Agreement with NDC?

15 A. With NDC, correct.

16 Q. Okay. Let me ask you this: Did you
17 follow up with anyone at VeriSign about the
18 conversation you had with Mr. Jeffrey and Mr. Akram
19 and Mr. Marenberg?

20 A. I probably gave them a summary of the
21 conversation, yes, although I can't be certain. In
22 most likely circumstances, I updated them on the
23 conversation.

24 Q. Are you aware that someone from VeriSign
25 reached out to ICANN staff in January 2018 to ask

1 about the process of having NDC assign the Registry
2 Agreement to VeriSign?

3 A. I recall in preparation for this, I recall
4 perhaps seeing that there was a contact about that.

5 Q. Let's just take a quick look at it. It is
6 Tab 32, Exhibit C-115.

7 I have two questions. First of all is
8 whether outside of preparing for the testimony, do
9 you recall seeing this exchange of emails at the
10 time?

11 A. I can't recall, no.

12 Q. Were you aware that these communications
13 were taking place at the time?

14 A. I honestly can't recall. I recognize
15 Jessica Hooper's name as someone who was assigned
16 by VeriSign at some point to help with the
17 assignment process. I think she was becoming
18 familiar with the assignment process.

19 Q. Do you recall speaking to her or anyone
20 else about that?

21 A. You know, I believe I did have a phone
22 call with someone. I think Jessica -- Ms. Hooper
23 was probably one of those people. It is just kind
24 of a preparatory call where we kind of talked about
25 what their understanding of the assignment process

1 was as the way they read it through ICANN's website
2 and the guidebook.

3 Q. Do you recall when that conversation took
4 place?

5 A. I really can't, no.

6 Q. Do you recall if they --

7 A. It was obviously premature.

8 Q. Do you recall if they told you that they
9 had already been in contact with ICANN?

10 A. No. I don't recall that.

11 Q. Okay. Let's take a look at what's behind
12 Tab 31 of your binder, which is Exhibit C-182, and
13 this is an email -- oh, we were looking at that.

14 So this is the email on top of that email
15 chain. It is an email from you to John Jeffrey and
16 Akram Atallah, dated February 15, 2018.

17 Do you recall whether between the phone
18 call in December 2017 and this February 15th, 2018,
19 email, there had been any other communications
20 between you and ICANN?

21 A. I can't be certain, but I don't believe
22 there were.

23 Q. Okay. And so you write to Mr. Jeffrey and
24 Mr. Atallah, quote, "I hope this message finds you
25 well. In line with our previous conversation, I am

1 contacting you regarding NuDotco signing the
2 Registry Agreement for .WEB. Now that the DOJ CID
3 has concluded and that there are no pending
4 accountability mechanisms associated with our
5 successful bid at the auction for this string in
6 2016, the next step in the process is for us to
7 execute the Registry Agreement. Please let me know
8 if you'll have sufficient time to get that to me
9 this week. Thanks so much for all your help
10 throughout this process, and I look forward to
11 wrapping this up."

12 Did you write this email yourself?

13 A. It definitely looks like my language, yes.

14 Q. Did anyone from ICANN respond to this
15 email?

16 A. I don't believe they did.

17 Q. So what was the next communication you had
18 with ICANN after this?

19 A. Again, I can't be certain, but I guess at
20 some point there was a notification that -- well, I
21 can't be certain if there was a notification that
22 there was no longer any accountability mechanisms
23 or whether or not that was for the entire
24 contention set, or in -- I believe it is in June we
25 received the Registry Agreement to sign.

1 Q. And when you received the Registry
2 Agreement, you signed it and returned it to ICANN?

3 A. As fast as I possibly could.

4 MR. De GRAMONT: Mr. Chairman, I think I
5 am getting close to the end of my examination.
6 Could I just have a two-minute break? I may have
7 about 15 minutes more or so, but I just want to
8 confer with my colleagues.

9 ARBITRATOR BIENVENU: Absolutely. I think
10 we will keep the witness in the hearing room, but
11 you are free to consult your colleagues.

12 MR. De GRAMONT: Thank you, Mr. Chairman.

13 (Whereupon a recess was taken.)

14 MR. De GRAMONT: Mr. Chairman, I'm sorry
15 that it took a little longer break than we thought,
16 but the time was well spent.

17 I have no further questions, Mr. Rasco.
18 Thank you very much for your time today.

19 THE WITNESS: Thank you very much.

20 ARBITRATOR BIENVENU: Mr. Marenberg has a
21 few questions for Mr. Rasco, and as we did for the
22 previous witness, I will begin. If my colleagues
23 have additional questions, they will go after me.

24 Mr. Rasco, could I ask you to take a look
25 at Paragraph 58 of your witness statement?

1 THE WITNESS: Yes, Mr. Chairman.

2 ARBITRATOR BIENVENU: There you say in the
3 first sentence that

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5
6 Do you see that?

7 THE WITNESS: I do, that's correct.

8 ARBITRATOR BIENVENU: The question of
9 whether Redacted - Third-Party Designated Confidential Information

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13 THE WITNESS: I don't recall it being a
14 part of the negotiations, Mr. Chairman.

15 ARBITRATOR BIENVENU: You don't recall the
16 determination being made on the part of NDC or as
17 part of its negotiations with VeriSign as to
18 whether or not -- let me finish, if I may.

19 THE WITNESS: Yeah, sorry.

20 ARBITRATOR BIENVENU: Do you recall a
21 determination being made -- and, of course, please
22 do not disclose any discussion you may have had
23 with counsel. But do you recall the determination
24 being made in the course of your negotiations with
25 VeriSign Redacted - Third-Party Designated Confidential Information

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THE WITNESS: I am having a little trouble to try to figure out how to answer the question.

The way that I understood
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ARBITRATOR BIENVENU: Was the question of whether the guidebook -- or I'll say the program rules in order to include both the guidebook and the auction rules. Was the question of whether the program rules required disclosure of the DAA to ICANN discussed with ICANN?

THE WITNESS: Discussed with ICANN, no, I don't believe so. In what context? I am not sure.

1 ARBITRATOR BIENVENU: I am asking if you
2 had a discussion with ICANN about whether that kind
3 of an agreement needed to be disclosed to them?

4 THE WITNESS: No, sir. No, we did not.

5 MR. MARENBERG: Mr. Chairman, you meant to
6 be inquiring about discussions he had with ICANN
7 and not VeriSign?

8 ARBITRATOR BIENVENU: Yes, I meant to ask
9 ICANN. Prior I asked the clarifying, but now I was
10 talking about ICANN.

11 Mr. Rasco, as you sit here today, I
12 believe you are aware that in November 2016 the
13 ICANN Board turned its mind to the question of
14 whether NDC's bid was compliant with the program
15 rules and decided not to pronounce itself on that
16 question. Are you aware of that?

17 THE WITNESS: In the context of this
18 hearing, I became aware of that.

19 ARBITRATOR BIENVENU: Exactly.

20 Now, when did you -- withdrawn.

21 Were you informed of that decision in the
22 days, weeks or months following that decision?

23 THE WITNESS: I don't believe I ever was,
24 no.

25 ARBITRATOR BIENVENU: So it is in the

1 context of this IRP that you became aware of that?

2 THE WITNESS: I believe that's correct.

3 ARBITRATOR BIENVENU: So if we look at the
4 letter under Tab 33, which is a letter sent by
5 Mr. Marenberg to ICANN, you recognize this letter?
6 It is the very last tab of the witness binder.

7 THE WITNESS: Yes, I see that, yes.

8 ARBITRATOR BIENVENU: You recognize that
9 letter?

10 THE WITNESS: I do. I haven't seen it in
11 some time, but I vaguely recognize it, yes.

12 ARBITRATOR BIENVENU: If we look at the
13 last paragraph of that letter, so basically this is
14 a letter complaining to ICANN that a lot of time
15 has passed since the auction, and we have reached a
16 point when a Registry Agreement should be delivered
17 for execution to NDC. In substance, I believe
18 that's what the letter says.

19 In the last paragraph we read this, "ICANN
20 has gone to great lengths over a very long period
21 of time to protect what it thought might be any
22 interests of other parties, including," et cetera,
23 and then we have the sentence, "That process is
24 complete."

25 When that letter was sent out, and I

1 assume it was with your approval, you were not
2 aware that the ICANN Board had deferred
3 consideration of whether NDC's bid was compliant
4 with the program rules, were you?

5 THE WITNESS: I was not aware. In my
6 experience, most new TLD applications didn't go
7 before the ICANN Board to go to signing. But I was
8 not aware that the Board had made a decision not to
9 decide.

10 ARBITRATOR BIENVENU: Thank you,
11 Mr. Rasco.

12 Do my co-panelists have questions for
13 Mr. Rasco?

14 ARBITRATOR CHERNICK: I do not.

15 ARBITRATOR KESSEDJIAN: Sorry, took me
16 some time to unmute. No. I decided not to ask the
17 questions that I initially had because the topics
18 had been covered, even though I am still fairly
19 confused about some of the answers, but I think in
20 terms of time, I think I will refrain.

21 ARBITRATOR BIENVENU: Thank you very much.
22 Mr. Marenberg, any redirect for Mr. Rasco?

23 MR. MARENBERG: Yes. May I just have two
24 minutes to cut some questions and make it very
25 brief?

1 ARBITRATOR BIENVENU: Of course. Wave
2 your hand when you're ready.

3 MR. MARENBERG: I am just going to go off
4 and then come back.

5 (Whereupon a recess was taken.)

6 MR. MARENBERG: I am ready whenever you
7 are, Mr. Chairman.

8 ARBITRATOR BIENVENU: We are ready for
9 your questions, Mr. Marenberg. Please proceed with
10 your redirect.

11 REDIRECT EXAMINATION

12 BY MR. MARENBERG

13 Q. Can we put up Rasco Exhibit O, please?
14 Would you go to the text of the email?

15 ARBITRATOR BIENVENU: Do you know which
16 tab of the exhibit book?

17 MR. De GRAMONT: It is Tab 13.

18 ARBITRATOR BIENVENU: 13, thank you,
19 Mr. De Gramont.

20 Q. BY MR. MARENBERG: I believe, Mr. Rasco,
21 you were shown this exhibit by Mr. De Gramont, and
22 he asked you a couple questions about it.

23 I just want to confirm, Ms. Willett from
24 ICANN reached out to you and asked you to call her;
25 is that correct?

1 A. That's correct.

2 Q. And you did that same day?

3 A. I believe it was the same day, yes.

4 Q. Now, if we could put up paragraph --
5 excuse me, Exhibit C-75 and turn to Page 4, which
6 is Ms. Willett's summary of the conversation that
7 she had with Mr. Rasco. Go to Page 4, please.

8 Mr. De Gramont, what was -- that's it.
9 Right there.

10 And you were shown this exhibit earlier in
11 your testimony here today.

12 Do you recall that?

13 ARBITRATOR BIENVENU: This is Tab 14 of
14 the witness exhibit?

15 THE WITNESS: Yes, I recall.

16 Q. BY MR. MARENBERG: Now, Mr. De Gramont
17 highlighted various sections of this document with
18 you, and he has with other people.

19 I want to highlight another section.
20 Would you highlight Paragraph 1. It reads, "When
21 ICANN previously contacted him about potential
22 changes, he assumed that the confirmation was part
23 of the standard auction process, and his response
24 was relatively brief."

25 Mr. Rasco, is it your understanding that

1 what Ms. Willett is referring to there is your
2 initial email exchange or exchange on the portal
3 with --

4 A. Mr. Erwin.

5 Q. -- Mr. Erwin; is that correct?

6 A. That's correct.

7 Q. All right. And Ms. Willett is recounting
8 what you said to her about that exchange in 2016,
9 correct?

10 A. That sounds correct, yes.

11 Q. Now, a fair amount of ink has been spilled
12 insinuating that you have changed your view of what
13 you said to Mr. Erwin over time now that we are in
14 an IRP proceeding.

15 But at the time you had this conversation
16 with Ms. Willett in 2016, was there an IRP
17 proceeding involving Afiliast?

18 A. No, there was not.

19 Q. And so when you told Ms. Willett and gave
20 the explanation of your response to Mr. Erwin as
21 that it was simply part of the standard auction
22 process and that you quickly responded to
23 Mr. Erwin, that was not in the context of any
24 declaration or witness statement prepared in
25 connection with any IRP or litigation?

1 A. No, not at all.

2 Q. All right. Before there was ever any of
3 this contention, you had told Mr. Erwin essentially
4 what you said in your witness statement -- you had
5 told Ms. Willett essentially what you said in the
6 witness statement, which was, "I fired off a quick
7 response to Mr. Erwin as part of the standard
8 auction process"?

9 MR. De GRAMONT: Mr. Chairman, I am not
10 objecting to leading questions because I want this
11 to go fast, but at some point Mr. Marenberg cannot
12 testify for the witness. So I will object to that
13 last question as leading.

14 MR. MARENBERG: I'll withdraw it.

15 ARBITRATOR BIENVENU: I think, Mr. De
16 Gramont, we all understand what's happening here,
17 but your point is well-taken by your colleague, I'm
18 sure.

19 MR. De GRAMONT: Thank you.

20 Q. BY MR. MARENBERG: Now, if we could put up
21 Exhibit C-100, which is Tab 18 in the binder?

22 ARBITRATOR BIENVENU: Just so that it is
23 clear, when I said we all understand what's
24 happening now, I meant to say that counsel is
25 simply trying to go through points to be covered in

1 the most efficient way. That's what I meant.

2 MR. MARENBERG: Right. Thank you,
3 Mr. Chairman.

4 Q. So this is your exchange with Ms. Willett
5 on the 31st of July of 2016, and you write to her,
6 Redacted - Third-Party Designated Confidential Information

7
8

9 To your knowledge, was this the first time
10 you said anything to ICANN about VeriSign's
11 involvement in the .WEB TLD?

12 A. I believe this was the first time I
13 mentioned VeriSign, that's correct.

14 Q. Now, did you discuss
15 Redacted - Third-Party Designated Confidential Information

16

17 A. I don't recall exactly, Mr. Marenberg, but
18 I know that the plan all along was, subsequent to
19 the auction, to notify ICANN immediately of
20 Redacted - Third-Party Designated Confidential Information

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22

23 Q. Did you have an understanding yourself as
24 to whether Redacted - Third-Party Designated Confidential Information

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1 Redacted - Third-Party Designated Confidential Information

2 A. I knew that no matter what, they were
3 going to be aware of the agreement. I can't be
4 sure as to whether or not they were going to ask
5 for a copy of it, but I knew that we were going to
6 have to let them know about our agreement and about

7 Redacted - Third-Party Designated Confidential Information

8 Q. Is it fair to say that

9 Redacted - Third-Party Designated Confidential Information

10
11 A. Well, yeah, correct.

12 Redacted - Third-Party Designated Confidential Information

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15
16 Q. Is it accurate to say, in essence, from
17 the beginning of the negotiations with VeriSign
18 over this deal,

19 Redacted - Third-Party Designated Confidential Information

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21 MR. De GRAMONT: Mr. Chairman, I want this
22 to go quickly, but Mr. Marenberg is really
23 testifying for the witness. So object to that
24 question as leading.

25 ARBITRATOR BIENVENU: Mr. Marenberg, do

1 you want to reformulate your question?

2 MR. MARENBERG: I'll withdraw it, your
3 Honor.

4 Q. Now, let me just go back to the Exhibit
5 C-100.

6 At the time that you mentioned to
7 Ms. Willett on July 31st that ^{Redacted - Third-Party Designated Confidential Information}

8 what was the nature of the blogosphere as
9 it concerned the .WEB TLD?

10 A. So if I recall correctly, even prior to
11 the auction I believe the filings from Donuts or
12 Ruby Glen were made public in their attempts to try
13 to stop the auction. So at that point I guess the
14 scuttlebutt or the gossip going around was, wow,
15 there must be someone behind this. And there were
16 kind of -- I don't know if you would say
17 suppositions or there were assumptions that, wow,
18 it must -- what if one of the big players is here?
19 What if, could it possibly be VeriSign?

20 And then subsequent to the auction or
21 around the time of the auction when the actual
22 dollar amount came out, I have a feeling, if I
23 recall correctly, there was, you know, definitely
24 bloggers, whether it was Kevin Murphy of Domain
25 Incite or Kieren McCarthy, I forget where he was

1 writing at the time, but probably writing about the
2 potential participation of VeriSign.

3 Q. Can we put up Exhibit C-43, please?

4 MR. De GRAMONT: Mr. Chairman, I have a
5 feeling counsel is about to go beyond the scope of
6 cross-examination, and if so, I will object to
7 that.

8 MR. MARENBERG: I don't believe so.

9 ARBITRATOR BIENVENU: Would you like to
10 respond to that objection, Mr. Marenberg?

11 MR. MARENBERG: I think I am just putting
12 up the clarifications that Mr. De Gramont asked him
13 and putting it in that context.

14 MR. De GRAMONT: I didn't go through that
15 with this witness, but why don't we hear the
16 question and then I'll deal with the objection.

17 Q. BY MR. MARENBERG: Is this an example of
18 the types of communications that were circulating
19 in the blogosphere in the aftermath of the .WEB
20 auction?

21 A. That's correct, this is an example of
22 those assumptions that VeriSign was potentially
23 involved.

24 Q. Okay. Now, let's go back to Exhibit
25 C-100, please.

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ARBITRATOR BIENVENU: Tab 18?

MR. MARENBERG: Tab 18.

Q. Now I want to focus your attention on the next email after the one you sent on July 31st and after Ms. Willett's response.

That's your email of August 4th. For what purpose were you writing Ms. Willett on August 4th?

A. I was confirming that they received the payment and inquiring about the CIR, which is the invitation to contracting.

Q. Okay. At this point in time, did you have an understanding when you were communicating with Ms. Willett as to whether she understood that VeriSign was involved in some way in the .WEB TLD?

A. I don't know what she thought, but I had already -- Redacted - Third-Party Designated Confidential Information, so I am assuming she already knew about it.

Q. Okay. And let's go to the top email on the page, which is Ms. Willett's response. Same document, top email, please, C-100. Thank you.

And Ms. Willett responds to you,
Redacted - Third-Party Designated Confidential Information

1 Redacted - Third-Party Designated Confidential Information

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5
6 What did you understand she was telling
7 you there?

8 A. From my point of view,

9 Redacted - Third-Party Designated Confidential Information

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11
12
13 Q. This was after VeriSign's involvement had
14 been disclosed, correct?

15 A. That's correct. It didn't -- in other
16 words, it didn't look like there was much of a
17 surprise here.

18 MR. MARENBERG: I have no further
19 questions.

20 ARBITRATOR BIENVENU: Thank you very much,
21 Mr. Marenberg.

22 Mr. Rasco, I would like, on behalf of the
23 other members of the Panel and indeed on behalf of
24 all the participants in this process, to thank you
25 for your evidence and for your time.

1 THE WITNESS: Thank you very much,
2 Mr. Chairman. It was fun.

3 ARBITRATOR BIENVENU: Mr. Rasco, I must
4 instruct you not to discuss your evidence and your
5 testimony with any other persons who are scheduled
6 to appear before the Panel.

7 THE WITNESS: Yes, sir.

8 ARBITRATOR BIENVENU: Thank you very much,
9 indeed.

10 THE WITNESS: Thank you.

11 ARBITRATOR BIENVENU: We are on to our
12 next witness. Mr. LeVee, will you be leading or
13 introducing the witness?

14 ARBITRATOR KESSEDJIAN: Can we can have a
15 short break, probably five or eight minutes, no
16 more?

17 ARBITRATOR BIENVENU: An unscheduled
18 break?

19 ARBITRATOR KESSEDJIAN: An unscheduled
20 break, yes.

21 ARBITRATOR BIENVENU: I see agreement by
22 our friend Mr. Chernick, so let's have an
23 unscheduled break of five minutes.

24 In the meantime, Mr. LeVee, you can
25 perhaps ensure that the witness -- can you tell us

1 if the witness is ready?

2 MR. LeVEE: The witness should be in his
3 own holding room. I believe that's been confirmed.
4 I apologize. I had expected the Panel to take a
5 short break.

6 ARBITRATOR KESSEDJIAN: I am reading your
7 mind, Mr. LeVee.

8 MR. LeVEE: My apologies, but I am sitting
9 here getting my computer activated.

10 ARBITRATOR KESSEDJIAN: Let's meet in five
11 minutes.

12 MR. LeVEE: Five minutes is good with me.

13 (Whereupon a recess was taken.)

14 ARBITRATOR BIENVENU: Welcome, again,
15 Mr. Litwin.

16 MR. LITWIN: Thank you, Mr. Chairman.

17 ARBITRATOR BIENVENU: Mr. Disspain,
18 welcome. My name is Pierre Bienvenu. I chair the
19 Panel in this IRP. My colleagues are Professor
20 Catherine Kessedjian, whom I assume you see on your
21 screen, and Mr. Richard Chernick.

22 THE WITNESS: Yes, I can see them. Thank
23 you.

24 ARBITRATOR BIENVENU: Very well. So first
25 of all, on behalf of the Panel, welcome to you.

1 Sir, you have signed a witness statement
2 in relation to this case dated 1st June 2020.

3 THE WITNESS: Yes, I have.

4 ARBITRATOR BIENVENU: And at the end of
5 your statement, you swear that the content of your
6 statement is true and correct?

7 THE WITNESS: Yes, I do.

8 ARBITRATOR BIENVENU: May I ask you, sir,
9 likewise solemnly to affirm that the evidence that
10 you will give to the Panel today will be the truth,
11 the whole truth and nothing but the truth?

12 THE WITNESS: Yes, I do so affirm, sir.

13 ARBITRATOR BIENVENU: Thank you very much.
14 Mr. LeVee.

15 MR. LeVEE: Thank you, Mr. Chairman.

16 Good evening, Mr. Disspain. How are you?

17 THE WITNESS: I'm fine, Mr. LeVee. Thank
18 you. How are you?

19 MR. LeVEE: I am fine. Thank you.

20 I have just two questions. One, are you
21 in the United Kingdom? Is that where you are
22 testifying from?

23 THE WITNESS: Yes, I am.

24 MR. LeVEE: Okay. And second, the Chair
25 showed you your witness statement. Do you have any

1 corrections to your witness statement that you'd
2 like to correct?

3 THE WITNESS: No, I don't.

4 MR. LeVEE: Then, Mr. Chair, I have no
5 additional questions and submit Mr. Disspain to
6 cross-examination.

7 ARBITRATOR BIENVENU: Thank you,
8 Mr. LeVee.

9 The cross-examination will be conducted by
10 Mr. Litwin.

11 Mr. Litwin, your witness.

12 MR. LITWIN: Thank you, Mr. Chairman.

13 CROSS-EXAMINATION

14 BY MR. LITWIN

15 Q. Mr. Disspain, can you hear me okay?

16 A. Yes, I can. Thank you very much.

17 Q. Excellent. Good evening, sir. I
18 understand you have received a bundle containing
19 our exhibits?

20 A. I do have it, yeah.

21 Q. If you could open that on camera, and
22 Mr. LeVee may do the same.

23 A. I will do my best to open it on camera
24 without cutting myself.

25 Q. Don't cut yourself. We see it is

1 unopened.

2 A. I will put it down so I can open it
3 properly. Okay. There we go. Okay. There we
4 are.

5 Q. I regret to say we killed quite a number
6 of trees with it, and I am not sure we are actually
7 going to review much of it.

8 A. It would appear so, but I can use it for
9 scrap paper later.

10 Q. Very good. I am happy to hear to that.
11 But if I do refer to a document in that
12 binder, you will see that we have marked each page
13 at the bottom right-hand corner with a unique page
14 number that is new, and I will be referring to that
15 page number, not to the original document number.

16 A. You said the bottom right-hand corner?

17 Q. Yeah, should be the bottom right-hand
18 corner.

19 A. So that's ICANN-WEB_ something?

20 Q. Yes.

21 A. The binder wants to spring itself open, so
22 just give me a second so I don't lose any
23 documents. I will do my best. It is kind of
24 damaged.

25 Q. No worries. As I said, I don't expect to

1 look at much of anything in there.

2 A. Just so you know, it is actually broken.
3 Don't worry. My apologies.

4 Q. I apologize.

5 A. No, it is not your fault. I just didn't
6 want to be an inconvenience to you.

7 Q. Mr. Disspain, you are a member of ICANN's
8 Board of Directors, correct?

9 A. Yes, that's correct.

10 Q. When did you first join the Board?

11 A. October 2011.

12 Q. And you have been a member of the Board
13 since that time, correct?

14 A. That is correct.

15 Q. I would like to take you back to the
16 events of November 2016. You stated in your
17 witness statement that ICANN lawyers periodically
18 provided updates to the Board regarding the status
19 of .WEB; is that correct?

20 A. That's correct.

21 Q. And these updates address various legal
22 matters, such as the Ruby Glen litigation against
23 ICANN regarding .WEB, correct?

24 A. Yes, that's correct.

25 Q. And the associated CEP that Donuts, Ruby

1 Glen's parent entity, had initiated concerning
2 .WEB; is that correct?

3 A. Yes, that's correct as well.

4 Q. And the complaints that Afiliias had made
5 to ICANN's ombudsman regarding .WEB?

6 A. Well, I think we knew that a complaint had
7 been made, but we didn't have any of the details.
8 That would not have been appropriate. Complaints
9 to the ombudsman, obviously they'd complained to
10 the ombudsman, so we didn't have any of the details
11 of that.

12 Q. What about the letters that Afiliias had
13 written to Mr. Akram Atallah that had raised
14 concerns regarding how the .WEB contention set had
15 been resolved, were those discussed during those
16 updates?

17 A. I think we certainly knew about them
18 because they were -- as Akram said, they were
19 public. They would have been part of the briefing,
20 if you will, to discuss the issue.

21 Q. And at the time in 2016, Mr. Atallah was
22 the president of ICANN's Global Domains Division,
23 correct?

24 A. I believe so, yeah.

25 Q. Generally speaking, he was responsible for

1 overseeing the administration of the new gTLD
2 Program, right?

3 A. Reporting to the CEO, but yes.

4 Q. Now, you attended the public ICANN
5 meetings that were held in Hyderabad, India in
6 November 2016, correct?

7 A. I did, indeed.

8 Q. And during those meetings, did you attend
9 a Board workshop session on November 3rd, 2016,
10 where ICANN legal briefed the Board about .WEB?

11 A. The answer to that is yes, although I
12 couldn't be certain about the actual dates, but
13 yes, at Hyderabad in November we had a briefing
14 session on the issue.

15 Q. I will represent to you that in ICANN's
16 privilege log, there is an entry for a transcript
17 of a Board workshop session that took place on
18 November 3rd. If I am representing that correctly,
19 would that help you recall that that is the subject
20 of the discussion?

21 A. If that's what it says, then I accept
22 that's what it was, yes.

23 Q. I will also represent, as far as I can
24 tell from ICANN's website, the first meeting of the
25 ICANN Board was on November 5th. Is it your

1 recollection that this workshop was held before
2 that regular meeting?

3 A. So you say "meeting," you mean formal
4 meeting of the Board?

5 Q. Yes.

6 A. If you do, the answer is yes.

7 Q. Okay. Was there a discussion during that
8 November 3rd workshop that the conversation you
9 were having was privileged?

10 A. Yes.

11 Q. And that meeting took place in India,
12 correct?

13 A. It took place in Hyderabad, yes.

14 Q. And ICANN carries out its activities in
15 conformity with the principles of international
16 law, correct?

17 A. I can't -- I don't understand -- I can't
18 answer that question. I don't know what you mean.
19 ICANN carries out its activities pursuant to
20 California law, I think.

21 Q. So already I have misrepresented to you,
22 sir, we are going to take a look at your witness
23 binder.

24 A. Not a problem.

25 Q. But it is at the beginning?

1 A. Given the state of it --

2 Q. If you can turn to Tab 4, sir.

3 A. Yes, I have got Tab 4.

4 Q. And if you can, if you just give me a
5 minute here, if you turn to Page 5, these are
6 ICANN's bylaws.

7 A. Hang on, is this your page number?

8 Q. Yes. Exhibit C-1, Page 5.

9 A. I am on Page 5, yep, yep, yep.

10 Q. If you look at Section 1.2(a).

11 A. Yes, I have got that.

12 Q. It says, "In performing its Mission, ICANN
13 must operate in a manner consistent with these
14 Bylaws for the benefit of the Internet community as
15 a whole, carrying out its activities in conformity
16 with relevant principles of international law and
17 international conventions and applicable local
18 law."

19 Do you see that?

20 A. I am fine with that, and yes, that's
21 absolutely what the bylaws say.

22 Q. So when there was a -- when you write in
23 your witness statement, sir, that the Board's
24 communications with counsel during the November 3rd
25 workshop session were privileged, which set of laws

1 regarding the legal privilege are you referring to?

2 A. I'm referring to advice received by our
3 lawyers. I am not an international lawyer, and you
4 are asking me to provide you with a legal opinion,
5 which I can't do.

6 Q. So you don't -- sitting here today, you do
7 not have an understanding of which laws concerning
8 legal privilege were governing that meeting in
9 India?

10 A. I have an understanding.

11 MR. LeVEE: Mr. Chairman, could I
12 interrupt briefly? There has already been
13 litigation or activity regarding Afiliias's claims
14 relating to this meeting, and the Panel concluded
15 what it did. I am not going to say what the Panel
16 concluded in front of the witness.

17 But this clearly is an improper line of
18 questioning with respect to a legal issue. The
19 witness has already said he doesn't know the legal
20 issue, but he also did say he understood California
21 law applied.

22 ARBITRATOR BIENVENU: Let us see where
23 we're headed with Mr. Litwin's questions, and I
24 invite you to reformulate your objection as the
25 case may be.

1 MR. LeVEE: I will do that.

2 Q. BY MR. LITWIN: Mr. Disspain, do you need
3 me to restate?

4 A. Yes, I do. I have no idea what you were
5 asking me. So you have to start again, I'm afraid.

6 Q. So my only question was whether, sitting
7 here today, you have any understanding as to which
8 privilege rules applied to the meeting you were
9 having in Hyderabad, India?

10 A. My understanding is we were instructed
11 that that meeting was privileged, not specifically
12 by what law, but that it was privileged.

13 Q. Now, Mr. Disspain, I am going to ask you a
14 series of questions regarding the November 3rd
15 workshop session.

16 I will not ask you to reveal the substance
17 of any privileged communication made during that
18 workshop, and certainly by my questions I am not
19 intending to elicit any answers that would reveal
20 any such privileged communications.

21 I would therefore request that, just to be
22 safe, you keep your responses brief, but naturally
23 you should be guided by the instructions of your
24 counsel in this regard. But I just wanted to make
25 that clear up front.

1 A. I appreciated it, and I understand. Thank
2 you very much.

3 Q. To the best of your recollection, how many
4 directors attended the November 3rd workshop
5 session where issues related to .WEB were
6 discussed?

7 A. I wouldn't start to put a number on it.
8 My recollection is there were a significant number
9 of Board members present, but I couldn't tell you
10 how many.

11 Q. Could you give me an approximation of what
12 percentage of the Board was present?

13 A. It would be very much a guess, but in my
14 mind I would suggest it was certainly more than 50
15 percent. It could have been up to -- it could have
16 been everyone, but certainly more than 50 percent,
17 in my mind.

18 Q. Did anyone from ICANN staff attend the
19 November 3rd workshop?

20 A. Yes, lots of people from -- are you
21 talking about this specific session or just
22 general?

23 Q. Yes, yes.

24 A. This specific session?

25 Q. This specific session, where -- the

1 November 3rd workshop I am going to refer to when
2 the issue -- the legal issues regarding .WEB were
3 discussed.

4 A. Yes, certainly the lawyers did. John
5 Jeffrey was there. I think Amy Stathos was there,
6 the CEO was there. Again, I don't have a clear
7 recollection. I would be surprised to discover
8 that Akram Atallah wasn't there. I am not telling
9 you stuff from actual memory. I am telling you it
10 would surprise me if he hadn't been, but yes, there
11 was certainly staff present.

12 Q. So just to be clear, Mr. Disspain, I am
13 not asking you to speculate. I am asking you, to
14 the best of your recollection, was Mr. Atallah in
15 attendance?

16 A. I believe he was.

17 Q. What about Ms. Willett?

18 A. I don't remember.

19 Q. Other than Mr. Atallah, were there any
20 other members of ICANN staff present at the
21 November 3rd workshop session, also other than
22 legal staff, that you recall?

23 A. Not that I can recall.

24 Q. So just to clarify again, what we are
25 talking about in the November 3rd workshop session,

1 is it fair to say, and this is really a yes-or-no
2 question, that multiple topics were discussed
3 during the entirety of that November 3rd workshop
4 unrelated to .WEB?

5 A. Now you have confused me because you said
6 before, you said when you refer to the November 3rd
7 workshop, you are specifically referring to a
8 discussion about this.

9 Q. Correct. What I am trying to just get at,
10 sir, I just want to understand, this was one of the
11 topics that were discussed at the workshop? And
12 then we'll go on.

13 A. During the day, during our sessions, a
14 number of topics were discussed, yes, that is
15 correct.

16 Q. Okay. So from now on when I refer to the
17 November 3rd workshop session, I am just going to
18 refer to the discussion regarding .WEB.

19 To the best of your recollection, how long
20 was the discussion concerning .WEB?

21 A. I couldn't -- I genuinely couldn't say. I
22 don't know. I would be speculating.

23 Q. Okay.

24 A. I would be saying -- I'd be thinking it
25 through and saying, well, I know what was

1 discussed, how long would that take, et cetera, and
2 that's what you don't want me to do, so I don't
3 know.

4 Q. Would you say it was more than 15 minutes?

5 A. I'm going to resort to a reply I gave you
6 earlier in another context. I would be surprised
7 if it wasn't more than 15 minutes, but I remember
8 there being a full and open discussion about the
9 topic. How long it actually took, I couldn't say.

10 Q. Okay. Had there been another sort of full
11 and open discussion of legal issues regarding .WEB
12 in any of the other updates that had been provided
13 to the Board?

14 A. You mean at Hyderabad?

15 Q. No, at any other time that you recall.

16 A. I don't recall there being any
17 face-to-face discussion. I do recall that we were
18 kept up to speed with what was happening to some
19 extent, but I don't recall that -- so we received
20 updates in respect to what was going on with .WEB,
21 but I don't recall a Board discussion.

22 Q. Now, the discussion regarding .WEB that
23 took place on November 3rd, did that -- ICANN was
24 involved in active federal court litigation with
25 Ruby Glen at the time. So the briefing, I assume,

1 would have included a discussion of Ruby Glen's
2 case; is that right?

3 A. Well, it included an update on Ruby Glen's
4 case, yes.

5 Q. And Donuts' CEP that we mentioned earlier?

6 A. Again, it would have been -- we would have
7 been briefed that that had happened, that was
8 happening, yes.

9 Q. What about what ICANN was doing in
10 response to the letters that Mr. Atallah had
11 received from Afilias?

12 MR. LeVEE: That question I will object to
13 because it is so vague.

14 Ethan, can you make it a little bit more
15 clear? We are trying to make sure -- you are
16 trying to make sure he doesn't waive the privilege.
17 I am trying to make sure he doesn't waive the
18 privilege. That question --

19 THE WITNESS: I'll be guided by both of
20 you as to whether I am waiving the privilege or
21 not, so I am comfortable.

22 Q. BY MR. LITWIN: I think you should listen
23 to ICANN's lawyer.

24 A. I think you are probably right.

25 Q. That's not my role here today, but I do

1 want to make sure that I am sensitive to this.

2 So I will rephrase the question. So did
3 the Board also receive an update about ICANN's
4 response to Afiliast's letters to Mr. Atallah?

5 A. My recollection is that we knew that ICANN
6 had sent out a questionnaire, if that's what you're
7 asking me.

8 Q. Yes. That is what I'm asking you. Thank
9 you.

10 Did the Board discuss on November 3rd
11 Ms. Willett's pre-auction investigation of NDC? I
12 am asking just for a yes-or-no question, not about
13 the substance.

14 A. I don't know what you're referring to, so
15 I am afraid I can't -- I don't know what
16 Ms. Willett's pre-auction investigation is, so I
17 can't answer that.

18 Q. What about the ombudsman's
19 pre-investigation auction -- excuse me. Let me
20 rephrase.

21 What about the ombudsman pre-auction
22 investigation of NDC, was that discussed?

23 A. We wouldn't discuss what the ombudsman had
24 done, because that's a matter for the ombudsman and
25 that remains with him and no one else.

1 Q. I can represent that other contention set
2 members had complained about the .WEB auction at
3 one point or another. Did the Board discuss any
4 complaints that were brought by any contention set
5 member other than Afiliias or Ruby Glen during the
6 November 3rd workshop?

7 A. Not that I can recall.

8 Q. You note in your witness statement that
9 Board members asked questions of ICANN's legal
10 counsel during the November 3rd discussion of .WEB.

11 To the best of your recollection, sir,
12 could you please identify everyone who asked a
13 question of ICANN's legal counsel during the
14 November 3rd discussion of .WEB?

15 A. Well, no, for a couple of reasons, but
16 mainly because I can remember the events and the
17 discussion, but you're asking me to identify
18 particular individuals who had asked particular
19 questions, and I can't do that.

20 I know there was a discussion. I know
21 that Board members were present. I know that -- I
22 believe, as I have already said, that 50 percent of
23 the Board was present, but I would not be able to
24 tell you who spoke, and I wouldn't be able to tell
25 you what questions they asked.

1 Q. Well, I am certainly not asking you to
2 reveal what questions were asked, sir.

3 Let me ask you this: Did you ask any
4 questions during that November 3rd discussion of
5 .WEB?

6 A. I believe that I probably did.

7 Q. Sitting here today, do you have a
8 recollection one way or another?

9 A. Well, you see, here's the challenge. I
10 know me, so I know that it's highly likely I would
11 have asked questions.

12 But if you're asking me can I actually
13 remember, I know you are not going to ask me what
14 they were, but logically for me to remember, I
15 would need to remember the questions, the answer is
16 no. To revert to a previous answer, I would be
17 surprised if I did not.

18 Q. Understood. We sound very much alike,
19 Mr. Disspain.

20 You note in your witness statement that
21 you received briefing materials in advance of the
22 November 3rd meeting, correct?

23 A. Correct.

24 Q. And did those briefing materials include a
25 copy of the August 25th, 2015, VeriSign-NDC Domain

1 Acquisition Agreement?

2 A. Not to my recollection.

3 Q. Did the briefing materials contain a copy
4 of the August 23rd, 2016, letter from Mr. Ronald
5 Johnston of Arnold & Porter on behalf of VeriSign
6 to Mr. Eric Enson of Jones Day on behalf of ICANN?

7 A. Again, not to my recollection.

8 Q. You mentioned a few minutes earlier that
9 ICANN had sent questionnaires out in response to
10 Afiliast's complaints. Were the responses to those
11 questionnaires that were received from Afiliast
12 included in your briefing materials?

13 A. Not to my recollection.

14 Q. What about the answers that were received
15 to the questionnaire from VeriSign or NDC, do you
16 recall?

17 A. I don't recall any responses or the
18 questionnaire.

19 Q. Did you ever discuss any issues regarding
20 .WEB with Mr. Atallah?

21 A. Are you asking me personally or are you
22 asking me --

23 Q. Yes, personally.

24 A. Not that I can recall, no.

25 Q. Since the Board was also discussing the

1 Ruby Glen .WEB litigation, did the briefing
2 materials also contain -- or did the briefing
3 materials contain a copy of Ruby Glen's pleadings
4 from that case?

5 A. Again, not that I can recall. I don't
6 remember seeing those.

7 Q. Did the briefing materials contain a copy
8 of any of the legal briefs at that had been filed
9 as of November 3rd, 2016, in that case?

10 A. Again --

11 MR. LeVEE: Let me just interrupt. I am
12 letting this go on, but I am confident that
13 whatever materials were provided to the Board would
14 themselves be -- the fact of a lawyer giving a
15 document to the Board would itself be privileged.

16 I don't think it is appropriate -- and I
17 don't want to waive the privilege, but I don't
18 think it is appropriate for questions to be asked
19 about what specific materials were provided to the
20 Board. They were selected by counsel. That's
21 already been established.

22 MR. LITWIN: Mr. Chairman, may I respond
23 to that, please?

24 ARBITRATOR BIENVENU: I was going to
25 invite you to do so.

1 MR. LITWIN: Thank you, Mr. Chairman.

2 Without belaboring the point, it is
3 well-established that the identity of a document
4 that is provided by a lawyer to a client is not
5 privileged, but the contents of that document and
6 any discussion about that document to the extent
7 the document is privileged.

8 So I believe I am entitled to know what
9 documents were provided to the Board. To the
10 extent that they are nonprivileged documents, I
11 would ask questions about them. To the extent it
12 is a privileged document, I obviously would not ask
13 questions about them.

14 MR. LeVEE: May I respond?

15 ARBITRATOR BIENVENU: Just a minute,
16 Mr. LeVee. I have a question.

17 What you say is well-established,
18 Mr. Litwin, is this a matter of New York law,
19 California law, U.S. federal law or all?

20 MR. LITWIN: I believe it is all of the
21 above, and I will represent that I checked with my
22 ethics counsel before embarking on these questions
23 here today. I would be happy to provide a written
24 opinion to the Panel if it so desires.

25 ARBITRATOR BIENVENU: Mr. LeVee, you want

1 to respond?

2 MR. LeVEE: Thank you, Mr. Chairman.

3 The Panel has already ruled that
4 California law applies, so I am going to stick with
5 California law.

6 Under California law, the fact that a
7 document exists, that's not privileged. The fact
8 that a lawyer gives the document to the client,
9 that is privileged because the lawyer is making a
10 determination of what materials to provide to the
11 client, and that is privileged.

12 So I agree with Mr. Litwin to the extent
13 that a document itself, the very existence of the
14 fact that a letter was sent, that's not a
15 privileged fact. I haven't argued that it was, but
16 the transmission by the lawyer to the client is
17 privileged. There are many cases in California
18 that agree with that concept.

19 MR. LITWIN: Mr. Chairman, if I might, I
20 am really at the end of these questions, so I think
21 we are having a debate over an academic point. But
22 if the Panel would like to hear further on this, I
23 would be happy to submit something in writing so we
24 do not take up any more of Mr. Disspain's time.

25 ARBITRATOR BIENVENU: So would you like,

1 then, to withdraw your question and move on to the
2 next topic?

3 MR. LITWIN: Yes, Mr. Chairman.

4 ARBITRATOR BIENVENU: Thank you.

5 Q. BY MR. LITWIN: Mr. Disspain, you stated
6 in your witness statement that on November 3rd the
7 Board, quote, "Chose not to take any action at that
8 time," close quote, concerning .WEB.

9 Did the Board take a vote on November 3rd?

10 A. No.

11 Q. Was a straw poll taken?

12 A. Not that I can recall.

13 Q. Was there a show of hands?

14 A. Not that I can recall.

15 Q. Was there a call of ayes and nays?

16 A. No, again, not that I can recall. It was
17 a decision to -- a choice, if you will, to do what
18 we would usually do, normally do with a
19 longstanding practice of not interfering when there
20 was an outstanding accountability mechanism.

21 Q. I will represent to you, Mr. Disspain,
22 that ICANN has stated at oral argument in this IRP
23 that the Board, quote, "decided to defer" --

24 A. But it wasn't a vote or a straw poll.

25 ARBITRATOR BIENVENU: Mr. Litwin, I think

1 you hadn't completed your question.

2 MR. LITWIN: To clear up the record, why
3 don't I ask my question again.

4 Q. So as I was saying, Mr. Disspain, at oral
5 argument ICANN's counsel represented that during
6 the November 3rd meeting, the Board, and I quote,
7 "decided to defer," end quote, "consideration of
8 Afiliast's complaints regarding the resolution of
9 the .WEB contention set."

10 Would you agree with that statement that
11 the Board took a, quote, "decision to defer"?

12 A. We decided that it was -- there were
13 outstanding accountability mechanisms.

14 ARBITRATOR BIENVENU: I'm sorry to
15 interrupt you. There was a break in the
16 communication, so we did not hear the beginning of
17 your question. Could I ask you to start again at
18 the very beginning of your answer?

19 THE WITNESS: The beginning of my answer.
20 I will do my best.

21 The Board discussed the briefing and it
22 decided that -- we had agreed that we would
23 continue the longstanding practice of not doing
24 anything where there is an outstanding
25 accountability mechanism.

1 I don't recall if there was a specific
2 agreement to not to deal with Afiliast's issues. It
3 was more -- my recollection, it was more it is not
4 appropriate for us to be doing anything in respect
5 to this because there are accountability --

6 (Discussion off the record.)

7 THE WITNESS: -- and our variable
8 practices.

9 MR. LeVEE: Mr. Disspain -- go ahead,
10 Mr. Chairman.

11 THE WITNESS: Would it be helpful if I
12 disconnect and reconnect? Would that be helpful?

13 ARBITRATOR KESSEDJIAN: Yes.

14 THE WITNESS: Shall I just do that?

15 ARBITRATOR KESSEDJIAN: Mr. Disspain,
16 Catherine Kessedjian, make sure you are close to
17 your Wi-Fi connection.

18 THE WITNESS: Close to my Wi-Fi
19 connection. Thank you. I will disconnect and
20 reconnect now.

21 ARBITRATOR BIENVENU: Yeah, okay.

22 (Whereupon a recess was taken.)

23 ARBITRATOR BIENVENU: You are back with
24 us. So let's -- do you have a live feed of the
25 transcript? Mr. Litwin, do you know where we left

1 off?

2 THE WITNESS: I do. I think --

3 ARBITRATOR BIENVENU: I think you should
4 repeat your question.

5 And, Mr. Disspain, you are going to have
6 to repeat your answer, I'm afraid.

7 THE WITNESS: Not a problem.

8 Q. BY MR. LITWIN: Just to summarize,
9 Mr. Disspain, because I think you generally do
10 recall what my question was, was -- would you agree
11 with ICANN's counsel's statement that the Board
12 took a, quote, "decision to defer," end quote,
13 during the November 3rd workshop session?

14 A. So what I said to you in response to that
15 question is I think the Board made a choice to
16 follow its longstanding practice of not doing
17 anything when there is an outstanding
18 accountability mechanism.

19 I cannot say that the Board proactively
20 decided, proactively agreed, proactively chose to
21 as to put to do -- as to do it as you put it, which
22 is to not pursue Afilias' complaints.

23 We just decided that it was our standard
24 practice not to do anything because there were
25 outstanding accountability mechanisms.

1 Q. So when you say that the Board did not
2 proactively decide, is it fair to say you received
3 a brief from legal counsel, questions were asked of
4 legal counsel, responses to those questions were
5 given, and then you moved on to the next item on
6 the agenda?

7 A. Yeah, it wasn't before us for a
8 decision -- for a formal decision unless we had
9 chosen to move to a formal decision.

10 What we chose to do was to follow our
11 longstanding practice.

12 MR. LITWIN: Excuse me for one second,
13 please.

14 (Whereupon a recess was taken.)

15 Q. BY MR. LITWIN: So, Mr. Disspain, I think
16 you testified earlier that certain members of staff
17 were present during the November 3rd workshop where
18 the .WEB issues were discussed, correct?

19 A. Correct, yes, that's correct.

20 Q. And that included Mr. Atallah?

21 A. That's my recollection.

22 Q. So Mr. Atallah, at the least, would have
23 heard the conversation and heard the questions that
24 were asked of legal counsel and the responses that
25 were given, correct?

1 A. Yes. If my recollection is correct and he
2 was in the room, then yes, he would have heard.

3 Q. The ICANN bylaws require that ICANN must
4 make, quote, "any action taken by the Board
5 publicly available within seven business days of
6 the conclusion of each meeting."

7 Are you aware of that, sir?

8 A. Yes, I am aware of what you just said,
9 yes.

10 Q. And that if the Board determines not to
11 disclose any action, that the Board must disclose
12 the reasons for that disclosure; is that also
13 correct?

14 A. That sounds right.

15 Q. Are you aware that Afilias sent a DIDP --
16 again, that's D-I-D-P for the court reporter -- a
17 DIDP request to ICANN in early 2018 demanding that
18 ICANN disclose the status of its .WEB investigation
19 and the .WEB contention set; are you aware of that?

20 A. I am aware there was a DIDP question from
21 Afilias, and I think that's the one you're
22 referring to, yes.

23 Q. Are you aware, in response to ICANN's
24 response to that DIDP request, Afilias filed a
25 reconsideration request?

1 A. Yep.

2 Q. Are you aware that ICANN, in its response
3 to the DIDP request, did not disclose anything
4 about the November 3rd workshop?

5 A. Yes, I think I would have been aware of
6 that at the time. At the time the reconsideration
7 request came in, I would have been aware of that,
8 yes.

9 Q. Are you aware that the Board denied
10 Afiliias' --

11 A. Yes.

12 Q. -- reconsideration request?

13 A. Yes.

14 Q. You state in your -- yes?

15 ARBITRATOR BIENVENU: Excuse me. The
16 Chair here. I am sorry to break your flow.

17 Could you, for my benefit, recall what
18 precisely was being sought by the DIDP and what was
19 the decision and then what precisely was being
20 sought by the reconsideration request?

21 MR. LITWIN: Mr. Chairman, I do not have
22 those documents in front of me, but I believe we
23 will have time that my team can compile those so we
24 can put those on the screen when I complete my
25 questions. Would that be acceptable, Mr. Chairman?

1 ARBITRATOR BIENVENU: Yeah, I don't need
2 to see the documents. I just need to have an
3 understanding exactly of what was being sought at
4 each step and what decision was at each step.

5 But if it takes too long to summarize it,
6 let's defer it.

7 MR. LITWIN: I just don't want to
8 misrepresent anything, Mr. Chairman. I would
9 prefer to take that later on in the examination, if
10 I might.

11 ARBITRATOR BIENVENU: That's fine. Please
12 proceed.

13 Q. BY MR. LITWIN: Mr. Disspain, you state in
14 your witness statement that it did not seem prudent
15 for the Board to interfere or preempt issues that
16 were the subject of accountability mechanisms
17 concerning .WEB; is that right?

18 A. Yes, that's correct.

19 Q. Now, as of November 3rd, 2016, Donuts had
20 filed a CEP concerning .WEB; is that correct?

21 A. Yes.

22 Q. And the claims at issue in the CEP had
23 also been brought in court as part of Ruby Glen's
24 litigation against ICANN; is that correct?

25 A. If you say so. I can't confirm that

1 personally.

2 Q. Is it your understanding that the claims
3 that were at issue, at least in the CEP, concerned
4 the conduct of ICANN's preauction investigation of
5 NDC?

6 A. I haven't looked at that for some time.
7 That sounds right, but I can't remember exactly. I
8 just know that there was an outstanding CEP and
9 that, therefore, waiting for that or any others
10 would be a prudent way to deal with the matter.

11 Q. Now, other than the Donuts CEP, as of
12 November 3rd, 2016, there were no other
13 accountability mechanisms pending concerning .WEB,
14 correct?

15 A. Not that I can recall, no, I don't believe
16 so.

17 Q. You state in your witness statement that
18 the Board also considered that there might be
19 future accountability mechanisms brought concerning
20 .WEB, correct?

21 A. That's correct.

22 Q. So there could be more CEPs, right?

23 A. There could be more CEPs. There could be
24 reconsideration requests. There could be DIDP
25 requests. There could be other considerations,

1 yes.

2 Q. Is a DIDP request an accountability
3 mechanism?

4 A. Probably not. Fair enough. It would be a
5 reconsideration request or a CEP.

6 Q. Or an IRP?

7 A. Or an IRP as an accountability mechanism,
8 that's correct.

9 Q. Now, if an IRP was brought, the bylaws
10 strongly encouraged and were designed to strongly
11 encourage complainants to bring a CEP before an
12 IRP, right?

13 A. Correct.

14 Q. Now, the purpose of a CEP is to narrow
15 claims in advance of filing an IRP; is that right?

16 A. Yeah, but I think it is also -- yes, but
17 in the main, it is also about getting the parties
18 together to discuss things and see if we can avoid
19 an IRP, if possible. But yes, you're right. The
20 purpose is to do exactly what you just said.

21 Q. I guess if everybody agrees you have
22 narrowed the claims completely and everybody can go
23 home happy, right?

24 A. Correct.

25 Q. So if ICANN determines if it agreed with

1 the claimant on any issue, that would help narrow
2 the claims in dispute in advance of filing an IRP,
3 right?

4 A. If they agreed. If the claimant and ICANN
5 agreed on something, absolutely it would.

6 Q. And if the ICANN --

7 A. By the way, if the claimant agreed with
8 ICANN or ICANN agreed with the claimant,
9 absolutely.

10 Q. Point taken. And if the ICANN Board
11 determined that it agreed with the claimant on any
12 issue, that would also help to narrow the claims in
13 dispute in advance of filing an IRP, right?

14 A. It would except for the fact that the
15 Board hasn't involved itself and didn't involve
16 itself in CEPs. The Board -- CEP is an
17 accountability mechanism. The accountability
18 mechanism takes place -- that particular
19 accountability mechanism takes place between ICANN
20 and the claimant, and so the Board wouldn't get
21 involved at all in that respect.

22 Q. Wouldn't it be consistent with the CEP for
23 the ICANN Board, if it had the opportunity to do
24 so, to consider the merits of a claim presented to
25 ICANN during CEP?

1 A. It never has. As far as I am aware, it
2 never has.

3 Q. You state in your witness statement that
4 you recall that once there were no pending
5 accountability mechanisms in June of 2018, that
6 ICANN staff changed the status of the .WEB
7 contention set from "on hold" to "resolved" and
8 NDC's status from "on hold" to "in contracting"; is
9 that right?

10 A. Yes.

11 Q. And Afilias' status had changed at the
12 same time from "on hold" to "will not proceed"; is
13 that also correct?

14 A. If you say so. I think that's a natural
15 corollary from the move that you previously laid
16 out, so yes.

17 Q. So just -- it would be ICANN's general
18 practice that if one member of a contention set's
19 status had changed to "in contracting," the other
20 members of the contention set would move to "will
21 not proceed," correct?

22 A. That sounds right.

23 Q. Are you aware that those changes were made
24 the very day after Afilias' reconsideration request
25 was denied?

1 A. No. I mean, I am aware they were made. I
2 wasn't -- I was aware -- not -- in contrast of the
3 fact it was the very day after.

4 Q. The ICANN Board did not meet to consider
5 the merits of Afilias' complaints during the
6 resolution -- regarding the resolution of the .WEB
7 contention set in June of 2018 after those
8 accountability mechanisms had expired, did it?

9 A. I don't think so. Again, you need to run
10 that past me one more time. Are you asking me that
11 we didn't meet to discuss what, Afilias'
12 complaints?

13 Q. Yes. So on November 3rd you stated that
14 the Board had --

15 A. Yes.

16 Q. -- chosen not to discuss any of the issues
17 regarding .WEB until all accountability mechanisms
18 had expired?

19 You write in your witness statement that
20 they had expired in June of 2018 --

21 A. Correct.

22 Q. -- and now my question is: Did the Board
23 meet in June of 2018, after those accountability
24 mechanisms had expired, to discuss those issues
25 regarding the .WEB?

1 A. That's a slightly different question. Yes
2 is the answer, the Boards did meet. Certainly the
3 Board Accountability Mechanisms Committee met. It
4 may have been that there were -- my recollection
5 would be that there were other Board members
6 present.

7 But originally you asked me specifically
8 to discuss Afilias' complaints, I think, and
9 that's -- I wouldn't say that. What I would say is
10 that we met -- we were briefed that after the
11 contract came off hold that that is what had
12 occurred, and, in fact, the Board Accountability
13 Mechanisms Committee was briefed prior to it coming
14 off hold, that the next step -- the next step in
15 the process would be that it would come off hold.

16 And it was also briefed that Afilias had
17 written letters, maybe a letter, I can't remember,
18 one or more than one, to say that if that happened,
19 if it came off hold, Afilias was going to launch an
20 accountability mechanism. I can't remember if it
21 says an IRP or not, but launch an accountability
22 mechanism. The BAMC was aware of that.

23 Q. Did the BAMC discuss the substance of
24 Afilias' complaints about how the resolution of the
25 .WEB set had occurred?

1 A. No.

2 Q. Did the Board during June of 2018 discuss
3 the merits of Afiliias' complaints regarding the
4 resolution of the .WEB contention set?

5 A. No.

6 Q. So, Mr. Disspain, as it turns out, this
7 was not the only period where there was no
8 accountability mechanism pending concerning .WEB.
9 I will represent to you that the Donuts CEP that we
10 discussed earlier terminated on January 30th of
11 2018 and that Donuts was given until February 14 of
12 2018 to file an IRP.

13 Are you aware of that?

14 A. That sounds right.

15 Q. And are you also aware that Donuts did
16 not, in fact, file an IRP by February 14?

17 A. Yes, I am aware of that.

18 Q. And Afiliias filed its first
19 reconsideration request on April 23rd, 2018.

20 Are you aware of that?

21 A. I am, indeed.

22 Q. So during the period when there was no
23 accountability mechanisms pending, the ICANN Board
24 held workshop sessions on March 9th and 11th.

25 Did the Board take up the merits of

1 Afilias' .WEB complaints during those workshops?

2 A. No.

3 Q. And on March 15th the Board held a regular
4 meeting, and by "regular meeting," I mean the
5 formal meeting that's called the regular meeting
6 that's set forth in ICANN's bylaws.

7 Did the Board consider the merits of
8 Afilias' .WEB complaints during the March 15
9 meeting?

10 A. No. The Board has, to my recollection,
11 not considered the merits of Afilias' complaint.

12 MR. LITWIN: Mr. Chairman, at this time I
13 would request that we would take our recess. I
14 realize it is a bit early, but I am coming towards
15 the end, and I would like to confer with my team
16 and also respond to your question about the
17 reconsideration requests.

18 ARBITRATOR BIENVENU: Surely. We will
19 take our 15-minute recess.

20 Mr. Disspain, you are not to discuss your
21 evidence with anyone during the break.

22 THE WITNESS: I shall not do so,
23 Mr. Chairman. Thank you very much. I will,
24 however, be leaving the camera. I believe the
25 expression is to take a comfort break.

1 ARBITRATOR BIENVENU: That's fine. Thank
2 you, Mr. Disspain.

3 MR. LITWIN: Thank you, Mr. Disspain.

4 THE WITNESS: Thank you.

5 (Whereupon a recess was taken.)

6 ARBITRATOR BIENVENU: Mr. Litwin, do you
7 wish to continue your cross-examination?

8 MR. LITWIN: I do, Mr. Chairman. Thank
9 you.

10 Chuck, if you could bring up Exhibit C-78,
11 please.

12 MR. VAUGHAN: Is this in the binder?

13 MR. LITWIN: This is not in the binder.
14 This is in response to the question the Chairman
15 asked of me earlier. I just wanted to have this up
16 to walk Mr. Disspain through it.

17 Q. Mr. Disspain, I will represent to you that
18 this is a letter that my colleague, Arif Ali, sent
19 to the Board of ICANN regarding a request for
20 update on ICANN's investigation of the .WEB
21 contention set and containing also a request for
22 documents pursuant to the DIDP.

23 So, Chuck, could we look at the top of
24 Page 2, please.

25 MR. LeVEE: Can I ask, Ethan, that you

1 just thumb through the whole thing so we can see
2 how long it is?

3 MR. LITWIN: Of course. It is a five-page
4 letter.

5 Chuck, if you could just scroll briefly
6 through all five pages, please.

7 Now, if you could go back to Page 2. If
8 you could just blow up the first -- the bullet and
9 the heading, rather, in the first two paragraphs --
10 three paragraphs. I'm sorry. That will be
11 easiest, yes.

12 Q. You will see, Mr. Disspain, this is
13 entitled "Request for Update on ICANN's
14 Investigation of .WEB Contention Set."

15 Do you see that, sir?

16 A. I do.

17 Q. Mr. Ali writes, "Therefore, pursuant to
18 ICANN's transparency obligations, we respectfully
19 request that ICANN provide an update on the status
20 of ICANN's investigation of the .WEB contention
21 set, including: (1) the steps (if any) taken by
22 ICANN to disqualify NDC's bid on the basis that NDC
23 violated the rules applicable to its application;
24 and (2) the steps (if any) taken by ICANN to assess
25 competition issues arising out of delegation of

1 .WEB to VeriSign."

2 Do you see that, sir?

3 A. I do.

4 Q. And turn to the next page. And if you
5 could just highlight the Point Heading II, Chuck.

6 This says, "Request for Documents Pursuant
7 to the DIDP," and you understand, Mr. Disspain,
8 that refers to the document information -- now I
9 can't remember. What is DIDP? Document
10 Information Disclosure Policy?

11 A. Yes.

12 Q. Yes. If we could turn to the next page,
13 Page 4 of the February 23rd, 2018, letter, Mr. Ali
14 requests the disclosure of, No. 6, "All documents
15 concerning any investigation or discussion related
16 to the .WEB contention set."

17 Do you see that, sir?

18 A. I do.

19 Q. So this DIDP request was sent on February
20 23rd of 2018.

21 Are you aware that ICANN responded to it
22 on March 24th?

23 A. I am aware that ICANN responded to it. I
24 have no idea what the date was.

25 Q. Are you aware that ICANN did not disclose

1 documents pursuant to this request?

2 A. Yes, I am.

3 Q. Are you aware that ICANN did not provide a
4 status update as requested pursuant to Point
5 Heading I?

6 A. Not specifically. I am aware that there
7 was a reconsideration request in respect to the
8 DIDP request, so matters that were part of that
9 reconsideration request, I would have been aware of
10 it at the time we were considering the
11 reconsideration request.

12 Q. I am just going to take you through the
13 timeline, Mr. Disspain.

14 On April 23rd, are you aware that Afiliias
15 filed a reconsideration request regarding the
16 denial of the DIDP request that had been sent in
17 February of 2018?

18 A. Again, I am aware they filed a
19 reconsideration request. I take your word for it
20 that it was on that date.

21 Q. And are you aware that also on April 23rd
22 Afiliias filed a second DIDP request requesting, in
23 sum and substance, the same information as in
24 February 23rd?

25 A. I do recall there was a -- I do recall

1 that there was a second DIDP request, yes.

2 Q. Now, on May 23rd, are you aware that ICANN
3 responded to this second DIDP request?

4 A. If you're asking me about the date, no.
5 If you're asking am I aware they responded, yes.

6 Q. And are you aware that they received the
7 same answer, which is essentially nothing?

8 A. Yes, I believe that that's correct.

9 Q. And then on June 5th, are you aware that
10 Afiliias' reconsideration request that had been
11 filed on April 23rd was considered within the BAMC?

12 A. So I am. Again, if you say it was on June
13 the 5th, I will accept that. I am aware of that.
14 I have a memory of that discussion, yes.

15 Q. And I believe it was your testimony from
16 earlier today that the BAMC recommended that
17 Afiliias' reconsideration request be denied; is that
18 a fair statement?

19 A. It is a little difficult to remember with
20 it, because there were two, but yes, I believe that
21 that's correct, we did, indeed.

22 Q. And are you aware that the -- that
23 Afiliias' reconsideration request was never
24 presented to the full Board?

25 A. I believe that under the bylaws at that

1 time, that's correct, yes.

2 MR. LITWIN: Mr. Chairman, does that
3 clarify your questions about the timeline and what
4 was requested under Afilias' DIDP request and
5 reconsideration requests?

6 ARBITRATOR BIENVENU: Yes, it does. Thank
7 you very much. All of these correspondence are in
8 the file, are in the record?

9 MR. LITWIN: They are, Mr. Chairman.

10 ARBITRATOR BIENVENU: Thank you very much.

11 Q. BY MR. LITWIN: Mr. Disspain, you
12 testified earlier today that ICANN and the ICANN
13 Board has a policy of not considering the merits of
14 complaints that are subject to outstanding
15 accountability mechanisms; is that correct?

16 A. No. I said that we had a longstanding
17 practice. And I'm sorry to be picky, but the term
18 "policy" in the context of ICANN has a different
19 meaning.

20 Q. And what is the difference between
21 practice and policy, in your mind, as a Board
22 member?

23 A. Well, policy is -- a policy in the ICANN
24 context is the policy that is set by the supporting
25 organizations for dealing with -- in the case of a

1 gTLD, the GNSO in the case of country codes and
2 ccNSO.

3 I didn't say "policy." I said "practice."
4 I don't use the word "policy" because that has a
5 different meaning to me.

6 Q. So the Board has certain practices that it
7 observes in its functioning; is that fair to say?

8 A. Yes. If you're implying that there's a
9 list of them somewhere, no. But there are things
10 that we have generally done over time, and our
11 practice has -- was in respect to new gTLDs, very
12 specifically, to avoid stepping in where there are
13 outstanding accountability mechanisms running.

14 Q. Is that practice documented anywhere?

15 A. Not -- I couldn't say, don't know.

16 Q. Is it in the bylaws, for example?

17 A. Not as far as I'm aware.

18 Q. Is there a document on ICANN's website
19 that reveals that practice?

20 A. Not as far as I'm aware, but it may be
21 that there are documents on the website that reveal
22 discussions that will reveal rationale. There may
23 be mentions in rationales and resolutions that say,
24 "In accordance with ICANN's longstanding practice."
25 They may appear in "whereas" clauses to

1 resolutions, you know, "whereas there was an
2 accountability mechanism outstanding." I don't
3 know. I can't say.

4 Q. So is it fair to say if I were to -- let
5 me just ask you, sir, just to bottom this out --

6 A. Sure.

7 Q. -- can you direct me to any resolution or
8 rationale that discloses this practice?

9 A. No. But I can direct you to numerous
10 occasions where -- there have been a number of
11 occasions where the Board has not done anything
12 because there have been accountability mechanisms
13 running. It's just our practice.

14 Q. Were those examples -- well, strike that.

15 Can you give me another example of when
16 the Board has not intervened because of an
17 outstanding accountability mechanism.

18 A. Not off the top of my head, and I wouldn't
19 do that without going away and doing some research,
20 but I can assure you they exist.

21 Q. So it's fair to say, sitting here today,
22 you could not direct me to any minutes or
23 transcripts of a Board meeting where that practice
24 was disclosed?

25 A. It would be fair to say that I cannot

1 direct you there today, but I can confirm that it
2 is a longstanding practice.

3 Q. Now, the practice, as you say, was
4 exercised during the November 3rd workshop session.
5 There was no transcript posted from that workshop,
6 correct?

7 A. No, there wasn't, and the discussion was
8 privileged, in any event.

9 Q. So is it fair to say that where this
10 practice had arisen previously was likely to be in
11 the context of a privileged discussion with
12 counsel?

13 A. It's possible. It's equally possible that
14 it could have been disclosed, as I said, as part of
15 a formal resolution as a parse action in a
16 "whereas" clause. I don't know.

17 So I don't think you can draw that
18 conclusion. I think you can say that it's --
19 either way is possible. I can only comment on this
20 particular occasion and tell you that it was
21 privileged.

22 Q. Okay. ICANN has collected hundreds of
23 millions of dollars in fees and auction proceeds as
24 a consequence of its administration of the new gTLD
25 Program; is that correct?

1 A. Yes, that's correct.

2 Q. In fact, just looking at auction proceeds,
3 ICANN has collected net revenues of approximately
4 \$240 million; is that correct?

5 A. That's about right.

6 Q. So if my math is correct, the .WEB auction
7 brought in somewhere north of 50 percent of that
8 \$240 million; is that fair to say?

9 A. If your math is correct, then yes, that is
10 correct.

11 Q. Now, ICANN represented to the community
12 that it would hold the auction proceeds in a fully
13 segregated bank and investment account earmarked
14 for use in a community-developed plan, correct?

15 A. You are going to have to tell me where we
16 represented that, because I don't recall that term.
17 I am not saying that -- I am not saying that -- I'm
18 saying that I don't remember us saying we would put
19 it in an entirely separate bank account, et cetera,
20 et cetera, et cetera. I don't remember any of
21 that.

22 Q. Okay. Are you aware that there is a CCWG,
23 a Cross Community Working Group, that was formed to
24 discuss the final plan for use of the funds; is
25 that correct?

1 A. I am aware of that, yes.

2 Q. Are you aware that they have yet to
3 develop a final plan for the use of those funds?

4 A. They have developed a number of proposals,
5 but the plan is as of yet still forming. We
6 anticipate we will be sending a report through to
7 the Board relatively soon.

8 Q. Since VeriSign paid the \$135 million
9 winning bid to ICANN, that money has earned
10 interest; is that fair to say?

11 A. Yes, I believe so. I wouldn't have any of
12 the details.

13 Q. Is it fair to say that ICANN has, in fact,
14 earned over \$10 million in interest on the auction
15 funds that it is holding in its bank in investment
16 accounts?

17 A. I have no idea. I could find out, but I
18 don't know.

19 Q. In the event that ICANN is required to
20 refund part or all of the \$135 million to VeriSign,
21 would it need to pay interest on that?

22 A. I don't know.

23 Q. If it is required to pay interest, would
24 it be a fair estimate to say that it is a
25 proportion relative to the overall value of the

1 \$135 million, as opposed to the full corpus that's
2 in that account?

3 A. I don't understand the question.

4 MR. LeVEE: Okay.

5 MR. LITWIN: I will rephrase. That was a
6 terrible question.

7 Q. Mr. Disspain, assuming my math is correct
8 and the \$135 million winning bid that was paid on
9 .WEB represents more than 50 percent of the corpus
10 of that investment account where the auction
11 proceeds are held --

12 A. Yes.

13 Q. -- is it fair to say that if ICANN is
14 required to refund that winning bid payment to
15 VeriSign and it had to pay interest on that, that a
16 reasonable estimate would be somewhere over 50
17 percent of the interest earned to date on that
18 account?

19 A. Well, there are so many ifs in that
20 question it is not helping me to answer it. I
21 don't know.

22 If you're saying -- I mean, if you're
23 asking me if you took the full amount of the money
24 and you got paid 1 percent interest on it and if
25 ICANN was refunding that money to VeriSign and it

1 was required to refund the portion of the interest,
2 then obviously it seems to me logical to say that
3 the 1 percent on that money would be paid. But I
4 don't know for sure, and I have no idea what the
5 actual arrangements are off the top of my head.

6 Q. Is it true that ICANN has already moved
7 \$36 million out of this account that holds the
8 auction proceeds and moved it into ICANN's reserve
9 fund?

10 A. It is correct that ICANN has repaid the
11 reserve fund with the amount of money calculated to
12 have been the cost of the gTLD Program, but that
13 is -- if you say that's 36 million, again, I'll
14 take your word for it. Off the top of my head, I
15 can't remember the exact amount. But yes, that is
16 correct, the amount, the costs of the new gTLD
17 Program have been refunded.

18 Q. And a reserve fund is used to pay
19 operating expenses when a company runs a deficit;
20 is that right?

21 A. Well, we could get into an extraordinarily
22 long discussion about what reserve funds are for
23 and whether it is a reserve fund and/or a
24 contingency fund, whether it should be the amount
25 of money to pay to wind down an organization in the

1 event that it's being wound up, et cetera, et
2 cetera. So I would prefer not to provide a
3 cast-iron definition of what a reserve fund is for.
4 It is entirely dependent on the organization
5 itself.

6 And ICANN has dipped into the reserve fund
7 on occasions and has a policy -- the Board has an
8 agreement, rather, to try to increase the amount of
9 the reserve fund to a reasonable amount. I can't
10 remember the exact number off the top of my head.

11 Q. When you say that ICANN has dipped into
12 the reserve fund, that is from time to time to pay
13 operating expenses, correct?

14 A. It pays some of the New gTLD expenses out
15 of its reserve funds, so yes. If you want to
16 characterize that as operating expenses, yes,
17 that's correct.

18 MR. LITWIN: Chuck, can you pull up Module
19 4 of the AGB, please, the applicant guidebook, and
20 I would refer your direction to Page 4-19.

21 ARBITRATOR BIENVENU: Is that in the
22 witness binder, Mr. Litwin?

23 MR. LITWIN: I am going to check, but I
24 don't believe it is.

25 ARBITRATOR BIENVENU: Okay. That's fine.

1 We will look at it on the screen.

2 MR. LITWIN: Oh, it is. It is Tab 6.

3 THE WITNESS: My strong advice is to tell
4 me to look at it on the screen instead of the
5 binder.

6 MR. LITWIN: Yeah, I think we have --
7 Chuck, I need Module 4, not Module 6. I think it
8 is Exhibit 314, if that helps. Okay. This is not
9 what I asked for.

10 Mr. Chairman, I am just going to go off
11 the record, but I think I am done with the witness.
12 May I have two minutes?

13 MR. ALI: Wait a second. You are not done
14 with the witness, Ethan. Why don't you and I just
15 have a chat first.

16 MR. LITWIN: Yeah, that's fine. That's
17 what I was going to say.

18 ARBITRATOR BIENVENU: Okay. So let's
19 pause for a few minutes to give counsel for the
20 claimant an opportunity to consult.

21 THE WITNESS: Mr. Chairman, are you okay
22 if I disappear briefly?

23 ARBITRATOR BIENVENU: I think you will be
24 made to disappear, but you may disappear.

25 THE WITNESS: Thank you so much. I

1 appreciate it.

2 (Whereupon a recess was taken.)

3 ARBITRATOR BIENVENU: All right. We are
4 ready to resume.

5 Mr. Disspain, I believe Mr. Litwin has
6 more questions for you.

7 Q. BY MR. LITWIN: Mr. Disspain, thank you
8 very much. I have just a couple of questions for
9 you.

10 Earlier, a few minutes ago, I represented
11 to you that ICANN had represented to the community
12 that it would hold the auction proceeds in a fully
13 segregated bank account, investment account
14 earmarked for community use.

15 I'd like to direct your attention to
16 Module 4 of the guidebook. This is Exhibit C-3.

17 Do you see that, sir, on your screen?

18 Mr. Disspain, I'll ask you again, do you
19 see Module 4 of the guidebook up on your screen
20 there?

21 A. Yes, I do.

22 Q. If we could turn to Page 4-19 of the
23 guidebook, which I understand is on Page 203 of the
24 PDF, and on that page, if you can bring up that
25 footnote on the bottom, please, you will see in

1 that second paragraph that the guidebook says that,
2 "Any proceeds from auctions will be reserved and
3 earmarked until the uses of funds are determined."

4 And then it says -- I am trying to find
5 where it says this -- that, "Possible uses of
6 auction funds include formation of a foundation
7 with a clear mission and transparent way to
8 allocate funds to projects that are of interest to
9 the greater Internet community."

10 Do you see that?

11 A. I do. That's what the working group is
12 currently working on, yes.

13 Q. And if you can -- if I could now call up
14 Exhibit 314, which are the Board resolutions.

15 MR. LeVEE: Is that in the binder?

16 MR. LITWIN: It is not.

17 Q. So these are -- if we could turn to Page
18 45, please.

19 MR. LeVEE: Ethan, if you would give me a
20 second with the exhibits. You are faster than I am
21 at putting them up, and I have to get copies.

22 MR. LITWIN: I understand that. Please
23 let me know when you're ready, Jeff.

24 MR. LeVEE: Thank you. Is it C-314?

25 MR. LITWIN: It is -- I believe it is. My

1 team has told me it is 314.

2 MR. LeVEE: Okay. I have got it. Thank
3 you. For the record, it is C-314, I believe.

4 Q. BY MR. LITWIN: Can we blow up Page 45,
5 please?

6 A. What is it I am actually looking at?

7 Q. These are the Board resolutions from
8 October 25th, 2018.

9 Chuck, can you just blow up that page?
10 I'm sorry, I apologize.

11 Arif, if you have anything on this, let me
12 know, but I'm sorry, I don't see the quote.

13 MR. ALI: Just one second, please.

14 ARBITRATOR KESSEDJIAN: I don't see the
15 Chair of the Tribunal anymore.

16 ARBITRATOR BIENVENU: I have lost my
17 connection, but I can still see the proceedings
18 using our administrative secretary's screen. I am
19 in the process of reconnecting.

20 ARBITRATOR KESSEDJIAN: Okay. You'll have
21 the time to find out what you want to show us.

22 (Discussion off the record.)

23 MR. LITWIN: Mr. Chairman, I would just
24 ask that, given that I cannot find what my team is
25 trying to refer to me, that perhaps Mr. Ali could

1 ask whatever question he is asking me to ask the
2 witness, just to be more efficient, given the time
3 limits.

4 ARBITRATOR BIENVENU: Mr. LeVee, any
5 objection to that?

6 MR. LeVEE: If it is one or two questions,
7 I have no objection to that.

8 ARBITRATOR BIENVENU: Mr. Ali, good
9 afternoon to you, and please proceed.

10 MR. De GRAMONT: Mr. Chairman, this is
11 Mr. De Gramont. Mr. Ali is just trying to find the
12 relevant page. This is one of the challenges of
13 having everybody spread out in different places,
14 and the associate who knows the documents best is
15 at home in Pennsylvania.

16 So if you'll just bear with us for another
17 minute, we'll be right back. Thank you.

18 ARBITRATOR BIENVENU: Thank you.

19 (Whereupon a recess was taken.)

20 MR. LeVEE: I wonder if the Panel has
21 questions. They could begin, conscious of the
22 time.

23 ARBITRATOR BIENVENU: Does that foreshadow
24 the length of your redirect, Mr. LeVee?

25 MR. LeVEE: It is only because I do not

1 know how long the members of the Panel will ask
2 questions.

3 ARBITRATOR BIENVENU: I was joking.

4 I think I prefer to wait until the
5 cross-examination is completed.

6 (Whereupon a recess was taken.)

7 ARBITRATOR BIENVENU: Please proceed,
8 Mr. Ali.

9 MR. ALI: Thank you, Mr. Chairman.

10 CROSS-EXAMINATION

11 BY MR. ALI

12 Q. Mr. Disspain, good afternoon. This is
13 Arif Ali here. It's been a long time since we have
14 seen each other.

15 A. It has, indeed.

16 Q. At the bottom of Page 66, you see that
17 language that says "Resolved"?

18 A. Yeah.

19 Q. "The Board directs the president and CEO,
20 or his designee(s)"?

21 A. Yep.

22 Q. Then we go to the top of the next page,
23 "to take all actions necessary to increase the
24 Reserve Fund through annual excesses from the
25 operating fund of ICANN organization by a total

1 amount of 32 million over a period of seven to
2 eight years starting with fiscal year 2019."

3 So my question is: If that money -- those
4 are moneys that are coming from the auction fund;
5 is that correct?

6 A. No. That's a resolution to direct the
7 president and CEO to take all actions necessary to
8 increase the reserve fund through annual excesses
9 from the operating fund by 32 million over a period
10 of seven to eight years. If they were to take
11 funds from the auction proceeds fund, then it would
12 be able to come out in one go and it would say
13 "auction proceeds funds" rather than "operating
14 fund."

15 Q. All right. Then let's continue down
16 below.

17 A. Yep. That's the resolution that deals
18 with the repayment of the costs of the -- of the
19 new gTLD Program, I believe.

20 Q. So what you're telling us is that no money
21 has been taken from the proceeds of the auctions to
22 fund the reserve fund?

23 A. That is correct. I am telling you that
24 one payment has been made -- well, a payment, I
25 don't know if it was one, but the new gTLD Program

1 was costed to be a cost of 36 million, and the
2 Board resolved that the auction proceeds should --
3 the 36 million should be taken from the auction
4 proceeds.

5 And I believe from memory that that means
6 that the Cross Community Working Group is working
7 on the principle that the funds for .WEB being cast
8 aside to a different category, that there is
9 roughly speaking, ignoring those, roughly speaking,
10 some 80-something to \$3 million left of the
11 proceeds, apart from the .WEB proceeds, and that is
12 the number they are working on, because no one has
13 any idea what will happen to the .WEB proceeds at
14 this stage.

15 And there is a separate resolution above
16 that which has to do with ongoing replenishment of
17 the reserve fund over a period of seven to eight
18 years, which is the Board's decision based on the
19 fact that the Board believes that that should be
20 set at a particular level, and I cannot remember
21 off the top of my head what that level is.

22 Q. None of those moneys from the reserve fund
23 would come from the auction proceeds; that's your
24 testimony?

25 A. Didn't say that. I said that the \$36

1 million from the auction proceeds that you referred
2 to here is repayment to the -- for the new GTLD
3 process -- sorry, new gTLD Program costs.

4 The previous resolution refers very
5 specifically to \$32 million being funded into the
6 reserve fund from annual excesses from the
7 operating fund of ICANN over seven to eight years,
8 which is not the same as the auction proceeds.

9 MR. ALI: Thank you, Mr. Disspain. I have
10 no further questions.

11 ARBITRATOR BIENVENU: Thank you, Mr. Ali.

12 Mr. Litwin, does that complete the
13 cross-examination of Mr. Disspain by the claimant?

14 MR. LITWIN: It does, Mr. Chairman.

15 Mr. Disspain, thank you very much, and I
16 do apologize about the kerfuffle at the end here.

17 THE WITNESS: There is nothing to
18 apologize for except possibly your binder.

19 ARBITRATOR BIENVENU: So do my colleagues
20 have questions for Mr. Disspain, or shall I begin
21 and you have supplementary questions and you go
22 after? What's your preference?

23 ARBITRATOR CHERNICK: Go ahead, Pierre.

24 ARBITRATOR KESSEDJIAN: Yeah, I think
25 that's good if you go ahead.

1 ARBITRATOR BIENVENU: Mr. Disspain, just a
2 couple of questions.

3 Turning your mind back to the November
4 2016 workshop session concerning .WEB, and
5 repeating the caution not to disclose any
6 privileged communication or any privileged advice,
7 do you know whether, as part of the briefing that
8 was provided to the Board at that session, the
9 staff of ICANN or, you know, what I think you
10 referred to as ICANN org had taken a position and
11 that position was conveyed to the Board as to
12 whether the NDC bid complied with the program? Was
13 there an ICANN staff position on this question?

14 THE WITNESS: I think I understand your
15 question, Mr. Chairman.

16 MR. LeVEE: Mr. Chairman, I am really
17 uncomfortable making this objection, but I do think
18 you are asking about the contents of a privileged
19 communication.

20 ARBITRATOR BIENVENU: Because you -- well,
21 I do not want to do so.

22 Basically it is a question I asked
23 Ms. Willett, I believe, what I tried to explore
24 with Ms. Willett, but if you're saying that
25 whatever position ICANN staff would have taken

1 would reflect the advice of counsel, I am prepared
2 to move forward.

3 MR. LeVEE: I am saying that.

4 ARBITRATOR BIENVENU: Okay. Very well.

5 Mr. Disspain -- and forgive me, Mr. LeVee,
6 I really didn't want to elicit privileged
7 communications or advice.

8 MR. LeVEE: Fair enough.

9 ARBITRATOR BIENVENU: Mr. Disspain, did
10 the Board discuss at the November 2016 working
11 session that its decision not to take any action
12 regarding the claims arising from the .WEB auction
13 should not be made public, including should not be
14 communicated to those who were within the
15 contention set? Was that part of the discussion?

16 THE WITNESS: No, I don't believe it was.

17 ARBITRATOR BIENVENU: And you as a Board
18 member, do you know that the decision taken by the
19 Board at that workshop session was only
20 communicated to the claimant as is alleged by the
21 claimant in the course of these proceedings?

22 THE WITNESS: Forgive me, Mr. Chairman. I
23 am not sure I actually understand your question.

24 ARBITRATOR BIENVENU: Let me reformulate
25 it.

1 Are you aware, as you sit here today, that
2 the decision taken by the Board during that
3 workshop was only communicated to Afiliias in the
4 course of the proceedings in this IRP, so just very
5 recently?

6 THE WITNESS: No. I am now aware of that.
7 I wasn't aware of that at the time. I am aware of
8 it because it's been mentioned.

9 ARBITRATOR BIENVENU: At the November 2016
10 session, Mr. Disspain, you were made aware that
11 Afiliias -- and you might have been aware of that
12 from prior correspondence -- was taking the
13 position that NDC's bid, supported as it was by
14 VeriSign through an agreement with NDC, that
15 Afiliias was taking the position that that bid did
16 not comply with the guidebook and the auction
17 rules, correct?

18 THE WITNESS: Yes, I am aware that Afiliias
19 had said that in correspondence.

20 ARBITRATOR BIENVENU: So after the
21 November 2016 working session, you knew as a Board
22 member that the question of whether the bid was
23 compliant or not was a pending question, one on
24 which the Board had not pronounced and had decided
25 not to address in November 2016; is that correct?

1 THE WITNESS: Yes. I was -- I knew that
2 we had not -- that it had not been addressed.
3 Well, no -- yes, you're right. I knew that.

4 ARBITRATOR BIENVENU: Right. And by early
5 2018, the situation as I have just described it,
6 remained unchanged; is that correct?

7 THE WITNESS: Yes.

8 ARBITRATOR BIENVENU: Can you look now at
9 Paragraphs 12 and 13 of your witness statement?

10 THE WITNESS: Yes.

11 ARBITRATOR BIENVENU: And there you refer
12 to the events of the first half of the year 2018?

13 THE WITNESS: Correct.

14 ARBITRATOR BIENVENU: So first you
15 referred to the DOJ announcement in January 2018
16 that it had closed its investigation?

17 THE WITNESS: Correct.

18 ARBITRATOR BIENVENU: Then to the
19 withdrawal by Donuts of its CEP?

20 THE WITNESS: Correct.

21 ARBITRATOR BIENVENU: And then the denial
22 by the Board of Afiliias' reconsideration request
23 regarding its document requests, correct?

24 THE WITNESS: Correct.

25 ARBITRATOR BIENVENU: And then you come to

1 ICANN's decision in June 2018 to change the status
2 of the .WEB contention set and send a draft
3 Registry Agreement for .WEB to NDC?

4 THE WITNESS: Correct.

5 ARBITRATOR BIENVENU: And in Paragraph 13,
6 you mention that this was a decision of ICANN
7 staff.

8 Do you see that?

9 THE WITNESS: I do.

10 ARBITRATOR BIENVENU: Does that mean that
11 the Board was not consulted about this decision?

12 THE WITNESS: Well, it depends on what you
13 mean by the word "consulted." But let me tell you
14 what actually happened. Perhaps that would be
15 helpful.

16 Again, I can't give you dates, but I can
17 tell you that prior to the -- I think I have
18 already said this to Mr. Litwin. Prior to the
19 lifting of the hold on the contention set, the
20 matter was discussed in the Board Accountability
21 Mechanisms Committee, I believe as part of its
22 general litigation update, but I am not certain.

23 In that discussion we were told that the
24 next step in the process was for -- should all of
25 the accountability mechanisms be dealt with, was

1 for it to come off hold, but that Afiliias had made
2 it abundantly clear that in the event that it did
3 come off hold, that they would file an IRP.

4 And we were also clear as a Board
5 committee that Afiliias would be aware that it had
6 come off hold because all of the contention set
7 members would be informed that it had come off
8 hold. So that occurred.

9 And then secondly, a couple days -- again,
10 I don't know exactly, I can't remember exactly
11 when -- after it had actually come off hold, there
12 was another discussion at which we were told that
13 it had come off hold and that an IRP claim from
14 Afiliias was expected -- I am going to paraphrase
15 here -- at any minute, so to speak, because that is
16 what they said they would do.

17 I hope that's helpful and clear.

18 ARBITRATOR BIENVENU: Yes, it is. In
19 fact, it kind of anticipates what was my next
20 question. When you say in the penultimate sentence
21 of Paragraph 13, "Given the letters we had received
22 from Afiliias threatening to take legal action in
23 such circumstances, I fully expected, as did
24 others, that Afiliias would immediately initiate
25 another Accountability Mechanism" --

1 THE WITNESS: Yes.

2 ARBITRATOR BIENVENU: -- so that suggests
3 that you as a Board member actually turned your
4 mind to this issue. And in light of that
5 expectation -- well, I shouldn't say that, but you
6 turned your mind to this, and you anticipated that
7 an IRP would be coming?

8 THE WITNESS: We as a group meeting --
9 again, I'm sorry. I cannot remember. I am fairly
10 sure it was the Board Accountability Mechanisms
11 Committee meeting, but I imagine there would have
12 been other Board members present as well. We were
13 very clear that our understanding was that Afilias
14 had said categorically that they would launch an
15 IRP in the event that the contention set was taken
16 off hold.

17 ARBITRATOR BIENVENU: By ICANN sending a
18 draft Registry Agreement to NDC for execution,
19 would you consider, Mr. Disspain, that ICANN was,
20 in effect, expressing disagreement with those who
21 claimed that NDC's bid was noncompliant and that
22 the auction rules had been breached by NDC because
23 of its agreement with VeriSign?

24 THE WITNESS: No, I don't think so. I
25 think that ICANN was taking the next step in its

1 process. You know, there are two -- without
2 wishing to place any weight on either side in this
3 matter, there are two sides. There are the Afilias
4 side, who are bringing this IRP; and then there are
5 others on the other side who believe that they are
6 entitled to the TLD. So both sides need to be
7 treated fairly by ICANN. The best way for ICANN to
8 do that is to follow its process.

9 To be clear, having been told in no
10 uncertain terms by Afilias that they were intending
11 to lodge an IRP, that is what we expected to
12 happen, and that is exactly what did happen. I
13 don't think you can read into the step, the process
14 step, a motive, if you will, that says we,
15 therefore, believe that this is the right thing to
16 do.

17 ARBITRATOR BIENVENU: Let us assume,
18 Mr. Disspain, that contrary to your and your
19 colleagues's expectations, Afilias had not
20 commenced an IRP, what would have happened then?
21 Would ICANN have executed the Registry Agreement
22 that NDC had promptly signed and returned to ICANN?

23 THE WITNESS: Well, Mr. Chairman, I can't
24 say what would have happened. I can say that the
25 Board would have known that Afilias had not filed

1 an IRP. I can say that the Board -- when I say
2 "the Board," I am mainly talking about the
3 Accountability Mechanisms Committee, but for the
4 purposes of this discussion, it amounts to the same
5 thing, and that the Board would have known that the
6 contract -- or the BAMC had known that the contract
7 had been returned, and I can't say what the Board
8 would have done in those circumstances. But I can
9 say that the Board would have been aware.

10 ARBITRATOR BIENVENU: Are you aware,
11 Mr. Disspain, that in November 2018, after Afiliias
12 filed its IRP, ICANN took the position in the
13 context of the IRP that it would only keep the dot
14 contention set on hold until 27 November 2018, so
15 as to give an opportunity to Afiliias to file a
16 request for emergency relief, barring which --
17 barring which ICANN would take the contention set
18 off of its on-hold status?

19 THE WITNESS: Yes, I am.

20 ARBITRATOR BIENVENU: You were aware of
21 that?

22 THE WITNESS: And I am aware that this is
23 the practice in respect to IRPs, that the process
24 itself -- it differs slightly from the way that
25 reconsideration requests are dealt with, in that

1 there is a mechanism by which the claimant can
2 bring a -- I think you used the expression
3 "emergency relief claim" to stay the moving
4 forwards. So yes, I am aware of that and that that
5 is the practice.

6 But I am not ICANN's lawyer, and what
7 lawyers instructed, advised us to do, I can't
8 comment.

9 ARBITRATOR BIENVENU: And what I'm
10 interested in asking you, Mr. Disspain, is whether
11 in so doing, ICANN was again taking a position that
12 might have resulted in .WEB being awarded to NDC,
13 delegated to NDC without the Board having the
14 opportunity to determine the question that it chose
15 not to pronounce upon in November 2016, namely
16 whether the bid was compliant?

17 THE WITNESS: So the answer to that
18 question is, again, I need to say I don't know what
19 the Board would have done, but to take the leap to
20 say does ICANN's position in the legal proceedings
21 imply that the delegation would have taken place is
22 a leap -- is not a leap I would take because I
23 don't know what the Board would have done.

24 And it is not -- it is impossible to
25 suggest that the Board would have stepped in, but I

1 don't know. I can't say whether they would or
2 wouldn't. That is purely a hypothetical.

3 ARBITRATOR BIENVENU: Now, I assume that
4 you are aware that in this IRP, as we speak today,
5 ICANN takes no position as to whether NDC's bid
6 violated the guidebook or not, you're aware of
7 that?

8 THE WITNESS: Yes.

9 ARBITRATOR BIENVENU: So the matter, then,
10 comes before -- the matter comes before the IRP
11 Panel, and the Panel doesn't have the benefit of
12 ICANN's view on the -- on whether the bid is
13 compliant or not even though the guidebook emanates
14 from ICANN.

15 You don't think it would have been useful
16 to the Panel to have the view of ICANN as to the
17 reach or the interpretation of the guidebook in
18 relation to an agreement like the DAA?

19 THE WITNESS: Well, I think two things,
20 Mr. Chairman. I think that the Board -- the Board
21 has rigorously stuck to its practice and its
22 processes.

23 And secondly, that the scope of the Panel,
24 as I understand it, doesn't stretch to a
25 discussion -- or, rather, a decision in respect to

1 the actual DAA itself.

2 Now, I am not holding myself out as an
3 expert in this respect. I am merely reading the
4 bylaws. That's my understanding. So I can only
5 say what I understand.

6 ARBITRATOR BIENVENU: I think you have
7 very accurately described the position of ICANN
8 before the Panel, but the claimant is taking a
9 different position.

10 THE WITNESS: I understand that.

11 ARBITRATOR KESSEDJIAN: Mr. Chairman, can
12 I ask a follow-up question on this one without
13 interrupting you, or do you want to finish your
14 questions?

15 ARBITRATOR BIENVENU: No, if it is a
16 follow-up question.

17 ARBITRATOR KESSEDJIAN: Mr. Disspain, this
18 is Catherine Kessedjian. I am speaking from Paris,
19 so we are actually closer.

20 THE WITNESS: Is it as hot there as it is
21 here?

22 ARBITRATOR KESSEDJIAN: It's very warm.

23 I have a follow-up question on this very
24 question of how you understand the scope of the
25 jurisdiction of the IRP. It is one of the issues

1 we have.

2 You just said that you don't think -- you
3 were careful, and if I rephrase in a way that is
4 not correct, please interrupt me.

5 But you said that you don't think that the
6 IRP jurisdiction will stretch to whether or not the
7 DAA was validly entered into considering the
8 guidebook rules; is that correct?

9 THE WITNESS: Yes. That is, in essence,
10 what I said, yes.

11 ARBITRATOR KESSEDJIAN: Okay. So if you
12 consider this is not our jurisdiction, whose
13 jurisdiction is that? Where does an applicant go
14 to have this question resolved?

15 THE WITNESS: Well, Professor, that is an
16 extraordinarily good question, and I believe that
17 at the end of the day, the answer may well be that
18 it is a matter for the Board. But that's just my
19 opinion, and I am not here to debate the legal
20 issues.

21 The IRP itself is -- the bylaws are very
22 clear about what an IRP does and what an IRP does
23 not do.

24 Let me suggest something to you as a sort
25 of answer to your question.

1 The Board -- I was asked earlier on what
2 would have happened if the Board had not -- if the
3 IRP had not happened, and I said I don't know
4 because I don't know what the Board would have
5 done.

6 What I do know is what the Board will do
7 with respect to this IRP. If the IRP finds in
8 favor of ICANN, the Board is going to consider the
9 decision of that IRP, and what the Board will do is
10 to take very seriously -- it will operate within
11 its fiduciary responsibility and its responsibility
12 to the community, within its responsibility to
13 ICANN's mission and bylaws and public interest, and
14 it will take very seriously anything that the Panel
15 says by way of recommendation outside of its
16 decision on the finer points of what the Panel's
17 scope extends to in respect to the bylaws.

18 Now, I can't say what the Board will do,
19 and I can't say that the Board will necessarily do
20 anything. But what I can say is that this Panel
21 operates under the terms of the bylaws, and I think
22 my understanding of an interpretation of bylaws is
23 the correct one.

24 I don't know if that's helpful.

25 ARBITRATOR KESSEDJIAN: I am just

1 surprised by the beginning of your answer, or
2 beginning of your explanation, for which I am very
3 grateful.

4 Sorry, I don't have the feed of the court
5 reporter.

6 THE WITNESS: Not a problem.

7 ARBITRATOR KESSEDJIAN: Did you say that
8 the Board would take seriously only if the IRP was
9 in favor of ICANN?

10 THE WITNESS: No, no, no. I was not
11 suggesting that at all, no. What the Panel decides
12 is what the Panel decides. I was simply suggesting
13 that if the Panel -- I was simply saying that the
14 Panel -- it is open to the Panel to make its
15 decision.

16 And if the Panel, on making its decisions,
17 makes a series of recommendations, those
18 recommendations are something that we treat very
19 seriously by the Board.

20 ARBITRATOR KESSEDJIAN: Thank you very
21 much.

22 THE WITNESS: That's all I was trying to
23 say. I hope that's clearer.

24 ARBITRATOR KESSEDJIAN: Yes, indeed.

25 THE WITNESS: I apologize if we missed

1 each other.

2 ARBITRATOR KESSEDJIAN: No, no, that's
3 great. Thank you.

4 ARBITRATOR BIENVENU: My last question,
5 Mr. Disspain, is the following: I am speaking
6 under the control of Mr. LeVee, but I understand --
7 not because we are treading near privilege, but
8 because I am about to summarize the position of
9 ICANN.

10 THE WITNESS: Okay. Thank you.

11 ARBITRATOR BIENVENU: I think I am correct
12 in describing ICANN's position in this IRP as being
13 that the proper scope of the IRP requires the Panel
14 to limit itself in deciding whether in making the
15 decision that it did in November 2016, the Board
16 acted reasonably.

17 My question to you is: Let us imagine
18 that we accept that position and that we refuse the
19 claimant's invitation to pronounce on the question
20 of whether the NDC's bid was compliant with the
21 program rules, then what will happen then and when
22 will the Board have an opportunity to resolve that
23 question and to pronounce upon it?

24 THE WITNESS: Thank you. I am going to,
25 in some respects, repeat what I just said to

1 Professor Kessedjian, but in the context of your
2 question. So when will the Board have an
3 opportunity?

4 My recollection is that the Board, there
5 is a set time frame in which the Board must address
6 any decision made by the Panel. I can't remember
7 what it is off the top of my head, but there is a
8 set time frame. So that is the answer, whatever
9 the set time frame is, that's the answer to that
10 question.

11 In respect to what the Board will do, I
12 don't know what the Board will do. Let me say it
13 again. I believe that the Board would take very
14 seriously any recommendations made by this Panel
15 outside of its decision within scope. This Panel
16 would have heard everything, and this Panel will
17 be -- what it says in respect to its decision is
18 its decision.

19 If it wants to make a series of
20 recommendations outside of its decision, I am
21 saying, when the Board looks at the decision of
22 this Panel, I would expect the Board to take those
23 recommendations very seriously.

24 ARBITRATOR BIENVENU: My question was
25 slightly different --

1 THE WITNESS: I apologize.

2 ARBITRATOR BIENVENU: -- than Professor
3 Kessedjian's question.

4 My question was: If we accept ICANN's
5 submission that in making the decision that it did,
6 the Board acted reasonably, and accept the further
7 submission by the respondent that we should go no
8 further, then the question that was not addressed
9 in November 2016 and that remains as yet
10 unaddressed, when will that question be resolved?

11 THE WITNESS: I don't know. All I can
12 tell you is that pursuant to the decision of this
13 Panel, the Board will meet and the Board will
14 consider what this Panel has to say. But I can't
15 give you -- I apologize. I can't give you a
16 clearer answer than that.

17 ARBITRATOR BIENVENU: No, that's fair
18 enough. Thank you. Thank you, Mr. Disspain.

19 Any questions from my colleagues?

20 ARBITRATOR CHERNICK: No, thank you.

21 ARBITRATOR KESSEDJIAN: No other
22 questions.

23 ARBITRATOR BIENVENU: Mr. LeVee, any
24 redirect?

25 MR. LeVEE: I do have some redirect. I am

1 mindful that it is seven minutes before we are
2 supposed to conclude, and if it's possible to go
3 over just a couple, I'll do my best to be
4 efficient.

5 ARBITRATOR BIENVENU: Thank you,
6 Mr. LeVee.

7 REDIRECT EXAMINATION

8 BY MR. LeVEE

9 Q. Mr. Disspain, thank you for staying with
10 us.

11 Let me return you briefly to the November
12 2016 meeting.

13 Do you recall anyone at the meeting
14 voicing opposition to the decision that was taken?

15 A. Do you mean voicing opposition to deciding
16 that we would not do anything pending the
17 accountability mechanisms running their course?

18 Q. Yes.

19 A. No, I do not.

20 Q. You were asked about whether the bylaws
21 required the publication of a decision from a
22 workshop like this.

23 A. Yes.

24 Q. I am not going -- I don't have the time to
25 take you through all the bylaws.

1 Do you have an understanding of whether
2 the bylaws require publication of actions taken at
3 Board workshops?

4 A. I don't believe that the bylaws do.

5 Q. Okay. Now, you were shown an application
6 under the DIDP policy, but you were not shown the
7 response. So I am going to ask Ms. Ozurovich to
8 bring up the response, and I think the exhibit
9 number is VeriSign-24.

10 Do you see that on your screen?

11 A. Yes, I do.

12 Q. And this is dated 24 March 2018.

13 Do you see that?

14 A. I do. Very large font now.

15 Q. The very first paragraph, can you read it
16 without Ms. Ozurovich blowing it up?

17 A. Yeah, I can read that perfectly well.
18 Thank you.

19 Q. Okay. In the first paragraph it
20 references a letter dated 23 February 2018, which
21 was Exhibit C-78 that you were shown earlier?

22 A. Yep, I remember that.

23 Q. And it included a request for an update
24 and then also a request under the DIDP policy.

25 Do you see that?

1 A. Yes, I do.

2 Q. And there was a statement by counsel that
3 ICANN provided no documents in response.

4 I wanted just briefly to show you that --
5 have you seen this before?

6 A. No, not that I can recall.

7 Q. Okay. Do you know --

8 A. Who is it from?

9 Q. Well, it is from ICANN.

10 A. Okay. Fine.

11 Q. Do you know whether as part of the DIDP
12 response ICANN refers people who submit DIDP
13 applications to documents that are in -- that are
14 publicly available?

15 A. I do know that ICANN does that, if the
16 document is published, then they will say go here.

17 Q. Okay. So ICANN doesn't actually send
18 copies of the documents; ICANN identifies where in
19 the public domain those documents exist?

20 A. Absolutely.

21 Q. So just by way of example, if you look --
22 I am going to go to Page 6. We are going to look
23 at the -- that's 4. If you look at the bottom, do
24 you see where it says, "Item 4, all applications
25 and all documents," et cetera, et cetera?

1 A. Yep.

2 Q. You see that ICANN provided links to a
3 number of materials?

4 A. Yep.

5 Q. I am going to ask you to turn to Page 16,
6 Ms. Ozurovich, just so you can see that initially
7 the response is 16 pages. I am not going to take
8 the time to go through all the responses.

9 Do you see that?

10 A. Yep.

11 Q. And then if you turn, Ms. Ozurovich, just
12 sort of scan through the next page, next several
13 pages, through Page 28, are additional links that
14 ICANN provided to Afilias and its counsel where
15 materials can be found?

16 A. Correct.

17 Q. And is that what you understand to be
18 ICANN's policy in terms of responding to the DIDP
19 request?

20 A. When you say is that what I understand,
21 you mean where the documents are public to provide
22 links? Yes.

23 Q. Yes.

24 A. Yes.

25 Q. Do you understand whether ICANN discloses

1 information that is privileged in response to a
2 DIDP request?

3 A. No, it doesn't.

4 Q. Okay. You were asked about the extent to
5 which ICANN's practice of keeping contention sets
6 on hold as a result of accountability mechanisms --
7 and I am not going to -- I am trying to avoid
8 saying what you said, but you reference the
9 possibility that ICANN has published material on
10 this topic.

11 Do you remember your testimony on that?

12 A. Yes, I did. I said it is possible. I
13 have no idea whether it's happened or not, but it
14 is possible.

15 Q. Let me ask everyone to take a look at
16 Exhibit R-33. Do you recall that ICANN published
17 updates on application status and contention sets
18 from time to time?

19 A. I certainly do, yeah.

20 Q. This particular one is dated August 1,
21 2016. Do you know if ICANN published them
22 regularly?

23 A. Yes. But how regularly, I don't know.

24 Q. Okay. And you can see -- I am not going
25 to read it all. I am going to go to the second

1 page in a second, but you can see that in the
2 middle there's a bold that says "Application Status
3 and Contention Set Status."

4 Do you see that?

5 A. Yes, yes.

6 Q. Toward the bottom it says "Explanation of
7 Application Status."

8 Do you see that?

9 A. Yes, I do.

10 Q. Now, I am going to just read at the
11 bottom. It says, "Alternatively" -- the very last
12 line, "Alternatively, the page may reflect one of
13 the following statuses for an application."

14 Do you see that?

15 A. Yep, yes.

16 Q. Okay. Now we'll turn the page. I am
17 going to have Ms. Ozurovich blow up just that top
18 section, just like that.

19 A. Brilliant.

20 Q. So one of the statuses is that the
21 application has been withdrawn, correct?

22 A. Yes, yep.

23 Q. Another is that it is not approved?

24 A. Yep.

25 Q. Another is that it will not proceed?

1 A. Yep.

2 Q. And then it says, "On-Hold"?

3 A. Yes.

4 Q. "May be applied if there are pending
5 activities (e.g., ICANN accountability mechanisms,
6 ICANN public comment periods)," so forth and so on?

7 A. Yep.

8 Q. Is that some recognition of the practice
9 that ICANN posted on its website that
10 accountability mechanisms result in an on-hold
11 status?

12 A. Yes.

13 Q. Okay.

14 ARBITRATOR BIENVENU: What's the exhibit
15 number of this document that you just introduced?
16 Because the transcript says 433.

17 MR. LeVEE: "R," as in "Robert," 33.

18 ARBITRATOR BIENVENU: R-33, thank you.

19 MR. LeVEE: Of course.

20 Q. Do you know whether in June 2018 -- I
21 think I misspoke.

22 You may be on mute, Mr. Disspain.

23 A. Sorry. I had to close the window due to
24 bats flying around.

25 Q. Sounds like a good excuse.

1 A. Trust me, you don't want one in the house.

2 Q. I am positive.

3 Do you know whether prior to June of 2018,
4 when Afiliias initiated what was actually a CEP at
5 that time, do you know whether Afiliias had
6 initiated an accountability mechanism relating to
7 the .WEB auction?

8 A. Not as far as I can recall.

9 Q. Okay. So the status at that time was that
10 Afiliias had sent letters?

11 A. Yeah, they sent heaps of letters saying
12 this was wrong, this should happen, that should
13 happen, et cetera. The questionnaire had gone out
14 and so on.

15 But they had not of themselves actually
16 filed any form of -- ignoring the DIDP, which is
17 separate, they had not filed any accountability
18 mechanism in this .WEB matter, no.

19 Q. Okay. In your witness statement, which is
20 the first tab of the binder, if you'd like to look
21 at it.

22 A. Yeah.

23 Q. You say -- I am not going to read it, but
24 you comment -- you address how ICANN deals with
25 letters, right?

1 A. Yeah, yep.

2 Q. And the practice of ICANN was that absent
3 the accountability mechanisms, such as a
4 reconsideration request, CEP and so forth, that was
5 the way to know that a contention set would be
6 placed on hold; is that correct?

7 A. Well, kind of. In essence, the way I
8 would put it is you can write whatever letters you
9 like. The way that you move forward with an issue
10 of this nature is through using ICANN's
11 accountability mechanisms. That's what they are
12 there for.

13 MR. LeVEE: Mr. Chairman, may I take one
14 minute to consult with my colleagues, including
15 Mr. Smith, who, of course, is in San Francisco?

16 ARBITRATOR BIENVENU: Of course.

17 MR. LITWIN: Before we break, I would beg
18 the Panel's indulgence to allow me one brief
19 recross on a document that was inspired by your
20 question, Mr. Chairman, that I think would clarify
21 one of Mr. Disspain's responses. It would be no
22 more than two minutes.

23 ARBITRATOR BIENVENU: That's fine. We
24 will hear the question, but first I will allow
25 Mr. LeVee to consult his colleagues.

1 MR. LeVEE: Just for the record,
2 Mr. Chairman, I do object to redirect -- sorry,
3 recross. It is not part of the rules. It is not
4 something we have done, and I just want the
5 objection noted for the record.

6 (Whereupon a recess was taken.)

7 ARBITRATOR BIENVENU: Mr. LeVee.

8 MR. LeVEE: I have no additional
9 questions. I do repeat that I am concerned about
10 recross, and if there is recross, I would ask that
11 I be given at least the opportunity to respond to
12 it.

13 ARBITRATOR BIENVENU: Yes, yes, well, I
14 agree with you that there is no recross, but I
15 didn't understand Mr. Litwin to ask for recross,
16 and if he did, I would disallow it.

17 However, we are an international
18 arbitration, and it is customary to allow counsel
19 to ask, you know, supplementary questions if they
20 arise out of redirect.

21 So I am sure that Mr. Litwin will be
22 disciplined, as he should be at this stage in the
23 process, and ask a question that only is
24 supplemental to your redirect, and he will do so
25 under our watchful eye.

1 MR. LeVEE: Thank you, Mr. Chairman.

2 MR. LITWIN: Mr. Chairman, just as a point
3 of clarification, my question arises not out of
4 Mr. LeVee's redirect, but in response to an answer
5 Mr. Disspain gave to one of your questions.

6 ARBITRATOR BIENVENU: That's fine. Please
7 proceed, but understand this is a supplementary
8 question, not a continuation of your cross.

9 MR. LITWIN: I understand, Mr. Chairman.

10 SUPPLEMENTARY EXAMINATION

11 BY MR. LITWIN

12 Q. Mr. Disspain, do you recall the Chairman
13 asking you about whether or not the Registry
14 Agreement would have been signed by ICANN in June
15 of 2018?

16 A. Can I interrupt you for one second? I
17 lost you at the beginning of your question. I just
18 heard you for the last ten seconds.

19 Can you go back and start again for me,
20 please?

21 Q. Mr. Disspain, do you recall that the
22 Chairman asked you whether or not ICANN would have
23 executed the Registry Agreement in June of 2018,
24 and you said that one way or another, you could not
25 speculate as to what would have happened?

1 Do you recall that?

2 A. Yes.

3 MR. LITWIN: I would ask Chuck to bring up
4 Exhibit 170, please.

5 MR. LeVEE: Mr. Chairman, I can tell
6 already, this is recross.

7 ARBITRATOR BIENVENU: I'll allow the
8 question, Mr. LeVee.

9 Q. BY MR. LITWIN: Mr. Disspain, I am showing
10 you an email that was sent from Mr. Grant Nakata
11 from ICANN internally, and he writes, "I want to
12 provide an update on the WEB Registry Agreement."

13 This email was sent on June 20th, 2018,
14 two days after Afilias filed its CEP.

15 He says, "Prior to the execution of the
16 WEB Registry Agreement, we received notice that a
17 Cooperative Engagement Process (CEP) was initiated
18 on .WEB. The .WEB/WEBS contention set has been
19 placed On Hold. We will void the current Registry
20 Agreement (via DocuSign). If or when we are able
21 to proceed, we will reinitiate this approval
22 process."

23 If you look down in this document at the
24 bottom of Page 1 and onto Page 2, you will see that
25 the Registry Agreement had been approved by

1 Ms. Christine Willett and the other members of her
2 team.

3 Do you see that, sir?

4 A. It would appear so, yes.

5 Q. So does that refresh your recollection
6 that had Afiliias not filed its CEP, that ICANN was
7 ready to sign the Registry Agreement?

8 A. No, it doesn't, because this doesn't
9 refresh my recollection. I don't have a
10 recollection. I simply said what I said. I am not
11 aware of these emails. They are internal emails,
12 so I can't comment on them.

13 Q. That's because the Board does not have to
14 approve a Registry Agreement. It simply required
15 the signature of Mr. Atallah; is that correct?

16 A. The Board does not have to approve an
17 agreement, that is correct. However, as I already
18 said, the BAMC in its discussion with ICANN org
19 prior to -- sorry, post the lifting of hold would
20 have been aware if Afiliias had not filed a --
21 what's the word I'm looking for? Accountability
22 mechanism, that's the word. Thank you.
23 Accountability mechanism.

24 But I am talking about what the Board was
25 doing. I can't tell you what ICANN org was doing.

1 That's a matter for ICANN org.

2 MR. LITWIN: Okay. Thank you,
3 Mr. Chairman.

4 ARBITRATOR BIENVENU: Thank you,
5 Mr. Litwin.

6 Mr. LeVee?

7 MR. LeVEE: I do not have follow-up.
8 Thank you.

9 ARBITRATOR BIENVENU: Mr. Disspain, it
10 remains for me and the members of the Panel and,
11 indeed, all the participants in this process, to
12 thank you very much for your time and for your
13 evidence. We appreciate it very much.

14 THE WITNESS: Thank you very much, indeed.

15 MR. LITWIN: Thank you, Mr. Disspain.

16 THE WITNESS: Thank you, Mr. Chairman.
17 Thank you all.

18 ARBITRATOR BIENVENU: Mr. Disspain, one
19 last point. Per the sequestration order, it
20 requires that I instruct you not to discuss the
21 case with other persons who may appear as witnesses
22 before us.

23 THE WITNESS: Not a problem. Thank you.

24 ARBITRATOR BIENVENU: Thank you. Thank
25 you for your time.

1 THE WITNESS: Thank you very much.

2 Good-bye.

3 ARBITRATOR BIENVENU: Well, it's been a
4 long day. Is there anything that absolutely needs
5 to be raised now, as opposed to when we resume next
6 Monday? Looking at the claimant.

7 MR. ALI: I apologize. Nothing from
8 claimant's side, Mr. Chairman, other than thank you
9 for a good week.

10 ARBITRATOR BIENVENU: On the respondent's
11 side, Mr. LeVee?

12 MR. LeVEE: Nothing beyond wishing
13 everyone a very nice weekend. We will see you on
14 Monday.

15 ARBITRATOR BIENVENU: Those are wishes I
16 send back from everyone on the Panel.

17 I wish to thank everyone for what I know
18 was an extremely demanding week. We are certainly
19 impressed, but mostly very grateful for the
20 extraordinary work of counsel throughout the week,
21 and in particular for going through our demanding
22 agenda today.

23 So thank you all. Have a good weekend.
24 We resume on Monday at the normal hour. And the
25 next witness is?

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MR. ALI: Mr. McAuley.

ARBITRATOR CHERNICK: Is the normal hour
8:00 a.m. Pacific?

ARBITRATOR BIENVENU: That's correct.

ARBITRATOR CHERNICK: Okay. That's fine.

ARBITRATOR BIENVENU: Thank you all. And
I wish you all a restful weekend.

ARBITRATOR KESSEDJIAN: Have a good
weekend.

MR. LITWIN: Thank you.

MR. LeVEE: Have a good weekend.

(Whereupon the proceedings were
concluded at 1:18 p.m.)

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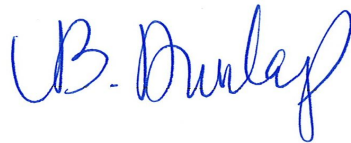
REPORTER'S CERTIFICATE

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STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN FRANCISCO)

I, BALINDA DUNLAP, certify that I was the official court reporter and that I reported in shorthand writing the foregoing proceedings; that I thereafter caused my shorthand writing to be reduced to typewriting, and the pages included, constitute a full, true, and correct record of said proceedings:

IN WITNESS WHEREOF, I have subscribed this certificate at San Francisco, California, on this 18th day of August, 2020.



BALINDA DUNLAP, CSR NO. 10710, RPR, CRR, RMR

\$	acceptable (4) 820:2;838:13,15; 941:25	919:14,19;920:15; 998:5	affords (2) 817:21;818:5	829:20;834:19; 837:15;934:12,18; 936:10;938:10; 1001:14
\$10 (2) 845:16;961:14	accomplish (1) 905:24	Activity (2) 839:24;921:13	Afilias (41) 797:22;822:17; 850:14;880:23; 903:17;917:4,12; 927:11;929:5; 931:11;940:15,21, 24;948:16,19; 949:18;954:14,22; 976:3,11,15,18; 979:1,5,14,22,24; 980:13;981:3,10,19, 25;982:11,15; 995:14;999:4,5,10; 1003:14;1004:6,20	agreeable (1) 854:1
\$135 (5) 859:22;961:8,20; 962:1,8	accordance (4) 826:10,18;845:4; 957:24	actual (5) 907:21;918:12; 924:9;963:5;985:1	Afilias' (19) 928:4;937:2; 938:22;941:10; 946:11,24;947:5,11; 948:8,24;949:3; 950:1,8,11;955:10, 17,23;956:4;977:22	agreed (13) 828:18;833:1,2; 834:2;876:2;936:22; 938:20;944:25; 945:4,5,7,8,11
\$142 (1) 877:18	account (9) 879:22;960:13,19; 962:2,10,18;963:7; 966:13,13	actually (23) 809:19,24;810:15; 839:20;859:22; 867:24;868:5; 870:17;879:8;883:9; 915:6;916:2;926:9; 930:12;968:6; 975:23;978:14; 979:11;980:3; 985:19;994:17; 999:4,15	Afilias's (3) 921:13;931:10; 936:8	Agreement (91) 802:10;808:14; 809:13,18;810:6,16, 24;812:18;813:13, 13;814:21;816:10; 817:13,16,20; 818:11,15;820:24; 823:2,14;825:3,14; 826:11,11,16;827:7, 9,12,15,20;828:5,5; 836:17,21;837:6,23; 838:4,6,7,8;840:8, 10,20;841:10;842:2; 843:25;845:1,2,3,4, 6,10,20,24;855:10, 23;875:11;887:16; 891:13,14;892:2; 894:2,7,25;895:2; 898:3;899:16; 905:22;906:3,6,14; 910:12;911:21; 931:1;937:2;964:8; 976:14;978:3; 980:18,23;981:21; 984:18;1002:14,23; 1003:12,16,20,25; 1004:7,14,17
\$17 (1) 856:12	accountability (51) 885:25;887:8; 891:3,6,11;894:4,22; 935:20;936:13,25; 937:5;938:18,25; 942:16;943:13,19; 944:2,7;945:17,17, 19;946:5;947:8,17, 23;948:3,12,20,21; 949:8,23;956:15; 957:13;958:2,12,17; 978:20,25;979:25; 980:10;982:3; 992:17;996:6;998:5, 10;999:6,17;1000:3, 11;1004:21,23	added (1) 888:7	afraid (3) 922:5;928:15; 938:6	agreement' (1) 826:14
\$185,000 (1) 846:3		adding (1) 885:16	aftermath (1) 908:19	agrees (3) 833:8;869:10; 944:21
\$2 (4) 823:13,14,22; 844:1		addition (1) 910:2	afternoon (2) 969:9;970:12	ahead (7) 793:5;798:5; 804:1;887:12;937:9; 973:23,25
\$240 (2) 960:4,8		additional (8) 843:17;845:19,25; 863:6;895:23;914:5; 995:13;1001:8	again (42) 810:23;820:17; 829:19;833:4; 836:10;839:8;842:3; 843:22;860:3,21; 862:25;867:24; 868:10;869:8; 880:16;883:21; 886:3;894:19; 912:14;922:5;924:6, 24;927:6;931:7; 932:5,10;935:16; 936:3,17;940:16; 947:9;954:18; 955:12;963:13; 966:18;978:16; 979:9;980:9;983:11, 18;990:13;1002:19	Akram (9) 878:12,24;887:24; 890:9;891:18; 893:16;917:13,18; 924:8
\$3 (1) 972:10		address (4) 916:21;976:25; 990:5;999:24	against (2) 916:22;942:24	Alex (1) 797:21
\$32 (1) 973:5		addressed (2) 977:2;991:8	AGB (1) 964:19	ALI (18) 793:8;794:4; 951:18;952:17; 953:13;965:13; 968:13,25;969:8,11; 970:8,9,11,13;973:9, 11;1006:7;1007:1
\$36 (2) 963:7;972:25		administration (2) 918:1;959:24	agenda (2) 939:6;1006:22	alike (1) 930:18
\$8 (2) 844:10,14		administrative (1) 968:18	ago (1) 966:10	
[accounts (1) 961:16	admissible (1) 897:9	agree (14) 813:17;816:25; 817:5;826:21; 827:24;828:3;	
[NDC's] (1) 871:5	accurate (8) 805:15;807:22; 816:20;823:11; 840:22;855:1; 861:12;906:16	advance (6) 817:21;818:5; 930:21;944:15; 945:2,13		
A		advice (5) 921:2;965:3; 974:6;975:1,7		
abbreviation (1) 800:24	accurately (1) 985:7	advise (1) 877:24		
abide (1) 793:25	acknowledges (2) 833:8;869:10	advised (4) 847:6,14;852:17; 983:7		
ability (3) 813:19;868:11,17	acquire (1) 806:15	advising (1) 847:24		
able (6) 805:12;813:14; 929:23,24;971:12; 1003:20	acquired (1) 801:25	affect (3) 819:8;821:12; 858:24		
above (5) 830:24;843:18; 850:2;933:21; 972:15	Acquisition (2) 808:14;931:1	affected (3) 805:17;819:10; 877:12		
absent (1) 1000:2	acted (2) 989:16;991:6	affirm (3) 796:7;913:9,12		
absolutely (9) 818:14;873:2; 877:6;895:9;920:21; 945:5,9;994:20; 1006:4	action (8) 836:6;890:17; 935:7;940:4,11; 959:15;975:11; 979:22	affirmatively (2) 847:10;851:8		
abundantly (1) 979:2	actions (4) 837:3;970:23; 971:7;993:2			
academic (1) 934:21	activated (1) 912:9			
accept (5) 918:21;955:13; 989:18;991:4,6	active (2) 871:6;926:24			

allegations (2) 874:10,14	973:6	applied (7) 801:21;802:2,8; 808:9;921:21;922:8; 998:4	23,24;974:1,20; 975:4,9,17,24;976:9, 20;977:4,8,11,14,18, 21,25;978:5,10; 979:18;980:2,17; 981:17;982:10,20; 983:9;984:3,9;985:6, 11,15,17,22;986:11; 987:25;988:7,20,24; 989:2,4,11;990:24; 991:2,17,20,21,23; 992:5;998:14,18; 1000:16,23;1001:7, 13;1002:6;1003:7; 1005:4,9,18,24; 1006:3,10,15; 1007:2,4,5,6,8	assignment (11) 840:11,20,24; 843:14;845:1;889:7; 892:17,18,25; 905:22;906:20
alleged (2) 867:9;975:20	anticipate (1) 961:6	applies (1) 934:4	argued (1) 934:15	assist (1) 803:4
allocate (1) 967:8	anticipated (1) 980:6	apply (1) 808:11	arguing (1) 807:9	associate (1) 969:14
allocated (1) 842:24	anticipates (1) 979:19	applying (2) 801:18;803:23	argument (2) 935:22;936:5	associated (2) 894:4;916:25
allow (8) 793:15,22;805:14; 834:24;1000:18,24; 1001:18;1003:7	Antitrust (1) 884:21	appreciate (2) 966:1;1005:13	Arif (3) 951:18;968:11; 970:13	assume (16) 801:11;802:5; 837:22,22;844:4,13; 851:23;852:22; 853:8;874:15;879:1; 900:1;912:20; 926:25;981:17; 984:3
allowed (1) 821:7	anymore (1) 968:15	appreciated (1) 923:1	arise (1) 1001:20	assumed (2) 851:15;902:22
allows (1) 875:11	apart (1) 972:11	appropriate (6) 815:15,17;917:8; 932:16,18;937:4	arisen (1) 959:10	assuming (3) 881:17;909:17; 962:7
almost (1) 880:17	apologies (2) 912:8;916:3	approval (5) 823:1;826:10,18; 900:1;1003:21	Arif (3) 951:18;968:11; 970:13	assumption (2) 851:13;875:25
along (6) 800:22;851:13; 874:23;890:23; 891:9;905:18	apologize (10) 871:25;912:4; 916:4;968:10; 973:16,18;988:25; 991:1,15;1006:7	approve (2) 1004:14,16	arising (2) 952:25;975:12	assumptions (2) 907:17;908:22
alter (2) 813:7,14	APP (1) 859:15	approved (2) 997:23;1003:25	Arnold (3) 882:2,14;931:5	assure (1) 958:20
Alternatively (2) 997:11,12	appear (6) 861:16;911:6; 915:8;957:25; 1004:4;1005:21	approves (1) 845:22	around (8) 806:13;826:4; 830:9;849:7;886:25; 907:14,21;998:24	Atallah (20) 878:25;879:4,6,9; 887:25;890:9,13; 893:16,24;917:13, 21;924:8,14,19; 927:10;928:4; 931:20;939:20,22; 1004:15
although (3) 861:17;891:21; 918:11	applicable (2) 920:17;952:23	approximately (1) 960:3	arrangement (5) 820:1;822:13; 823:17;824:4,14	attempt (1) 841:25
always (9) 813:18;826:22; 828:12;829:21,22; 830:11;859:5; 863:24,25	applicant (6) 825:7;844:23; 853:23;857:2; 964:19;986:13	approximation (1) 923:11	arrangements (1) 963:5	attempted (1) 796:25
Amici (1) 793:7	applicants (7) 805:5,17;814:22; 815:2;856:16;859:1; 865:19	April (5) 846:18;949:19; 954:14,21;955:11	arrive (1) 829:3	attempts (1) 907:12
amount (20) 829:17;830:24,25; 831:4,9;833:1; 842:10,10;843:18; 844:5;903:11; 907:22;962:23; 963:11,15,16,24; 964:8,9;971:1	applicant's (1) 821:19	arbitration (1) 1001:18	ASAP (1) 850:20	attend (2) 918:8;923:18
amounts (2) 843:4;982:4	application (64) 800:17;802:5,6, 23;803:1,16,20; 805:15;811:24; 813:8,14,20;818:3, 23;819:16;821:20; 822:1;823:5,9,11,23; 826:24;832:19; 836:4,8;837:5,10,18, 21,24;846:3,4;859:3, 5,6,7;860:3,24; 861:9,12,15;862:10, 15,19;863:17,19; 871:6,10;873:5; 874:11;877:9,12; 881:1;896:5,10; 897:6,11;952:23; 993:5;996:17;997:2, 7,13,21	ARBITRATOR (172) 793:3;794:3,10,13, 24;795:7,10,19,25; 796:5,11;797:11,16; 838:14,19,24;839:4, 7,10;870:19;882:9; 888:24;895:9,20; 896:2,8,15,20; 897:18;898:1,8,19, 25;899:3,8,12; 900:10,14,15,21; 901:1,8,15,18; 902:13;904:15,22; 906:25;908:9;909:1; 910:20;911:3,8,11, 14,17,19,21;912:6, 10,14,17,24;913:4,8, 13;914:7;921:22; 932:24;933:15,25; 934:25;935:4,25; 936:14;937:13,15, 21,23;938:3;941:15; 942:1,11;950:18; 951:1,6;956:6,10; 964:21,25;965:18, 23;966:3;968:14,16, 20;969:4,8,18,23; 970:3,7;973:11,19,	attitude (1) 809:7	attendant (1) 924:15
Amy (1) 924:5	applications (18) 802:12,19;804:5, 13;808:1,7,25;809:3, 5,6,9;814:3;846:8; 854:17;857:13; 900:6;994:13,24	ARBITRATOR (172) 793:3;794:3,10,13, 24;795:7,10,19,25; 796:5,11;797:11,16; 838:14,19,24;839:4, 7,10;870:19;882:9; 888:24;895:9,20; 896:2,8,15,20; 897:18;898:1,8,19, 25;899:3,8,12; 900:10,14,15,21; 901:1,8,15,18; 902:13;904:15,22; 906:25;908:9;909:1; 910:20;911:3,8,11, 14,17,19,21;912:6, 10,14,17,24;913:4,8, 13;914:7;921:22; 932:24;933:15,25; 934:25;935:4,25; 936:14;937:13,15, 21,23;938:3;941:15; 942:1,11;950:18; 951:1,6;956:6,10; 964:21,25;965:18, 23;966:3;968:14,16, 20;969:4,8,18,23; 970:3,7;973:11,19,	attends (1) 918:8;923:18	attending (2) 918:4;923:4
and/or (4) 817:23;818:7; 850:16;963:23			attends (1) 909:3;966:15	attention (2) 909:3;966:15
Angeles (1) 795:14			attends (1) 907:12	attitude (1) 809:7
Anne (2) 800:5,22			attends (1) 907:12	attorney (4) 810:16;811:25; 868:20;888:15
Annex (1) 839:23			attends (1) 907:12	attractive (1) 805:7
announced (1) 853:6			attends (1) 907:12	auction (209) 797:8;801:7,8,9; 805:2,25;814:3,14, 15,15,17,19,24;
announcement (2) 885:8;977:15			attends (1) 907:12	
annual (3) 970:24;971:8;			attends (1) 907:12	

815:3,8,9,14;817:16; 819:8,11;820:11; 822:5,18,25,25; 824:23;825:4,6,9,13, 15,15,16,24;826:12, 13,16;827:10;828:2, 4,6,9,15,19,23;829:4, 12,21;830:14,20,21, 23;832:11,16,20; 833:11,12,15,18,22, 23;834:5,6,9,15,20, 25;835:11,13,14; 837:13,14;839:21, 24,24;840:3;841:1; 842:10,14;843:5; 844:9,22;846:20; 847:4,8,16;849:25; 850:17,19,21;851:4, 5,11,12,15,18,19; 852:4,7,13,19,19,23; 853:3,10,14;854:1; 855:13,17,25;856:5, 8,16,18,22,23;857:2, 6;858:16,21,24,25; 860:16;862:14; 863:2,5;864:10; 865:18,20,22,25; 867:16,17,19,23; 868:13,13,18,19,25; 869:1,6,7,12,13,18, 19,21,23;871:19; 872:2,16;873:7,8,9, 12,16,24;874:21,21; 875:13,13,16,22,23; 876:3;877:17,21; 879:14;880:25; 887:18;894:5; 897:21;899:15; 902:23;903:21; 904:8;905:19,20; 906:7;907:11,13,20, 21;908:20;909:23; 928:19;929:2; 959:23;960:2,6,12; 961:14;962:10; 963:8;966:12;967:6; 971:4,11,13;972:2,3, 23;973:1,8;975:12; 976:16;980:22; 999:7 Auction-related (1) 828:4 auctions (16) 802:17;804:15; 806:4;822:16; 826:21;834:2;835:3, 17;866:5,7,14; 879:16,25;909:24; 967:2;971:21 augment (1) 796:14 AUGUST (15) 793:1;808:20;	812:11;824:25; 848:19;879:12; 880:1,10;881:5,8; 909:6,7;930:25; 931:4;996:20 Authority (1) 840:16 authorized (3) 817:9;828:21; 829:18 available (6) 830:17;847:4; 848:1;850:4;940:5; 994:14 avoid (4) 837:5;944:18; 957:12;996:7 avoidance (2) 833:8;869:9 awarded (1) 983:12 aware (79) 812:1;832:3; 857:23;860:6;874:9, 18;881:8,12,15,16; 883:12,25;884:21; 891:24;892:12; 898:12,16,18;899:1; 900:2,5,8;906:3; 940:7,8,15,19,20,23; 941:2,5,7,9;946:1, 23;947:1,2;948:22; 949:13,15,17,20; 953:21,23,25;954:3, 6,9,14,18,21;955:2,5, 6,9,13,22;957:17,20; 960:22;961:1,2; 976:1,6,7,7,10,11,18; 979:5;982:9,10,20, 22;983:4;984:4,6; 1004:11,20 away (1) 958:19 ayes (1) 935:15	B	back (25) 793:13;805:4; 835:6;836:13; 839:14;841:22; 842:15,18;854:20; 860:5,20;863:11,11; 868:5;872:23;901:4; 907:4;908:24; 916:15;937:23; 952:7;969:17;974:3; 1002:19;1006:16 background (1) 803:12 Bain (1) 803:12	BAMC (6) 948:22,23;955:11, 16;982:6;1004:18 bank (6) 846:9;879:22; 960:13,19;961:15; 966:13 banker (1) 879:23 barrier (1) 860:15 barring (2) 982:16,17 based (7) 805:12;854:19; 859:10;860:10; 861:24;909:24; 972:18 baseless (2) 874:10,13 baseline (2) 869:6;876:1 basically (6) 816:24;823:10; 834:13;844:18; 899:13;974:22 basis (3) 876:15,18;952:22 bats (1) 998:24 bear (2) 817:4;969:16 became (5) 809:25;847:4; 874:9;898:18;899:1 become (6) 820:22;821:5,18; 822:12;825:20; 874:17 becoming (1) 892:17 beg (1) 1000:17 begin (3) 895:22;969:21; 973:20 beginning (9) 816:24;906:17; 919:25;936:16,18, 19;988:1,2;1002:17 behalf (7) 797:14;814:13; 910:22,23;912:25; 931:5,6 behind (16) 798:8,8;847:20; 853:16,17;859:2,4; 861:5;864:22; 866:17;870:23; 873:19;878:7; 886:18;893:11; 907:15 belaboring (1)	933:2 belief (1) 796:3 believes (1) 972:19 below (2) 829:11;971:16 benefit (5) 825:8,25;920:14; 941:17;984:11 besides (1) 887:7 best (13) 796:2;805:13; 910:5;914:23; 915:23;923:3; 924:14;925:19; 929:11;936:20; 969:14;981:7;992:3 beyond (6) 846:3;854:15; 855:1;885:23;908:5; 1006:12 Bezsonoff (7) 799:11;800:5,19; 802:22;824:16,20; 854:12 bid (33) 804:16;806:5; 829:17;830:14,18, 23;831:3,5,15,18,21; 832:5;833:1;841:2; 843:5;877:18; 879:13;894:5; 898:14;900:3; 952:22;961:9;962:8, 14;974:12;976:13, 15,22;980:21; 983:16;984:5,12; 989:20 bidder (11) 826:13;827:7,9,12, 15,20;828:11,11; 829:21,24;877:19 bidding (2) 830:13;831:25 bids (5) 829:11;830:12; 832:11,15,24 BIENVENU (148) 793:3;794:3,10,13, 24;795:7,10,11,19, 25;796:5,11;797:11, 16;838:14,19,24; 839:4,7,10;870:19; 882:9;888:24;895:9, 20;896:2,8,15,20; 897:18;898:1,8,19, 25;899:3,8,12; 900:10,21;901:1,8, 15,18;902:13; 904:15,22;906:25; 908:9;909:1;910:20;	911:3,8,11,17,21; 912:14,17,18,24; 913:4,8,13;914:7; 921:22;932:24; 933:15,25;934:25; 935:4,25;936:14; 937:21,23;938:3; 941:15;942:1,11; 950:18;951:1,6; 956:6,10;964:21,25; 965:18,23;966:3; 968:16;969:4,8,18, 23;970:3,7;973:11, 19;974:1,20;975:4,9, 17,24;976:9,20; 977:4,8,11,14,18,21, 25;978:5,10;979:18; 980:2,17;981:17; 982:10,20;983:9; 984:3,9;985:6,15; 989:4,11;990:24; 991:2,17,23;992:5; 998:14,18;1000:16, 23;1001:7,13; 1002:6;1003:7; 1005:4,9,18,24; 1006:3,10,15; 1007:4,6 big (3) 793:5;805:21; 907:18 big (21) 797:25;798:6; 853:17;861:5;868:3; 870:23;873:20; 881:14;893:12; 899:6;904:21; 915:12,21;919:23; 951:12,13;964:22; 965:5;967:15; 973:18;999:20 bit (3) 871:24;927:14; 950:14 blank (1) 888:6 bloggers (1) 907:24 blogosphere (2) 907:8;908:19 blow (4) 952:8;968:4,9; 997:17 blowing (1) 993:16 Board (139) 853:22;854:18; 857:17,19,22,23; 863:6;876:21; 898:13;900:2,7,8; 916:8,10,12,18; 918:9,10,17,25; 919:4;923:9,12;
--	--	----------	--	---	---	--

926:13,21;928:3,10; 929:3,9,21,23; 931:25;932:13,15, 20;933:9;935:7,9,23; 936:6,11,21;938:11, 15,19;939:1;940:4, 10,11;941:9;942:15; 943:18;945:10,15, 16,20,23;947:4,14, 22;948:3,5,12;949:2, 23,25;950:3,7,10; 951:19;955:24; 956:13,21;957:6; 958:11,16,23;961:7; 964:7;967:14;968:7; 970:19;972:2,19; 974:8,11;975:10,17, 19;976:2,21,24; 977:22;978:11,20; 979:4;980:3,10,12; 981:25;982:1,2,5,7, 9;983:13,19,23,25; 984:20,20;986:18; 987:1,2,4,6,8,9,18, 19;988:8,19;989:15, 22;990:2,4,5,11,12, 13,21,22;991:6,13, 13;993:3;1004:13, 16,24	839:2;895:6,15; 911:15,18,20,23; 912:5;936:15; 941:16;950:21,25; 1000:17 breaking (1) 810:2 Brian (7) 810:16;811:21; 881:20;882:16; 883:23;888:7,14 Brian's (1) 811:25 brief (5) 900:25;902:24; 922:22;939:3; 1000:18 briefed (5) 918:10;927:7; 948:10,13,16 briefing (12) 917:19;918:13; 926:25;930:21,24; 931:3,12;932:1,2,7; 936:21;974:7 briefly (7) 793:8;879:20; 921:12;952:5; 965:22;992:11; 994:4 briefs (1) 932:8 Brilliant (1) 997:19 bring (9) 794:15,16;795:1; 944:11;951:10; 966:24;983:2;993:8; 1003:3 bringing (1) 981:4 broken (1) 916:2 brought (5) 929:4;942:23; 943:19;944:9;960:7 bullet (1) 952:8 bundle (1) 914:18 business (12) 799:8,25;820:9; 828:22;829:3,5,7; 844:25;849:20; 861:13;875:10; 940:5 businesses (1) 812:2 businessperson (1) 841:14 bylaws (18) 920:6,14,21; 940:3;944:9;950:6;	955:25;957:16; 985:4;986:21; 987:13,17,21,22; 992:20,25;993:2,4 C C-1 (1) 920:8 C-100 (5) 878:6;904:21; 907:5;908:25; 909:21 C-102 (1) 881:14 C-115 (1) 892:6 C-182 (2) 886:18;893:12 C-3 (1) 966:16 C-314 (2) 967:24;968:3 C-33 (2) 847:21;852:25 C-35 (1) 853:17 C-43 (1) 908:3 C-69 (1) 812:18 C-75 (1) 902:5 C-78 (2) 951:10;993:21 C-97 (1) 873:20 calculate (1) 846:2 calculated (1) 963:11 CALIFORNIA (9) 793:1,1;919:20; 921:20;933:19; 934:4,5,6,17 call (26) 796:25;806:14; 807:13,21;808:12, 16;809:20;818:18; 849:23;850:4,6,8; 864:17,20;865:1; 876:8;879:8;886:7; 890:2,3;892:22,24; 893:18;901:24; 935:15;967:13 Calle (7) 799:10;800:11,19; 824:15,20;847:14; 854:12 called (3) 806:20;879:6; 950:5 calling (1)	879:4 calls (2) 882:4;888:21 came (6) 810:15;866:16; 907:22;941:7; 948:11,19 camera (3) 914:21,23;950:24 can (102) 793:12,19,25; 794:15,16,22;795:8, 9,15,18;798:16; 799:2;800:9;816:7; 821:21;845:11; 848:13;856:6; 860:10;862:2;866:6; 868:22;870:15,22; 871:21;872:19; 876:12;882:5;884:4; 886:22;887:14,15; 890:19;901:13; 908:3;911:14,14,24, 25;912:22;914:15, 16;915:2,8;918:23; 920:2,4;924:23; 927:14;929:1,7,16; 930:12;931:24; 932:5;935:12,14,16; 941:23,24;943:15; 944:18,22;951:25; 952:1;958:7,9,15,20; 959:1,17,18,19; 964:18;966:24; 967:13;968:4,9,17; 977:8;978:16; 981:13,24;982:1,8; 983:1;985:4,11; 987:20;991:11; 993:15,17;994:6; 995:6,15;996:24; 997:1;999:8;1000:8; 1002:16,19;1003:5 capacities (1) 799:3 capacity (2) 798:25;799:2 captioned (2) 839:23;840:16 careful (1) 986:3 carefully (1) 794:22 carries (2) 919:14,19 carrying (2) 846:9;920:15 case (12) 795:23;818:9,10; 913:2;921:25;927:2, 4;932:4,9;956:25; 957:1;1005:21 cases (1)	934:17 cast (1) 972:7 cast-iron (1) 964:3 catch-up (1) 849:9 categorically (1) 980:14 category (1) 972:8 Catherine (4) 795:12;912:20; 937:16;985:18 cause (1) 877:9 caution (2) 888:17;974:5 ccNSO (1) 957:2 ccTLD (2) 800:20,24 ccTLDs (1) 801:2 CCWG (1) 960:22 CEO (5) 799:5;918:3; 924:6;970:19;971:7 CEP (25) 887:8,9,14;890:18, 25;916:25;927:5; 942:20,22;943:3,8, 11;944:5,11,14; 945:16,22,25;949:9; 977:19;999:4; 1000:4;1003:14,17; 1004:6 CEPs (3) 943:22,23;945:16 certain (15) 808:10;829:7; 831:4;846:24;874:9; 878:4;879:25; 891:21;893:21; 894:19,21;918:12; 939:16;957:6; 978:22 certainly (12) 838:14;858:19; 917:17;922:18; 923:14,16;924:4,11; 930:1;948:2;996:19; 1006:18 cetera (12) 805:22;863:7; 899:22;926:1; 960:19,20,20;964:1, 2;994:25,25;999:13 chain (1) 893:15 Chair (6) 795:11;912:18;
--	--	---	--	--

913:24;914:4; 941:16;968:15 Chairman (64) 793:8;797:10,15, 18;838:10,18; 839:13;882:7,11; 895:4,12,14;896:1, 14;898:5;901:7; 904:9;905:3;906:21; 908:4;911:2;912:16; 913:15;914:12; 921:11;932:22; 933:1;934:2,19; 935:3;937:10; 941:21,25;942:8; 950:12,23;951:8,14; 956:2,9;965:10,21; 968:23;969:10; 970:9;973:14; 974:15,16;975:22; 981:23;984:20; 985:11;1000:13,20; 1001:2;1002:1,2,9, 12,22;1003:5; 1005:3,16;1006:8 challenge (1) 930:9 challenges (1) 969:12 chance (1) 802:13 change (15) 796:14;817:18; 829:12;832:12,16; 854:21;860:7,11; 861:18;862:18,19; 867:9;877:7,9;978:1 changed (10) 804:3;850:18; 851:15;863:17,19; 871:10;903:12; 946:6,11,19 changes (13) 827:8,12,16,18; 860:24;861:9,13,14; 862:3,10,23;902:22; 946:23 changing (6) 804:9,10;808:3; 852:15,16;855:17 characterize (1) 964:16 chat (1) 965:15 check (5) 854:20;859:13,17; 872:9;964:23 checked (1) 933:21 Chernick (8) 795:13;900:14; 911:22;912:21; 973:23;991:20;	1007:2,5 chief (1) 798:21 choice (4) 856:16,18;935:17; 938:15 choose (4) 801:3;855:24; 868:12,17 Chose (4) 935:7;938:20; 939:10;983:14 chosen (2) 939:9;947:16 Chris (1) 866:21 Christine (4) 876:24;877:4; 910:5;1004:1 Chuck (8) 951:10,23;952:5; 953:5;964:18;965:7; 968:9;1003:3 CID (1) 894:2 CIR (3) 880:5;909:9;910:2 circulating (1) 908:18 circumstance (1) 838:3 circumstances (6) 815:20;836:22; 875:4;891:22; 979:23;982:8 cited (1) 836:18 claim (3) 945:24;979:13; 983:3 claimant (14) 797:14;945:1,4,7, 8,11,20;965:20; 973:13;975:20,21; 983:1;985:8;1006:6 claimant's (2) 989:19;1006:8 claimed (1) 980:21 claims (8) 921:13;942:22; 943:2;944:15,22; 945:2,12;975:12 clarification (4) 796:19;885:18; 886:2;1002:3 clarifications (1) 908:12 clarify (4) 797:1;924:24; 956:3;1000:20 clarifying (1) 898:9	clarity (1) 823:18 clause (1) 959:16 clauses (1) 957:25 clear (18) 823:7;860:23; 865:19;871:14; 872:24;904:23; 922:25;924:6,12; 927:15;936:2;967:7; 979:2,4,17;980:13; 981:9;986:22 clearer (2) 988:23;991:16 clearly (2) 852:15;921:17 client (4) 933:4;934:8,11,16 client-counsel (1) 889:3 close (6) 871:10;895:5; 935:8;937:16,18; 998:23 closed (1) 977:16 closer (1) 985:19 CO (16) 798:22;800:1,20; 801:8;822:5;858:13; 859:5,8;860:22,23; 861:9;862:3,20; 877:21;879:22; 910:1 Coast (1) 793:4 code (1) 800:25 codes (1) 957:1 colleague (4) 807:5,7;904:17; 951:18 colleagues (9) 795:12;895:8,11, 22;912:19;973:19; 991:19;1000:14,25 colleagues's (1) 981:19 collected (2) 959:22;960:3 collectively (1) 867:21 Colombia (2) 801:7,11 comfort (1) 950:25 comfortable (1) 927:21 coming (5)	887:3;948:13; 950:14;971:4;980:7 command (1) 805:1 commenced (3) 846:25;884:22; 981:20 comment (9) 803:17;817:22; 818:6;819:1;959:19; 983:8;998:6;999:24; 1004:12 commitment (3) 793:24;794:1,19 committed (3) 851:7;865:21; 875:15 Committee (6) 948:3,13;978:21; 979:5;980:11;982:3 communicate (3) 836:7;837:3; 852:15 communicated (6) 796:21,22;881:3; 975:14,20;976:3 communicating (4) 817:25;818:21; 867:10;909:12 communication (13) 817:23;818:7,8; 863:8;871:18; 876:16,22;882:5; 894:17;922:17; 936:16;974:6,19 communications (34) 796:24;797:3,4,6; 813:24;814:1,2,12, 17,23;815:2,7; 817:24;848:22; 870:1;871:11; 872:11,12,13; 874:25;882:6,12,16; 886:9;888:18,22; 889:3,14;892:12; 893:19;908:18; 920:24;922:20; 975:7 community (8) 920:14;960:11,23; 966:11,14;967:9; 972:6;987:12 community-developed (1) 960:14 companies (4) 800:7;806:9; 821:10;824:11 company (42) 800:4,5;801:8; 812:20,25;813:6; 814:8;817:20,21,25; 818:4,9;821:1,14; 825:5,6;826:7,12;	827:7;828:1,3,20,21; 829:9;832:8;833:8, 10,11,14,15;835:11; 836:6;839:24,25; 844:20,22,24;855:5; 869:10,12,13;963:19 Company's (6) 818:2,6;836:8,15; 837:4;844:25 comparing (1) 884:6 competition (1) 952:25 competitor (2) 867:7,10 competitors (13) 804:16;820:12,13; 831:16,19;834:8,12; 856:24;872:8,11,14, 20,22 compile (1) 941:23 complain (1) 880:24 complainant (1) 871:9 complainants (1) 944:11 complained (2) 917:9;929:2 complaining (1) 899:14 complaint (4) 865:16,24;917:6; 950:11 complaints (14) 917:4,8;929:4; 931:10;936:8; 938:22;947:5,12; 948:8,24;949:3; 950:1,8;956:14 complete (6) 823:4;840:19,23; 899:24;941:24; 973:12 completed (4) 802:22;843:14; 936:1;970:5 completely (4) 810:2;877:10; 897:9;944:22 compliance (4) 813:20;826:24; 832:20;864:2 compliant (6) 898:14;900:3; 976:23;983:16; 984:13;989:20 complicated (1) 810:1 complied (1) 974:12 comply (2)
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815:23;976:16 computer (1) 912:9 conceal (1) 816:3 concept (1) 934:18 concerned (6) 821:13;835:12,17; 907:9;943:3;1001:9 concerning (12) 837:24;917:1; 921:7;925:20;935:8; 942:17,20;943:13, 19;949:8;953:15; 974:4 concerns (2) 835:2;917:14 conclude (1) 992:2 concluded (4) 894:3;921:14,16; 1007:13 conclusion (3) 804:18;940:6; 959:18 concrete (2) 890:22;891:2 conditions (4) 804:3,11;805:18; 826:7 conduct (3) 793:16;875:10; 943:4 conducted (3) 810:12,18;914:9 conducting (1) 797:13 confer (2) 895:8;950:15 conference (1) 830:2 confident (1) 932:12 Confidential (10) 816:23;817:1,1,6, 7,8,19;820:18; 821:11;824:6 confidentiality (4) 824:12;836:16; 837:12;838:9 confirm (9) 831:1;861:8; 862:2,9;875:14; 879:12;901:23; 942:25;959:1 confirmation (2) 850:16;902:22 confirmed (5) 829:13;875:21; 880:2;909:23;912:3 confirming (6) 831:7,8,9;876:24;	881:4;909:8 conformity (2) 919:15;920:15 confused (4) 871:22,24;900:19; 925:5 Congratulations (1) 846:15 connection (5) 810:6;903:25; 937:17,19;968:17 conscious (2) 794:25;969:21 consent (20) 813:9,15;818:11, 16;819:23;820:7; 821:8;824:8,17; 828:6;836:5,23; 837:2,8,19;838:1; 840:11;863:23; 864:7;906:20 consequence (1) 959:24 consequences (1) 829:23 consider (9) 805:13;867:23; 945:24;947:4;950:7; 980:19;986:12; 987:8;991:14 consideration (2) 900:3;936:7 considerations (1) 943:25 considered (3) 943:18;950:11; 955:11 considering (4) 862:14;954:10; 956:13;986:7 consistent (4) 813:18;815:18; 920:13;945:22 constraints (1) 794:25 consult (4) 895:11;965:20; 1000:14,25 consultant (2) 803:9,12 consultants (1) 803:3 consulted (2) 978:11,13 consummated (1) 808:20 consummation (1) 816:9 contact (9) 806:21;807:14; 810:14;830:10; 878:17;883:1;892:4; 893:9;910:4	contacted (4) 860:7;867:7; 878:24;902:21 contacting (2) 878:12;894:1 contacts (1) 861:15 contain (4) 931:3;932:2,3,7 containing (2) 914:18;951:21 contemplated (2) 814:21;816:10 content (3) 796:1;814:12; 913:5 contention (64) 802:18;805:3,9,22, 24;806:9;820:22; 821:5,18;822:1,11; 825:17;839:18; 844:8,21;846:19,24; 847:1,7,15,24; 850:15,25;852:1,5, 10,17;853:9;856:6, 25;857:5;863:4; 865:17;867:12; 875:14,15;894:24; 904:3;917:14;929:1, 4;936:9;940:19; 946:7,18,20;947:7; 949:4;951:21; 952:14,20;953:16; 975:15;978:2,19; 979:6;980:15; 982:14,17;996:5,17; 997:3;1000:5; 1003:18 contents (3) 820:7;933:5; 974:18 context (19) 860:15,17;861:21; 867:2,8;870:18; 877:10;886:25; 897:25;898:17; 899:1;903:23; 908:13;926:6; 956:18,24;959:11; 982:13;990:1 contingency (1) 963:24 contingent (2) 822:8;856:12 continuation (1) 1002:8 continue (7) 830:21,24,25; 839:10;936:23; 951:7;971:15 continued (2) 815:14;880:24 continuing (1)	830:23 contract (8) 816:14,16;827:3; 842:5;891:7;948:11; 982:6,6 contracting (6) 880:4;909:10,25; 910:2;946:8,19 contractual (1) 842:4 contrary (1) 981:18 contrast (1) 947:2 control (12) 823:4,11;828:8, 12;829:24;859:6; 860:8,12;866:9; 874:11;877:7;989:6 controlled (2) 859:7,8 conventions (1) 920:17 conversation (19) 807:5;841:19; 863:5;865:3;876:5, 18,23;879:23; 887:19;888:15; 891:18,21,23;893:3, 25;902:6;903:15; 919:8;939:23 conversations (1) 876:11 conveyed (1) 974:11 convince (2) 865:17,25 Cooperative (2) 887:9;1003:17 coordinate (2) 817:24;818:7 co-panelists (1) 900:12 copied (1) 853:7 copies (2) 967:21;994:18 copy (5) 906:5;930:25; 931:3;932:3,7 corner (4) 849:7;915:13,16, 18 corollary (1) 946:15 CORP (3) 809:4,21,22 corporate (2) 811:25;828:16 corpus (2) 962:1,9 corrections (1) 914:1	correctly (8) 814:25;821:8,24; 886:24;887:23; 907:10,23;918:18 corresponded (1) 853:20 correspondence (5) 847:11;866:14; 956:7;976:12,19 cost (2) 963:12;972:1 costed (1) 972:1 costs (4) 846:2;963:16; 971:18;973:3 counsel (27) 881:9,10;882:19, 20,25;883:3;887:24; 896:23;904:24; 908:5;920:24; 922:24;929:10,13; 932:20;933:22; 936:5;939:3,4,24; 959:12;965:19; 975:1;994:2;995:14; 1001:18;1006:20 counsel's (1) 938:11 count (1) 883:10 country (4) 800:25;801:2,3; 957:1 couple (10) 848:10,17;849:21; 853:24;901:22; 929:15;966:8;974:2; 979:9;992:3 course (11) 810:23;896:21,24; 901:1;952:3;975:21; 976:4;992:17; 998:19;1000:15,16 Court (5) 874:22;926:24; 940:16;942:23; 988:4 covered (2) 900:18;904:25 coworking (1) 799:6 create (1) 860:15 cross (4) 797:14;960:23; 972:6;1002:8 cross-examination (13) 793:10;794:21; 796:16;797:19; 839:11;908:6;914:6, 9,13;951:7;970:5,10; 973:13
--	--	--	---	---

current (1) 1003:19	878:3,16;880:4,6,7; 882:3,15,19,24;	22;873:11;898:21, 22;900:8;935:17;	794:20;964:4	948:1;956:18;957:5; 969:13;972:8;985:9; 990:25
currently (2) 798:24;967:12	902:2,3;925:13; 931:6;946:24;947:3; 986:17;1006:4	936:11;938:12; 939:8,8,9;941:19; 942:4;972:18;	depending (1) 839:18	differently (1) 876:2
customary (1) 1001:18	days (10) 807:18;828:22; 829:3;830:15; 844:25;865:12; 898:22;940:5;979:9; 1003:14	975:11,18;976:2; 978:1,6,11;984:25; 987:9,16;988:15; 989:15;990:6,15,17, 18,20,21;991:5,12; 992:14,21	depends (1) 978:12	differs (1) 982:24
customer (4) 861:23;885:21; 886:5,6	De (37) 795:3,4;797:13,15, 17,20,22;798:4; 838:10;839:12,13; 868:16;870:16,21; 871:3;882:8,11,23; 888:25;889:1;895:4, 12,14;901:17,19,21; 902:8,16;904:9,15, 19;906:21;908:4,12, 14;969:10,11	decision-making (1) 805:19	deposit (2) 841:1;843:5	difficult (2) 809:25;955:19
cut (6) 793:13;838:12; 842:6;855:20; 900:24;914:25	deal (13) 808:19;809:8,9; 826:3;834:3,7; 846:14;884:14,16; 906:18;908:16; 937:2;943:10	decisions (2) 855:6;988:16	described (3) 804:10;977:5; 985:7	difficulty (1) 838:16
cutting (1) 914:24	dealing (2) 811:16;956:25	declaration (2) 796:15;903:24	describing (2) 858:12;989:12	dipped (2) 964:6,11
D	deals (3) 824:10;971:17; 999:24	declared (1) 877:19	designed (1) 944:10	direct (9) 835:23;839:22; 862:21;958:7,9,22; 959:1;966:15;971:6
DAA (67) 808:14,20;811:6, 12;812:11,17; 813:18;816:7;819:4, 9,17,20;820:6;823:7, 18;824:3,18;826:18; 831:12;832:17; 834:1,12,17;836:3,4, 11,14,23;837:7,17, 21;839:23;842:22; 843:13;845:17; 848:18,21;850:10; 855:15;856:19; 858:22;859:10; 863:15;864:6; 867:25;868:8,10,17, 23;869:2;872:6,25; 877:11;881:11; 896:4,9,25;897:4,5, 7,22;905:15,25; 906:9;984:18;985:1; 986:7	debate (2) 934:21;986:19	deduction (1) 841:5	designees (1) 970:20	directed (3) 817:10;827:11; 828:3
damaged (1) 915:24	December (5) 886:14,19,21; 887:20;893:18	defined (1) 829:11	desired (1) 827:9	direction (7) 825:8,25;833:13, 17;869:15;877:18; 964:20
Daniel (1) 800:8	decide (6) 833:5;849:25; 855:11;869:17; 900:9;939:2	default (2) 837:5;851:14	desires (1) 933:24	directly (4) 820:25;850:15; 879:17,25
date (6) 845:15;865:9; 953:24;954:20; 955:4;962:17	decided (13) 855:15;856:12; 867:18,22;898:15; 900:16;935:23; 936:7,12,22;938:20, 23;976:24	defer (6) 811:21;935:23; 936:7,11;938:12; 942:6	detailed (1) 814:6	Directors (6) 857:23;861:15; 871:5,7;916:8;923:4
dated (10) 795:23;853:1; 866:20;873:20; 886:19;893:16; 913:2;993:12,20; 996:20	debate (2) 934:21;986:19	deferred (1) 900:2	details (4) 853:4;917:7,10; 961:12	directs (1) 970:19
dates (2) 918:12;978:16	December (5) 886:14,19,21; 887:20;893:18	deficit (1) 963:19	determination (4) 896:16,21,23; 934:10	disagree (6) 823:12;827:23; 829:22;856:3; 857:10;868:16
David (2) 803:6,11	decides (4) 801:2;845:23; 988:11,12	defined (1) 829:11	determines (2) 940:10;944:25	disagreement (2) 829:25;980:20
day (28) 793:3,5;807:17, 18;809:23;829:5,7; 865:12;872:21; 873:24;877:25;	deciding (2) 989:14;992:15	definition (1) 964:3	develop (2) 805:13;961:3	disallow (1) 1001:16
	decision (63) 833:19,21,23; 834:13;847:25; 854:15,25;855:2,16, 23;856:1,13;867:12, 13,15,17,21,24,25; 868:8;871:18,20; 872:2,3,7,15,16,18,	delay (3) 853:25;854:11; 860:15	developed (1) 961:4	disappear (3) 965:22,24,24
		delegated (2) 823:20;983:13	deviation (3) 829:12;832:12,16	disciplined (1) 1001:22
		delegation (3) 814:19;952:25; 983:21	DIDP (25) 940:15,17,20,24; 941:3,18;943:24; 944:2;951:22;953:7, 9,19;954:8,16,22; 955:1,3;956:4;993:6, 24;994:11,12; 995:18;996:2; 999:16	disclose (19) 818:10;819:3,17; 821:3,7;824:7,17; 836:22;837:17,20; 864:6;888:18; 896:22;940:11,11, 18;941:3;953:25; 974:5
		delivered (1) 899:16	D-I-D-P (1) 940:16	disclosed (10) 819:10;837:16; 864:10;890:11; 898:3;905:15; 906:19;910:14; 958:24;959:14
		demanding (3) 940:17;1006:18, 21	Diego (2) 799:10;800:11	discloses (2) 958:8;995:25
		denial (2) 954:16;977:21	difference (1) 956:20	Disclosing (5) 817:6,10;818:15; 905:25;906:10
		denied (3) 941:9;946:25; 955:17	different (16) 798:16;801:13; 802:2;803:7,8; 808:18;843:23; 858:15;861:19;	
		Department (2) 875:9;884:22		
		depended (1) 806:6		
		dependent (2)		

<p>disclosure (10) 819:21,22;820:20; 863:20,22;888:21; 897:22;940:12; 953:10,14</p> <p>disclosures (1) 820:24</p> <p>disconnect (2) 937:12,19</p> <p>discover (1) 924:7</p> <p>discretion (9) 817:15;820:20; 821:3;826:9;833:9; 835:10;868:24; 869:11,17</p> <p>discuss (26) 798:9;817:8,15; 824:15;839:1;848:1; 851:16;853:23; 905:14;911:4; 917:20;928:10,23; 929:3;931:19; 944:18;947:11,16, 24;948:8,23;949:2; 950:20;960:24; 975:10;1005:20</p> <p>discussed (17) 866:2;875:8; 896:11;897:23,24; 917:15;923:6;924:3; 925:2,11,14;926:1; 928:22;936:21; 939:18;949:10; 978:20</p> <p>discussing (2) 808:17;931:25</p> <p>discussion (33) 817:23;896:22; 898:2;918:20;919:7; 925:8,18,20;926:8, 11,17,21,22;927:1; 929:10,14,17,20; 930:4;933:6;937:6; 953:15;955:14; 959:7,11;963:22; 968:22;975:15; 978:23;979:12; 982:4;984:25; 1004:18</p> <p>discussions (8) 817:17;834:17,22; 846:25;875:20,24; 898:6;957:22</p> <p>dispute (2) 945:2,13</p> <p>disqualify (1) 952:22</p> <p>Disspain (58) 793:11;912:17; 913:16;914:5,15; 916:7;922:2,13; 924:12;930:19;</p>	<p>935:5,21;936:4; 937:9,15;938:5,9; 939:15;942:13; 949:6;950:20;951:2, 3,16,17;952:12; 953:7;954:13; 956:11;962:7;966:5, 7,18;970:12;973:9, 13,15,20;974:1; 975:5,9;976:10; 980:19;981:18; 982:11;983:10; 985:17;989:5; 991:18;992:9; 998:22;1002:5,12, 21;1003:9;1005:9, 15,18</p> <p>Disspain's (2) 934:24;1000:21</p> <p>District (1) 874:22</p> <p>Division (3) 849:13;884:22; 917:22</p> <p>DMH (4) 799:17,23,24; 800:1</p> <p>document (27) 824:25;858:12; 868:15;879:10; 883:13;902:17; 906:1;909:21; 915:11,15;932:15; 933:3,5,6,7,12; 934:7,8,13;953:8,9; 957:18;977:23; 994:16;998:15; 1000:19;1003:23</p> <p>documented (1) 957:14</p> <p>documents (19) 797:25;798:9; 915:23;933:9,10; 941:22;942:2; 951:22;953:6,14; 954:1;957:21; 969:14;994:3,13,18, 19,25;995:21</p> <p>DocuSign (1) 1003:20</p> <p>DOJ (8) 885:9;887:2,7,13; 888:10;890:16; 894:2;977:15</p> <p>dollar (1) 907:22</p> <p>dollars (1) 959:23</p> <p>domain (26) 799:6,16;808:14; 814:4,20,22,24; 815:3;817:16;818:4, 24;820:23;821:6;</p>	<p>822:13;825:7,10; 828:6;829:11; 832:11,15,24;843:7, 10;907:24;930:25; 994:19</p> <p>Domains (2) 849:13;917:22</p> <p>done (16) 793:19;794:2; 809:10;838:3; 846:16;906:9; 928:24;957:10; 958:11;965:11,13; 982:8;983:19,23; 987:5;1001:4</p> <p>Donuts (16) 847:23;874:16,18, 20;887:9,14;890:18, 25;907:11;916:25; 942:19;943:11; 949:9,11,15;977:19</p> <p>Donuts' (1) 927:5</p> <p>DOT (14) 798:22;822:5; 858:12;859:5,8; 860:22,23;861:9; 862:3,19;877:21; 879:22;910:1; 982:13</p> <p>doubt (4) 832:19;833:8; 869:10;897:14</p> <p>down (10) 810:2,15;811:20; 835:21;838:12; 886:18;915:2; 963:25;971:15; 1003:23</p> <p>draft (4) 811:5;883:19; 978:2;980:18</p> <p>drafts (1) 811:8</p> <p>draw (1) 959:17</p> <p>drawing (1) 888:6</p> <p>drove (1) 805:19</p> <p>dry (1) 842:6</p> <p>Dublin (1) 848:12</p> <p>due (2) 885:24;998:23</p> <p>during (35) 829:12;830:13; 832:11,15;835:4,16; 838:25;839:2;876:7, 8;905:16;917:15; 918:8;919:7;920:24; 922:17;925:3,13,13;</p>	<p>929:5,10,13;930:4; 936:5;938:13; 939:17;945:25; 947:5;949:2,22; 950:1,8,21;959:4; 976:2</p> <p style="text-align: center;">E</p> <p>earlier (18) 793:9;838:11; 866:11;868:11; 885:14;888:6; 902:10;926:6;927:5; 931:8;939:16; 949:10;951:15; 955:16;956:12; 966:10;987:1; 993:21</p> <p>early (5) 793:4;884:23; 940:17;950:14; 977:4</p> <p>earmarked (3) 960:13;966:14; 967:3</p> <p>earned (4) 843:13;961:9,14; 962:17</p> <p>easiest (1) 952:11</p> <p>easily (1) 794:23</p> <p>Echeladria (1) 800:8</p> <p>echo (1) 794:18</p> <p>Eduardo (2) 800:6,23</p> <p>effect (1) 980:20</p> <p>effectively (1) 823:4</p> <p>efficient (5) 793:20,21;905:1; 969:2;992:4</p> <p>effort (1) 798:11</p> <p>eg (2) 861:14;998:5</p> <p>eight (5) 911:15;971:2,10; 972:17;973:7</p> <p>either (4) 875:12;877:13; 959:19;981:2</p> <p>elect (3) 833:10;835:10; 869:11</p> <p>election (4) 826:8,17;833:12; 869:14</p> <p>elects (1)</p>	<p>833:14</p> <p>elements (1) 897:5</p> <p>elicit (3) 889:2;922:19; 975:6</p> <p>else (19) 810:21;826:4; 830:9;847:13,14; 851:2;860:25; 872:25;873:4,9; 874:25;876:19; 877:8;881:4;888:2; 890:1,10;892:20; 928:25</p> <p>email (53) 796:25;826:10; 829:13;847:23; 848:6,8,15;849:5; 850:13,16,23; 852:24,25;853:7,16; 854:3;858:10; 859:12;860:10,14; 861:1,7,17,22; 864:14;865:1,4; 866:20;867:2;871:4; 875:1;876:14,16; 877:14;880:22; 886:7,16,19;893:13, 14,14,15,19;894:12, 15;901:14;903:2; 909:4,6,19,21; 1003:10,13</p> <p>emailed (1) 864:17</p> <p>emails (7) 848:10;849:21; 864:11;879:11; 892:9;1004:11,11</p> <p>emanates (1) 984:13</p> <p>embarking (1) 933:22</p> <p>emergency (2) 982:16;983:3</p> <p>employed (1) 798:24</p> <p>enable (1) 838:12</p> <p>encourage (1) 944:11</p> <p>encouraged (1) 944:10</p> <p>end (23) 795:25;809:8,15; 826:4;839:1;850:5; 867:14;872:21; 880:18;887:3,13,14; 890:17,20,25;895:5; 913:4;934:20;936:7; 938:12;950:15; 973:16;986:17</p> <p>endeavored (1)</p>
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871:12 ended (2) 809:23;829:6 ends (2) 891:2,5 Engagement (2) 887:10;1003:17 engaging (1) 910:2 English (2) 795:1,5 enjoin (1) 874:20 enough (3) 944:4;975:8; 991:18 Enson (1) 931:6 ensure (2) 828:20;911:25 enter (10) 808:12;810:5; 826:11,15;827:15; 828:4;855:23; 867:25;868:8; 871:19 entered (5) 848:18;863:7; 868:10;872:6;986:7 entering (6) 813:13;823:13; 827:7;834:17; 855:15;897:7 entire (1) 894:23 entirely (4) 833:25;867:13; 960:19;964:4 entirety (1) 925:3 entitled (8) 824:23;843:3,8,12, 18;933:8;952:13; 981:6 entity (3) 802:2;817:9;917:1 entry (1) 918:16 envision (1) 802:16 equally (1) 959:13 Eric (1) 931:6 Erwin (11) 861:2,7;866:9,16; 903:4,5,13,20,23; 904:3,7 essence (4) 824:3;906:16; 986:9;1000:7 essentially (4) 856:1;904:3,5;	955:7 established (1) 932:21 estimate (4) 793:10;846:6; 961:24;962:16 et (12) 805:22;863:6; 899:22;926:1; 960:19,20,20;964:1, 1;994:25,25;999:13 Ethan (4) 927:14;951:25; 965:14;967:19 ethics (1) 933:22 even (11) 818:20;819:2,4; 823:18;824:12; 855:10;864:4; 865:18;900:18; 907:10;984:13 evening (2) 913:16;914:17 event (17) 816:8;832:13; 840:2,19;841:9; 842:1,23;843:10; 844:8;845:5;860:6; 863:21;959:8; 961:19;964:1;979:2; 980:15 events (5) 875:6,7;916:16; 929:16;977:12 eventually (2) 891:1;910:12 everybody (3) 944:21,22;969:13 everyone (10) 793:3;798:16; 848:1;850:16; 923:16;929:12; 996:15;1006:13,16, 17 everyone's (1) 889:15 evidence (9) 796:6;839:1,2; 867:9;910:25;911:4; 913:9;950:21; 1005:13 evident (1) 825:20 exact (5) 803:18;806:22; 808:15;963:15; 964:10 exactly (15) 807:16;811:10; 830:9,16;860:21; 865:13;874:3; 898:19;905:17;	942:3;943:7;944:20; 979:10,10;981:12 examination (6) 798:12;895:5; 901:11;942:9;992:7; 1002:10 examinations (1) 793:14 example (6) 884:5;908:17,21; 957:16;958:15; 994:21 examples (1) 958:14 Excellent (4) 794:3;795:19; 838:19;914:17 except (7) 817:9;836:15; 837:6,11;864:5; 945:14;973:18 excesses (3) 970:24;971:8; 973:6 exchange (8) 853:12;863:12; 879:11;892:9;903:2, 2,8;905:4 exchanged (1) 811:9 exchanges (1) 864:11 exclude (1) 797:2 exclusively (2) 825:7,24 Excuse (6) 870:15;902:5; 928:19;939:12; 941:15;998:25 execute (4) 811:18;829:9; 832:9;894:7 executed (6) 812:11,14;832:13; 836:2;981:21; 1002:23 execution (6) 840:8;844:25; 896:25;899:17; 980:18;1003:15 exercised (1) 959:4 exhaustive (1) 796:23 Exhibit (40) 812:18;824:22,24; 836:11;839:17; 847:21;852:25; 853:17;861:6; 863:25;864:25; 866:18;868:6;869:9; 873:20;878:6;	881:14;886:18; 892:6;893:12; 901:13,16,21;902:5, 10,14;904:21;907:4; 908:3,24;920:8; 951:10;965:8; 966:16;967:14; 993:8,21;996:16; 998:14;1003:4 exhibits (3) 847:17;914:19; 967:20 exist (2) 958:20;994:19 existed (1) 819:5 existence (8) 817:19;818:10; 824:18;836:22; 837:7;864:6;881:18; 934:13 exists (1) 934:7 expanding (1) 808:5 expect (6) 838:15;880:3; 890:19;910:1; 915:25;990:22 expectation (1) 980:5 expectations (2) 804:22;981:19 expected (4) 912:4;979:14,23; 981:11 expended (1) 843:4 expenses (5) 846:10;963:19; 964:13,14,16 experience (5) 804:14;821:9; 847:3;888:10;900:6 expert (1) 985:3 expired (4) 947:8,18,20,24 explain (3) 799:15;807:4; 856:24 explanation (3) 903:20;988:2; 997:6 explore (1) 974:23 express (1) 820:7 expressing (2) 806:14;980:20 expression (2) 950:25;983:2 extend (1)	871:17 extends (1) 987:17 extension (1) 854:22 extent (12) 808:10;814:8; 818:1;836:7;837:4; 888:20;926:19; 933:6,10,11;934:12; 996:4 extraordinarily (2) 963:21;986:16 extraordinary (1) 1006:20 extremely (1) 1006:18 eye (1) 1001:25
F				
			face (3) 806:23;849:9,9 face-to-face (1) 926:17 Facility (1) 828:22 fact (29) 797:2;814:6; 819:4;820:20;821:3, 7;835:15;852:5; 862:14;864:20; 867:14,17;868:8; 869:21;873:12; 887:12;932:14; 934:6,7,14,15; 945:14;947:3; 948:12;949:16; 960:2;961:13; 972:19;979:19 failed (1) 808:6 failure (2) 841:9;842:1 fair (21) 806:1;825:19; 860:12;903:11; 906:8;925:1;939:2; 944:4;955:18;957:7; 958:4,21,25;959:9; 960:8;961:10,13,24; 962:13;975:8; 991:17 fairly (4) 881:19;900:18; 980:9;981:7 faith (1) 833:16 familiar (2) 806:24;892:18 family (1) 800:11	

fantastic (1) 846:14	945:2,13	843:23;909:3	forwards (1) 983:4	funds (14) 834:10;879:21,24; 960:24;961:3,15; 963:22;964:15; 967:3,6,8;971:11,13; 972:7
far (6) 891:10;918:23; 946:1;957:17,20; 999:8	filings (1) 907:11	focused (2) 811:12,13	found (1) 995:15	further (9) 797:9;818:9; 890:17;895:17; 910:18;934:22; 973:10;991:6,8
fast (2) 895:3;904:11	final (2) 960:24;961:3	folks (2) 802:25;822:15	foundation (1) 967:6	future (1) 943:19
faster (1) 967:20	financed (1) 831:16	follow (10) 798:17;829:9; 832:9;891:4,10,17; 910:11;938:16; 939:10;981:8	founded (1) 799:11	
fault (2) 858:17;916:5	financial (2) 798:21;811:17	followed (3) 832:13,23;871:12	founder (1) 799:5	
favor (2) 987:8;988:9	financial-modeling (2) 831:25;832:4	following (6) 817:2;844:21; 875:1;898:22;989:5; 997:13	founding (1) 799:15	
February (9) 893:16,18;949:11, 16;953:13,19; 954:17,24;993:20	financing (2) 822:16;831:20	follows (1) 844:20	four (4) 809:2,4,5;862:14	
federal (2) 926:24;933:19	find (7) 841:20,21;961:17; 967:4;968:21,24; 969:11	follow-up (6) 865:8;868:7; 985:12,16,23;1005:7	frame (3) 990:5,8,9	G
fee (10) 802:5;844:7,10,15, 17,19,24;845:8,13; 846:4	finds (2) 893:24;987:7	font (1) 993:14	Francisco (1) 1000:15	gain (1) 845:19
feed (2) 937:24;988:4	fine (11) 913:17,19;920:20; 942:11;951:1; 964:25;965:16; 994:10;1000:23; 1002:6;1007:5	footnote (1) 966:25	frankly (2) 860:5;887:17	gave (9) 823:4;855:11,23; 868:11,17;891:20; 903:19;926:5; 1002:5
feel (2) 852:6;910:4	finer (1) 987:16	forego (1) 872:16	free (3) 849:23;895:11; 910:4	GDD (7) 849:7,11,12,13,15; 888:1;910:3
feeling (2) 907:22;908:5	finish (3) 794:19;896:18; 985:13	foresee (1) 834:6	frequently (1) 805:6	general (14) 805:11;808:25; 809:1;818:18;834:2; 847:2,3;855:6; 885:8;887:24; 890:24;923:22; 946:17;978:22
feelings (1) 834:1	fired (2) 862:16;904:6	foreshadow (1) 969:23	Friday (1) 880:1	generally (8) 801:5;806:23; 807:24;830:22; 840:18;917:25; 938:9;957:10
fees (2) 845:16;959:23	firm (1) 885:7	forget (2) 884:25;907:25	friend (1) 911:22	genuinely (1) 925:21
felt (3) 815:14;852:11; 862:24	firms (1) 889:9	forgive (2) 975:5,22	friendly (2) 806:24;858:14	given (11) 804:9,10;891:2; 920:1;939:5,25; 949:11;968:24; 969:2;979:21; 1001:11
few (12) 807:18;810:22; 824:10;849:15; 854:23;868:7;876:4; 889:9;895:21;931:8; 965:19;966:10	first (33) 799:16;806:21; 808:24;809:11; 811:5,15;827:16; 837:18,25;840:25; 843:3,25;844:7,14; 870:25;874:8;892:7; 896:3;905:9,12; 912:24;916:10; 918:24;949:18; 952:8,9;965:15; 977:12,14;993:15, 19;999:20;1000:24	form (1) 999:16	front (5) 798:6;847:18; 921:16;922:25; 941:22	generally (8) 801:5;806:23; 807:24;830:22; 840:18;917:25; 938:9;957:10
fiduciary (1) 987:11	fiscal (1) 971:2	formation (1) 967:6	full (11) 817:3;854:16; 855:15;857:12; 879:13;909:23; 926:8,10;955:24; 962:1,23	genuinely (1) 925:21
Figuratively (2) 859:21,24	five (7) 799:24;844:25; 911:15,23;912:10, 12;952:6	formed (2) 801:17;960:23	fully (3) 960:12;966:12; 979:23	given (11) 804:9,10;891:2; 920:1;939:5,25; 949:11;968:24; 969:2;979:21; 1001:11
figure (7) 811:15;832:4; 841:20;857:5,5,7; 897:3	five-page (1) 952:3	forming (1) 961:5	fun (1) 911:2	gives (1) 934:8
file (5) 949:12,16;956:8; 979:3;982:15	flow (1) 941:16	forth (6) 836:16;839:16; 840:1;950:6;998:6; 1000:4	functioning (1) 957:7	giving (2) 851:6;932:14
filed (15) 932:8;940:24; 942:20;949:18; 954:15,18,22; 955:11;981:25; 982:12;999:16,17; 1003:14;1004:6,20	flying (1) 998:24	fortunate (1) 824:10	fund (22) 963:9,11,18,23,24; 964:3,6,9,12;970:24, 25;971:4,8,9,11,14, 22,22;972:17,22; 973:6,7	Glen (6) 880:23;907:12; 916:22;926:25; 929:5;932:1
filing (4) 874:22;944:15;	focus (4) 808:23;839:19;	forward (13) 794:22;831:10,11; 834:8;849:4;860:16; 869:21;873:16; 894:10;910:9,11; 975:2;1000:9	funded (1) 973:5	Glen's (5) 917:1;927:1,3; 932:3;942:23
		forwarded (3) 848:25;850:9; 854:7	funding (15) 815:14;819:6; 820:11,12;822:4,13, 24;823:17,23;824:3; 827:21;831:14; 858:23;873:4; 905:20	Global (2) 849:13;917:22
		forwarding (1) 881:10		GNSO (1) 957:1
				goals (1) 905:25

<p>goes (3) 836:17;854:15,25</p> <p>Good (28) 793:3;794:10,12; 795:7,9,17;797:21; 798:10;808:4; 833:16;839:7,9; 846:13;849:9; 850:14;912:12; 913:16;914:17; 915:10;969:8; 970:12;973:25; 986:16;998:25; 1006:9,23;1007:8,11</p> <p>Good-bye (1) 1006:2</p> <p>Google (4) 805:22;806:3,4,4</p> <p>gossip (1) 907:14</p> <p>governing (1) 921:8</p> <p>Government (1) 840:16</p> <p>Gramont (37) 795:3,4;797:13,15, 17,20,22;798:4; 838:10;839:12,13; 868:16;870:16,21; 871:3;882:8,11,23; 888:25;889:1;895:4, 12,14;901:17,19,21; 902:8,16;904:9,16, 19;906:21;908:4,12, 14;969:10,11</p> <p>Grant (1) 1003:10</p> <p>grateful (2) 988:3;1006:19</p> <p>great (3) 848:13;899:20; 989:3</p> <p>greater (1) 967:9</p> <p>grounds (1) 888:22</p> <p>group (5) 850:19;960:23; 967:11;972:6;980:8</p> <p>gTLD (22) 801:14,18,19,21, 24;802:4;803:23; 804:5,12;805:6; 808:1;910:3;918:1; 957:1;959:24; 963:12,16;964:14; 971:19,25;973:2,3</p> <p>gTLDs (7) 801:14;802:11; 808:5,7,22;809:1; 957:11</p> <p>guess (9) 803:11;848:24;</p>	<p>858:17;863:1; 894:19;897:8; 907:13;923:13; 944:21</p> <p>guidebook (19) 820:2;821:16; 826:25;893:2; 897:10,15,17,19,20; 964:19;966:16,19, 23;967:1;976:16; 984:6,13,17;986:8</p> <p>guided (3) 869:23;922:23; 927:19</p> <p>guidelines (5) 801:6;826:20; 827:2;841:25;842:3</p>	<p>870:22</p> <p>hard-nose (1) 810:24</p> <p>head (6) 958:18;963:5,14; 964:10;972:21; 990:7</p> <p>headed (1) 921:23</p> <p>heading (5) 812:24;834:12; 952:9;953:5;954:5</p> <p>headquarters (2) 828:16;873:23</p> <p>HEALTH (4) 799:5;801:25; 802:1,3</p> <p>heaps (1) 999:11</p> <p>hear (7) 795:8;908:15; 914:15;915:10; 934:22;936:16; 1000:24</p> <p>heard (10) 863:10,11,13; 876:1;881:3;939:23, 23;940:2;990:16; 1002:18</p> <p>hearing (5) 794:15;795:21; 890:16;895:10; 898:18</p> <p>held (6) 836:3;918:5; 919:1;949:24;950:3; 962:11</p> <p>help (6) 802:24;892:16; 894:9;918:19;945:1, 12</p> <p>helped (3) 803:6;805:23; 811:23</p> <p>helpful (6) 871:2;937:11,12; 978:15;979:17; 987:24</p> <p>helping (1) 962:20</p> <p>helps (1) 965:8</p> <p>herein (2) 814:16,22</p> <p>here's (2) 817:12;930:9</p> <p>hereunder (1) 814:10</p> <p>hesitant (1) 841:23</p> <p>hey (1) 887:12</p> <p>Hi (3)</p>	<p>853:1,19;909:22</p> <p>high (2) 804:22;805:1</p> <p>higher (1) 879:10</p> <p>high-level (1) 849:18</p> <p>highlight (3) 902:19,20;953:5</p> <p>highlighted (1) 902:17</p> <p>highly (2) 806:5;930:10</p> <p>hire (2) 803:3;889:10</p> <p>hired (1) 803:5</p> <p>hiring (1) 888:15</p> <p>history (1) 852:20</p> <p>hold (27) 809:6;823:20,20; 885:5,24;946:7,8,12; 948:11,14,15,19; 960:12;966:12; 978:19;979:1,3,6,8, 11,13;980:16; 982:14;996:6; 1000:6;1003:19; 1004:19</p> <p>holding (5) 800:4,5;912:3; 961:15;985:2</p> <p>Holdings (1) 799:17</p> <p>holds (2) 838:25;963:7</p> <p>holidays (1) 887:1</p> <p>home (2) 944:23;969:15</p> <p>Honestly (11) 852:6,20;861:21; 862:12;866:15; 875:24;877:5; 880:14;883:4; 889:13;892:14</p> <p>Honor (1) 907:3</p> <p>Hooper (1) 892:22</p> <p>Hooper's (1) 892:15</p> <p>hope (4) 793:19;893:24; 979:17;988:23</p> <p>hopefully (1) 910:9</p> <p>hoping (1) 802:9</p> <p>hot (1) 985:20</p>	<p>hour (2) 1006:24;1007:2</p> <p>hours (3) 814:11;815:1,7</p> <p>hours' (1) 815:19</p> <p>house (2) 850:19;999:1</p> <p>hundred (1) 846:11</p> <p>hundreds (1) 959:22</p> <p>Hyderabad (5) 918:5,13;919:13; 922:9;926:14</p> <p>hypothetical (1) 984:2</p>
H				
<p>half (1) 977:12</p> <p>hand (1) 901:2</p> <p>handled (1) 831:22</p> <p>handling (1) 888:10</p> <p>hands (5) 842:21;855:2; 856:2,18;935:13</p> <p>Hang (1) 920:7</p> <p>happen (9) 841:18;869:24; 885:10;972:13; 981:12,12;989:21; 999:12,13</p> <p>happened (13) 819:13;839:20; 842:14;844:13; 927:7;948:18; 978:14;981:20,24; 987:2,3;996:13; 1002:25</p> <p>happening (6) 852:1;856:13; 904:16,24;926:18; 927:8</p> <p>happens (1) 839:17</p> <p>happy (4) 915:10;933:23; 934:23;944:23</p> <p>hard (1) 849:24</p> <p>hardcopies (1) 798:15</p> <p>hardcopy (1)</p>	<p style="text-align: center;">I</p>	<p>ICANN (257) 796:21,22,24; 797:3;800:15; 801:14;805:2,25; 814:2,13,18;815:7; 817:16,18,23,25; 818:1,7,8,21;819:14, 17,19;825:14; 826:24;832:20; 833:22;834:5;836:7; 837:3,22;839:20; 840:9,16;841:1,4; 844:9;845:22; 846:18,19,19; 849:13,14,19; 851:12,14,19;852:7, 13,18;853:3;854:1; 855:12,16,25;856:5, 7,17;857:4;858:20; 859:13,17,22;860:1, 7,16;861:10;862:5; 863:8,20,22;864:2,5, 10;866:5,22;867:17, 19;868:13,19;869:1, 5,7,18,21;870:1,9; 871:11,19;872:12; 873:1,4;875:1,13,16, 22;876:3,10,19; 879:12,25;880:23; 881:4;883:1;884:18; 885:8,10,21,21,22; 886:5,10,14;887:5,9, 20;890:6;891:25; 893:9,20;894:14,18; 895:2;896:10;897:1, 23,23,24;898:2,6,9, 10,13;899:5,14,19; 900:2,7;901:24; 902:21;905:10,15, 19;906:1,10,13,19, 20;910:11;916:17, 23;918:4,10,25; 919:14,19;920:12;</p>		

923:18;924:20; 926:23;927:9;928:5; 931:6,9;935:22; 940:3,3,17,18;941:2; 942:24;944:25; 945:4,6,8,8,10,19,23, 25;946:6;947:4; 949:23;951:19; 952:19,22,24; 953:21,23,25;954:3; 955:2;956:12,12,18, 23;959:22;960:3,11; 961:9,13,19;962:13, 25;963:6,10;964:6, 11;966:11;970:25; 973:7;974:9,10,13, 25;978:6;980:17,19, 25;981:7,7,21,22; 982:12,17;983:11; 984:5,14,16;985:7; 987:8;988:9;989:9; 994:3,9,12,15,17,18; 995:2,14,25;996:9, 16,21;998:5,6,9; 999:24;1000:2; 1002:14,22;1003:11; 1004:6,18,25;1005:1	ifs (1) 962:19 Ignacio (1) 850:3 ignoring (2) 972:9;999:16 ii (7) 814:22;817:25; 827:10;833:11; 845:2;869:12;953:5 iii (3) 820:16,17;833:13 illegal (1) 816:10 imagine (3) 841:18;980:11; 989:17 immediately (3) 840:7;905:19; 979:24 impacted (1) 837:14 impacts (1) 828:5 imply (1) 983:21 implying (1) 957:8 important (1) 817:3 impossible (2) 906:12;983:24 impressed (1) 1006:19 impression (1) 867:11 improper (1) 921:17 inaccurate (1) 862:18 INC (2) 809:4,20 Incite (1) 907:25 include (4) 861:11;897:20; 930:24;967:6 included (6) 798:7;927:1,3; 931:12;939:20; 993:23 including (8) 800:3;801:22; 861:12;875:9; 899:22;952:21; 975:13;1000:14 inconvenience (1) 916:6 incorporate (1) 827:11 incorporated (1) 827:19 increase (3)	964:8;970:23; 971:8 increasingly (1) 883:22 Indeed (10) 836:4;910:23; 911:9;918:7;949:21; 955:21;970:15; 988:24;1005:11,14 India (4) 918:5;919:11; 921:9;922:9 indicated (1) 851:3 indirect (1) 822:14 indirectly (7) 820:21,25;821:4, 17,25;822:10,16 individual (3) 806:6,8,9 individuals (2) 800:3;929:18 indulgence (1) 1000:18 industry (2) 808:3;849:12 infer (1) 797:7 influenced (1) 806:2 inform (1) 834:14 information (20) 800:14;817:1,6,8, 17;818:1,21;819:14, 16,19;820:18; 821:11;830:17; 851:24;861:11; 881:11;953:8,10; 954:23;996:1 informed (9) 834:16;851:20,21, 22;853:8;871:8; 874:24;898:21; 979:7 initial (1) 903:2 initially (2) 900:17;995:6 initials (1) 811:4 initiate (2) 796:24;979:24 initiated (4) 917:1;999:4,6; 1003:17 ink (1) 903:11 inner (1) 858:12 inquire (1) 887:6	inquiries (3) 866:8;885:21; 886:5 inquiring (2) 898:6;909:9 inquiry (4) 862:13;863:1; 876:17;888:11 insinuating (1) 903:12 insist (1) 852:13 inspired (1) 1000:19 instance (1) 840:25 instances (1) 884:17 instead (1) 965:4 instruct (3) 838:25;911:4; 1005:20 instructed (3) 833:3;922:10; 983:7 instructing (1) 831:8 instructions (6) 829:10;832:10,14, 18,23;922:23 integrally (1) 906:13 intended (1) 862:22 intending (3) 858:11;922:19; 981:10 intends (2) 878:9;905:6 intention (1) 840:9 interest (12) 806:15;822:21; 961:10,14,21,23; 962:15,17,24;963:1; 967:8;987:13 interested (3) 808:17,22;983:10 interesting (1) 879:23 interests (1) 899:22 interfere (1) 942:15 interfering (1) 935:19 internal (1) 1004:11 internally (2) 860:22;1003:11 international (5) 919:15;920:16,17;	921:3;1001:17 Internet (2) 920:14;967:9 interpretation (3) 884:15;984:17; 987:22 interrupt (5) 921:12;932:11; 936:15;986:4; 1002:16 interrupting (1) 985:13 intervened (1) 958:16 into (26) 793:13;808:4,13; 810:5;813:13; 826:11;827:7,11,15, 20;828:4;834:1,4,12; 841:21;853:4; 855:23;863:7;897:7; 963:8,21;964:6,11; 973:5;981:13;986:7 introduced (1) 998:15 introducing (3) 794:5,6;911:13 introductory (1) 796:12 invades (1) 888:22 investigation (14) 884:23;885:1,6; 890:16;928:11,16, 22;940:18;943:4; 951:20;952:14,20; 953:15;977:16 investment (6) 805:14;846:13; 960:13;961:15; 962:10;966:13 Investments (3) 800:2,4,10 investor (1) 800:7 invitation (4) 880:3;909:10; 910:1;989:19 invite (2) 921:24;932:25 involve (1) 945:15 involved (15) 811:19;846:8; 854:17;857:12; 871:7;873:9;881:20, 25;906:13;907:8; 908:23;909:14; 926:24;945:15,21 Involvement (5) 840:17;905:11; 906:7,12;910:13 involving (1)
---	--	--	---	---

903:17 IRP (42) 899:1;903:14,16, 25;912:19;935:22; 944:6,7,9,12,15,19; 945:2,13;948:21; 949:12,16;976:4; 979:3,13;980:7,15; 981:4,11,20;982:1, 12,13;984:4,10; 985:25;986:6,21,22, 22;987:3,7,7,9; 988:8;989:12,13 IRPs (1) 982:23 issue (15) 877:25;878:3,9; 905:7;917:20; 918:14;921:18,20; 924:2;942:22;943:3; 945:1,12;980:4; 1000:9 issued (2) 847:25;878:15 issues (15) 811:24;878:18; 910:10;923:5;924:2; 926:11;931:19; 937:2;939:18; 942:15;947:16,24; 952:25;985:25; 986:20 issuing (1) 801:14 item (2) 939:5;994:24	joking (1) 970:3 Jon (6) 847:23;849:23; 852:25;853:12; 863:11,12 Jones (5) 882:3,15,19,24; 931:6 Jose (6) 848:14;850:3,5; 853:20;867:20; 909:23 Juan (6) 799:10;800:11; 834:4;854:18;855:5; 857:17 July (17) 846:20;853:1; 864:12,16,23;865:6; 866:21;873:17,21; 874:1,4;877:17,23; 878:8;905:5;907:7; 909:4 June (21) 850:21;853:12,19; 854:9;859:12;861:1; 894:24;913:2;946:5; 947:7,20,23;949:2; 955:9,12;978:1; 998:20;999:3; 1002:14,23;1003:13 jurisdiction (4) 985:25;986:6,12, 13 Justice (1) 884:22 Justice's (1) 875:9	988:7,20,24;989:2; 990:1;991:21; 1007:8 Kessedjian's (1) 991:3 Kevin (3) 811:3,3;907:24 Kieren (1) 907:25 killed (1) 915:5 kind (21) 803:6,6,9,12; 805:19;808:19; 820:10;821:21; 831:14;847:18; 856:3;858:11; 863:20;881:19; 892:23,24;898:2; 907:16;915:23; 979:19;1000:7 Kingdom (1) 913:21 knew (26) 805:8,11;808:9; 820:10;824:13; 834:1,8,11,18;842:9, 13;851:18;852:3; 855:14;857:7;859:1; 891:10;906:2,5; 909:17;917:6,17; 928:5;976:21;977:1, 3 knowing (1) 805:17 knowledge (4) 796:3;805:12; 889:6;905:9 known (3) 981:25;982:5,6 knows (1) 969:14	997:11;1002:18; 1005:19 lasted (2) 830:14;885:1 late (2) 793:13;884:23 later (6) 860:9;880:4,5; 887:4;915:9;942:9 launch (3) 948:19,21;980:14 launched (1) 800:20 law (14) 816:8;889:9; 919:16,20;920:16, 18;921:21;922:12; 933:18,19,19;934:4, 5,6 laws (3) 801:11;920:25; 921:7 lawyer (10) 882:13;888:6; 921:3;927:23; 932:14;933:4;934:8, 9,16;983:6 lawyers (7) 810:22;811:2; 889:22;916:17; 921:3;924:4;983:7 leading (4) 904:10,13;906:24; 911:12 leap (3) 983:19,22,22 learned (1) 860:9 least (9) 828:21;866:6; 883:18;889:10; 890:11;897:13; 939:22;943:3; 1001:11 leaving (1) 950:24 led (1) 808:13 left (3) 835:14;937:25; 972:10 legal (22) 811:20;881:19; 883:22;916:21; 918:10;921:1,4,8,18, 19;924:2,22;926:11; 929:9,13;932:8; 939:3,4,24;979:22; 983:20;986:19 legalese (1) 883:23 legalities (1) 811:21	legality (3) 835:3,12,17 legitimate (1) 802:13 length (2) 794:20;969:24 lengths (1) 899:20 less (3) 804:4,12;849:18 letter (25) 873:20;874:1,3; 875:21;881:1,10,13, 18;882:2,14;899:4,4, 5,9,13,14,18,25; 931:4;934:14; 948:17;951:18; 952:4;953:13; 993:20 letters (9) 917:12;927:10; 928:4;948:17; 979:21;999:10,11, 25;1000:8 letting (1) 932:12 LeVeé (64) 793:9,16,24;794:5, 9,18;911:12,24; 912:2,7,8,12;913:14, 15,17,19,24;914:4,8, 22;921:11;922:1; 927:12;932:11; 933:14,16,25;934:2; 937:9;951:25;962:4; 967:15,19,24;968:2; 969:4,6,20,24,25; 974:16;975:3,5,8; 989:6;991:23,25; 992:6,8;998:17,19; 1000:13,25;1001:1, 7,8;1002:1;1003:5,8; 1005:6,7;1006:11, 12;1007:11 LeVeé's (1) 1002:4 level (2) 972:20,21 Leventhal (9) 810:17;811:22,23; 829:1;830:2;881:20; 888:7,19;889:14 lie (1) 860:20 lifting (2) 978:19;1004:19 light (3) 809:23;875:6; 980:4 likely (13) 804:4,12;805:23; 834:19;843:20; 848:9;850:25;852:1,
J				
January (4) 885:1;891:25; 949:10;977:15 Jared (1) 861:2 Jeff (1) 967:23 Jeffrey (7) 887:24;890:9,13; 891:18;893:15,23; 924:5 Jessica (2) 892:15,22 jobs (1) 799:5 John (5) 850:13;887:24; 890:9;893:15;924:4 Johnston (1) 931:5 join (2) 869:22;916:10 joining (2) 795:13;848:12	Kane (5) 806:22;807:1,13, 21;850:13 keep (7) 816:25;843:18; 850:20;878:12; 895:10;922:22; 982:13 keeping (1) 996:5 kept (1) 926:18 kerfuffle (1) 973:16 Kessedjian (26) 795:12;900:15; 911:14,19;912:6,10, 20;937:13,15,16; 968:14,20;973:24; 985:11,17,18,22; 986:11;987:25;	K	L	
		LaHatte (5) 866:22;871:4,23; 876:23,25 laid (1) 946:15 language (7) 814:7;815:10; 836:18;867:11; 869:16;894:13; 970:17 large (1) 993:14 last (16) 830:14;847:22; 853:20;856:8; 859:11;874:9;875:8, 20;899:6,13,19; 904:13;989:4;		

18;875:4;891:22; 930:10;959:10 likewise (2) 796:7;913:9 limit (3) 817:14;882:5; 989:14 limited (2) 831:15,17 limits (1) 969:3 line (7) 886:4;888:2,3; 890:9;893:25; 921:17;997:12 lines (2) 874:23;891:9 links (3) 995:2,13,22 list (6) 796:23;889:12,16, 16,22;957:9 Listen (6) 807:25;834:4; 841:19;867:21; 890:15;927:22 literally (1) 800:2 litigation (8) 888:9;903:25; 916:22;921:13; 926:24;932:1; 942:24;978:22 little (7) 858:18;860:19; 871:24;895:15; 897:2;927:14; 955:19 Litwin (63) 912:15,16;914:10, 11,12,14;922:2; 927:22;932:22; 933:1,18,20;934:12, 19;935:3,5,25;936:2; 937:25;938:8; 939:12,15;941:21; 942:7,13;950:12; 951:3,6,8,13;952:3; 956:2,9,11;962:5; 964:18,22,23;965:2, 6,16;966:5,7;967:16, 22,25;968:4,23; 973:12,14;978:18; 1000:17;1001:15,21; 1002:2,9,11;1003:3, 9;1005:2,5,15; 1007:10 Litwin's (1) 921:23 live (1) 937:24 Livesay (23) 807:8,10,10,10,15,	23;810:20,25;812:3, 16;824:5;830:6,11, 18;831:1,4;873:21; 874:14,17,24; 878:18,19;879:2 LLC (8) 799:17;809:4,21; 854:15;855:4;858:1; 861:9;862:3 LLCs (1) 857:23 loan (5) 822:17,20,20,21, 23 local (1) 920:17 lodge (1) 981:11 log (1) 918:16 logical (1) 963:2 logically (1) 930:14 Logistically (1) 879:19 long (17) 803:1,2;807:13; 817:2;818:25; 871:25;890:19; 899:20;925:19; 926:1,9;942:5; 952:2;963:22;970:1, 13;1006:4 longer (6) 854:16;857:12; 861:11;871:6; 894:22;895:15 longstanding (7) 935:19;936:23; 938:16;939:11; 956:16;957:24; 959:2 look (52) 806:17;808:4; 810:3;812:17; 813:23,24;816:22; 826:6;832:12; 836:13;840:6,15; 841:13;843:21; 847:20,21;848:10; 849:5;852:24; 853:15;864:22; 866:17;870:22; 875:5;878:6;880:15; 881:13;883:5;884:7; 885:12;886:16; 892:5;893:11; 894:10;895:24; 899:3,12;910:10,16; 916:1;919:22; 920:10;951:23; 965:1,4;977:8;	994:21,22,23; 996:15;999:20; 1003:23 looked (6) 832:7;836:20; 864:3;868:23;910:8; 943:6 looking (9) 798:17;834:8; 866:20;885:9; 893:13;960:2;968:6; 1004:21;1006:6 looks (5) 825:2;848:8; 861:24;894:13; 990:21 loop (1) 878:13 Lori (2) 800:5,22 Los (1) 795:14 lose (1) 915:22 losing (1) 834:10 lost (2) 968:16;1002:17 lot (8) 798:11;804:16; 806:5;818:13;822:8; 849:18;866:13; 899:14 lots (2) 822:15;923:20 LP (1) 799:20	management (2) 803:11;866:9 managers (6) 798:21;854:15; 855:6;857:24;858:3, 4 manner (1) 920:13 many (16) 803:20;807:12; 811:8;812:1,6; 824:13;830:12,16; 858:15;883:10,25; 884:10;923:3,10; 934:17;962:19 March (5) 949:24;950:3,8; 953:22;993:12 Marenberg (58) 793:16;794:6,8,11, 12,16;796:12,13; 797:5,9,12;798:3,5; 838:16,17;868:14; 870:15;871:1;882:4, 21;885:14;888:3,5,8, 12,14,16;889:7,11, 15,25;891:19; 895:20;898:5;899:5; 900:22,23;901:3,6,9, 12,20;902:16; 904:11,14,20;905:2, 17;906:22,25;907:2; 908:8,10,11,17; 909:2;910:18,21 marked (1) 915:12 market (5) 804:2,10,11,21; 805:18 Marketing (1) 799:17 material (3) 816:7;837:5;996:9 materials (12) 930:21,24;931:3, 12;932:2,3,7,13,19; 934:10;995:3,15 math (3) 960:6,9;962:7 matter (15) 842:13;859:19; 881:19;882:20; 906:2;928:24; 933:18;943:10; 978:20;981:3;984:9, 10;986:18;999:18; 1005:1 matters (5) 793:6;794:14; 811:21;916:22; 954:8 May (36) 795:23;796:5;	798:3;806:13; 815:25;826:10; 833:9;849:4,5,22; 850:2,13;861:11; 869:11;895:6; 896:18,22;900:23; 913:8;914:22; 921:25;932:22; 933:14;948:4;955:2; 957:20,22,25; 965:12,24;986:17; 997:12;998:4,22; 1000:13;1005:21 Maybe (3) 832:12;887:2; 948:17 McAuley (1) 1007:1 McCarthy (1) 907:25 McCombie (2) 803:6,10 McKinsey (1) 803:12 mean (24) 796:23;825:18; 841:13;842:16; 846:7;852:14; 855:20;858:10,15; 860:13,17,19; 862:17;870:4;919:3, 18;926:14;947:1; 950:4;962:22; 978:10,13;992:15; 995:21 meaning (3) 811:11;956:19; 957:5 means (6) 797:1,3;804:25; 844:22;845:5;972:5 meant (6) 876:20;877:2; 898:5,8;904:24; 905:1 meantime (1) 911:24 mechanism (23) 819:6;822:24; 887:8;905:20; 935:20;936:25; 938:18;944:3,7; 945:17,18,19; 948:20,22;949:8; 958:2,17;979:25; 983:1;999:6,18; 1004:22,23 mechanisms (31) 885:25;891:3,6, 12;894:4,22;936:13; 938:25;942:16; 943:13,19;946:5; 947:8,17,24;948:3,
M				
		magnitude (1) 841:16 main (1) 944:17 mainly (2) 929:16;982:2 maintain (1) 838:8 maintained (4) 813:19;826:22; 836:3;837:9 major (1) 855:6 makes (2) 816:9;988:17 making (10) 821:11;826:2; 837:13;874:16,18; 934:9;974:17; 988:16;989:14; 991:5 man (1) 803:5		

13;949:23;956:15; 957:13;958:12; 978:21,25;980:10; 982:3;992:17;996:6; 998:5,10;1000:3,11 meet (7) 812:3;912:10; 947:4,11,23;948:2; 991:13 meeting (28) 795:6;848:14; 849:12,16;886:20, 22;918:24;919:2,3,4, 11;921:8,14;922:8, 11;930:22;936:6; 940:6;950:4,4,5,5,9; 958:23;980:8,11; 992:12,13 meetings (3) 849:14;918:5,8 member (8) 916:7,12;929:5; 946:18;956:22; 975:18;976:22; 980:3 members (34) 805:8;846:24; 847:7,14,24;850:15; 852:5,9,17;853:9,22; 857:19,22,24,25; 858:1,5;863:3,6; 876:21;910:23; 923:9;924:20;929:2, 9,21;939:16;946:20; 948:5;970:1;979:7; 980:12;1004:1; 1005:10 memory (4) 848:16;924:9; 955:14;972:5 mention (5) 808:6;873:8; 876:8,10;978:6 mentioned (16) 796:20;805:7,20; 818:17;820:8;824:9; 866:4;872:24; 875:25;877:11; 890:15;905:13; 907:6;927:5;931:8; 976:8 mentions (1) 957:23 merely (1) 985:3 merits (7) 945:24;947:5; 949:3,25;950:7,11; 956:13 message (10) 807:25;854:10; 861:22;862:1; 864:23;865:5;	866:15;886:25; 890:24;893:24 met (7) 810:22;811:2; 812:6,8,9;948:3,10 Miami (2) 799:7;812:8 middle (2) 849:22;997:2 might (14) 802:24;807:17; 819:12;825:16; 830:8;838:12; 860:11;879:2; 899:21;934:19; 942:10;943:18; 976:11;983:12 million (29) 823:13,14,22; 843:13;844:1,10,14; 845:16,20,25; 856:12;859:22; 877:18;960:4,8; 961:8,14,20;962:1,8; 963:7,13;971:1,9; 972:1,3,10;973:1,5 millions (1) 959:23 mind (12) 826:2;852:15,16; 863:7;898:13;912:7; 923:14,17;956:21; 974:3;980:4,6 mindful (1) 992:1 mine (2) 798:3;809:7 minute (5) 920:5;933:15; 969:17;979:15; 1000:14 minutes (16) 838:20;895:7; 900:24;911:15,23; 912:11,12;926:4,7; 931:8;958:22; 965:12,19;966:10; 992:1;1000:22 miscellaneous (1) 846:10 misleading (1) 862:18 misrepresent (1) 942:8 misrepresented (1) 919:21 missed (1) 988:25 Mission (3) 920:12;967:7; 987:13 misspoke (1) 998:21	misstates (2) 868:14,15 modifications (4) 827:9,13,17,19 modify (2) 813:7,14 Module (5) 964:18;965:7,7; 966:16,19 moment (2) 809:2;868:6 Monday (3) 1006:6,14,24 monetize (1) 802:18 money (17) 827:25;828:13; 833:5;842:17;846:7; 859:25;860:1; 879:16,17;961:9; 962:23,25;963:3,11, 25;971:3,20 moneys (3) 842:19;971:4; 972:22 monitor (1) 794:21 month (1) 862:13 months (4) 848:17;875:8,20; 898:22 more (30) 793:18;800:17; 804:16;805:7; 810:23;814:6; 837:13;846:12; 849:19;865:16,24; 876:4;895:7;911:16; 923:14,16;926:4,7; 927:14;934:24; 937:3,3;943:22,23; 947:10;948:18; 962:9;966:6;969:2; 1000:22 morning (15) 793:4;794:7,10, 12;795:3,4,7,9,17; 797:16,17,21,23; 839:8,9 most (13) 804:4,12;816:2; 848:9;849:8;850:15; 852:1;860:22;875:3; 878:17;891:22; 900:6;905:1 Mostly (2) 805:4;1006:19 motive (1) 981:14 move (9) 869:22;876:4; 910:9;935:1;939:9;	946:15,20;975:2; 1000:9 moved (3) 939:5;963:6,8 moving (4) 860:16;869:20; 910:10;983:3 much (40) 793:13,14,18; 797:23;807:4;808:3; 828:14;831:17; 832:5;833:6;834:3; 859:23;866:11; 890:22;894:9; 895:18,19;900:21; 910:16,20;911:1,8; 913:13;914:16; 915:7;916:1;923:2, 13;930:18;950:23; 956:7,10;965:25; 966:8;973:15; 988:21;1005:12,13, 14;1006:1 multiple (3) 799:4,4;925:2 Murphy (1) 907:24 must (8) 805:23;907:15,18; 911:3;920:13;940:3, 11;990:5 mute (1) 998:22 myself (5) 800:3,4;810:25; 914:24;985:2	798:22;799:11,15, 18;801:17,21,24; 802:2,5;804:3,11; 805:12;806:15; 810:13;812:19; 813:3,13,25;816:16; 818:13,20;819:17; 820:6,11,15;821:6; 823:4,22;825:23; 826:15;828:11,12; 829:17,23;831:5,12; 834:24;836:3;837:2, 11,17,20;839:20; 840:7,19,23,24; 841:6;842:14,23; 843:8,12;844:1,5,10, 14;845:16;847:7,13; 851:2,3,10;852:18, 21;855:12;860:8; 865:25;866:4; 867:18;868:12,18, 25;869:17;874:10, 11;875:12;880:24; 883:1,6,14;884:17; 885:20;888:2;889:7; 890:1;891:7,14,15; 892:1;896:16; 899:17;928:11,22; 931:15;943:5; 952:22;974:12; 976:14;978:3; 980:18,22;981:22; 983:12,13 NDC's (23) 802:23;819:15; 840:1,9;868:9;871:9, 20;872:2,16,18; 873:12;881:1;884:7; 896:4,9;898:14; 900:3;946:8;952:22; 976:13;980:21; 984:5;989:20 near (1) 989:7 necessarily (3) 805:16;813:17; 987:19 necessary (7) 814:9;817:24; 818:8,22;819:15; 970:23;971:7 need (12) 861:10;862:4; 877:8;922:2;930:15; 942:1,2;947:9; 961:21;965:7;981:6; 983:18 needed (7) 826:23;850:4; 862:24;864:1,9; 898:3;906:14 needs (1) 1006:4
N				
			Nakata (1) 1003:10 name (7) 795:10;797:21; 800:8;803:5;888:6; 892:15;912:18 namely (1) 983:15 names (1) 811:1 narrow (3) 944:14;945:1,12 narrowed (1) 944:22 natural (1) 946:14 naturally (1) 922:22 nature (4) 817:19;883:23; 907:8;1000:10 nays (1) 935:15 NDC (104)	

<p>negatively (1) 851:8</p> <p>negotiate (1) 812:4</p> <p>negotiating (3) 809:1,19,24</p> <p>negotiation (2) 811:14;897:13</p> <p>negotiations (16) 808:13;809:25; 810:2,7,12,18,25; 812:4;835:4,16; 896:12,14,17,24; 905:16;906:17</p> <p>net (1) 960:3</p> <p>Neustar (1) 857:15</p> <p>Nevett (10) 847:23;849:23; 852:25;853:12,19; 858:14;860:7;863:6; 876:14;877:14</p> <p>Nevett's (1) 875:1</p> <p>new (17) 801:14,18,18; 808:5;900:6;910:3; 915:14;918:1; 933:18;957:11; 959:24;963:16; 964:14;971:19,25; 973:2,3</p> <p>news (1) 798:10</p> <p>news! (1) 850:14</p> <p>next (31) 807:18;831:2,3,6, 12;848:1;852:8,24; 865:12;877:25; 878:3,15;887:6; 894:6,17;909:4; 911:12;935:2;939:5; 948:14,14;953:4,12; 970:22;978:24; 979:19;980:25; 995:12,12;1006:5,25</p> <p>nice (1) 1006:13</p> <p>Nicolai (6) 799:11;800:5; 834:4;854:16;855:5; 857:11</p> <p>night (2) 793:13,13</p> <p>nobody (1) 820:10</p> <p>noise (2) 874:15,18</p> <p>nonapplicant (1) 821:16</p> <p>noncompliant (1)</p>	<p>980:21</p> <p>nondisclosure (1) 810:6</p> <p>none (2) 897:5;972:22</p> <p>nonprivileged (1) 933:10</p> <p>Nope (1) 794:16</p> <p>normal (2) 1006:24;1007:2</p> <p>normally (1) 935:18</p> <p>north (1) 960:7</p> <p>note (2) 929:8;930:20</p> <p>noted (1) 1001:5</p> <p>notice (4) 815:19,23;846:18; 1003:16</p> <p>notification (3) 894:20,21;896:10</p> <p>notified (1) 897:1</p> <p>notifies (2) 817:20;818:4</p> <p>notify (4) 814:1,11;840:9; 905:19</p> <p>Notwithstanding (2) 835:15;863:15</p> <p>November (47) 898:12;916:16; 918:6,9,13,18,25; 919:8;920:24; 922:14;923:4,19; 924:1,21,25;925:3,6, 17;926:23;928:10; 929:6,10,14;930:4, 22;932:9;935:6,9; 936:6;938:13; 939:17;941:4; 942:19;943:12; 947:13;959:4;974:3; 975:10;976:9,21,25; 982:11,14;983:15; 989:15;991:9; 992:11</p> <p>NSR (4) 854:16;857:12,14, 15</p> <p>NU (13) 798:21;822:5; 858:12;859:5,8; 860:22,23;861:9; 862:3,19;877:21; 879:22;909:25</p> <p>Nuco (2) 799:20;800:12</p> <p>NuDotco (1) 894:1</p>	<p>number (15) 915:5,14,15,15; 920:7;923:7,8; 925:14;958:10; 961:4;964:10; 972:12;993:9;995:3; 998:15</p> <p>numbers (3) 798:14,16,18</p> <p>numerous (1) 958:9</p> <p style="text-align: center;">O</p> <p>o0o- (2) 793:2;1007:14</p> <p>object (6) 888:20;904:12; 906:23;908:6; 927:12;1001:2</p> <p>objecting (1) 904:10</p> <p>objection (13) 838:17;868:14; 882:4,21;888:16,25; 908:10,16;921:24; 969:5,7;974:17; 1001:5</p> <p>obligated (6) 840:7,25;841:6; 842:23;848:21; 852:6</p> <p>obligation (6) 842:14,18;846:9; 852:11;856:15; 857:1</p> <p>obligations (8) 814:10;825:5; 836:16;839:25; 840:2,18;842:4; 952:18</p> <p>obliged (1) 856:23</p> <p>observes (1) 957:7</p> <p>obtain (1) 802:9</p> <p>obtained (1) 837:25</p> <p>obviously (16) 794:20;808:10; 809:4;811:20;823:1; 826:21;829:23; 830:10;837:11; 883:22;884:13; 891:1;893:7;917:9; 933:12;963:2</p> <p>occasion (2) 816:1;959:20</p> <p>occasions (3) 958:10,11;964:7</p> <p>occur (1) 861:13</p>	<p>occurred (3) 948:12,25;979:8</p> <p>October (5) 847:22;848:11; 885:20;916:11; 968:8</p> <p>off (31) 794:23;855:20; 858:14;860:4,20; 862:16;872:23; 901:3;904:6;937:6; 938:1;948:11,14,15, 19;958:18;963:5,14; 964:10;965:10; 968:22;972:21; 979:1,3,6,7,11,13; 980:16;982:18; 990:7</p> <p>office (3) 812:8,9,16</p> <p>officer (1) 798:21</p> <p>officers (1) 861:14</p> <p>offices (2) 830:3;874:6</p> <p>official (1) 858:11</p> <p>ombudsman (10) 864:12;866:22; 876:16;877:13; 917:5,9,10;928:21, 23,24</p> <p>ombudsman's (1) 928:18</p> <p>once (7) 834:2;855:15; 856:11;872:6;888:8, 8,946:4</p> <p>one (59) 798:20;800:6; 801:13,24,24; 803:13;805:7;810:3; 811:3;812:8,9; 820:17;828:12; 829:5,7;833:4; 852:21;862:13; 864:14;865:7;871:5; 885:15;890:11; 892:23;907:18; 909:4;913:20; 925:10;928:25; 929:3;930:8;939:12; 940:21;946:18; 947:10;948:18,18; 968:13;969:6,12; 971:12,24,25; 972:12;976:23; 985:12,25;987:23; 996:20;997:12,20; 999:1;1000:13,18, 21;1002:5,16,24; 1005:18</p>	<p>ongoing (2) 887:8;972:16</p> <p>on-hold (3) 982:18;998:2,10</p> <p>only (26) 794:17;800:17; 808:23;809:17; 814:8;816:13;826:9, 16,17,18;833:11,13; 843:8;850:17; 869:13,14;922:6; 949:7;959:19; 969:25;975:19; 976:3;982:13;985:4; 988:8;1001:23</p> <p>onto (1) 1003:24</p> <p>open (10) 797:25;798:3; 835:14;914:21,23; 915:2,21;926:8,11; 988:14</p> <p>opened (2) 861:25;885:15</p> <p>operate (4) 799:6;802:10; 920:13;987:10</p> <p>operated (1) 860:22</p> <p>operates (1) 987:21</p> <p>operating (7) 963:19;964:13,16; 970:25;971:9,13; 973:7</p> <p>operation (1) 814:19</p> <p>operations (1) 861:14</p> <p>operator (7) 800:6;818:3,24; 820:23;821:6,19; 822:12</p> <p>operators (1) 849:17</p> <p>opinion (3) 921:4;933:24; 986:19</p> <p>opportunity (11) 817:22;818:6; 819:1;849:9;945:23; 965:20;982:15; 983:14;989:22; 990:3;1001:11</p> <p>opposed (4) 852:19;860:2; 962:1;1006:5</p> <p>opposition (2) 992:14,15</p> <p>oral (2) 935:22;936:4</p> <p>order (5) 830:24;860:20;</p>
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<p>865:16;897:20; 1005:19 org (4) 974:10;1004:18, 25;1005:1 organization (7) 860:24;861:10; 862:4,22;963:25; 964:4;970:25 organizations (2) 805:11;956:25 organized (1) 825:17 original (3) 825:3;871:10; 915:15 originally (1) 948:7 others (6) 854:19;857:18; 859:15;943:9; 979:24;981:5 other's (1) 816:25 otherwise (6) 817:14;820:22; 821:5,18;822:11; 841:4 ours (1) 872:22 out (49) 796:19;808:19; 811:15;815:21; 821:12;830:7;832:4, 19;841:8,20;853:23; 857:5,6,7;860:14,17; 862:13;867:8;870:4, 18;882:19,25; 886:13;887:5;890:5; 891:25;897:3; 899:25;901:24; 907:22;919:14,19; 920:15;928:6;931:9; 946:16;949:6; 952:25;958:5; 961:17;963:7; 964:14;968:21; 969:13;971:12; 985:2;999:13; 1001:20;1002:3 outcome (5) 819:8,10;837:14; 839:18;858:25 outcomes (1) 803:7 outside (17) 831:17;849:14; 852:7;867:2;881:9, 10;882:6,12,16,19, 20,25;883:3;892:8; 987:15;990:15,20 outstanding (10) 935:20;936:13,24;</p>	<p>938:17,25;943:8; 956:14;957:13; 958:2,17 over (16) 811:9;823:5; 875:8,20;899:20; 903:13;906:18; 934:21;957:10; 961:14;962:16; 971:1,9;972:17; 973:7;992:3 overall (1) 961:25 overly (2) 881:20,25 overseeing (1) 918:1 own (4) 801:3;817:24; 818:8;912:3 owned (8) 799:17,20,23,24, 25;800:1,12,17 owners (1) 858:5 ownership (2) 860:12;867:10 owns (1) 800:9 Ozurovich (5) 993:7,16;995:6, 11;997:17</p>	<p>962:8,24;963:3 pained (1) 859:25 painful (2) 859:16,19 pains (1) 859:12 Panel (42) 793:15;795:11; 796:7;838:13;859:9; 873:10;910:23; 911:6;912:4,19,25; 913:10;921:14,15; 933:24;934:3,22; 969:20;970:1; 984:11,11,16,23; 985:8;987:14,20; 988:11,12,13,14,14, 16;989:13;990:6,14, 15,16,22;991:13,14; 1005:10;1006:16 Panel's (2) 987:16;1000:18 paper (1) 915:9 Paragraph (39) 796:20;797:6; 799:14;806:16; 820:16;835:21,22, 23;836:1,2;839:22; 840:15;841:8,24; 842:22;863:25; 865:14;867:5;870:7, 8,25;871:2,3;874:8; 875:5;880:16,21; 885:12,13;895:25; 899:13,19;902:4,20; 967:1;978:5;979:21; 993:15,19 paragraphs (3) 952:9,10;977:9 paraphrase (1) 979:14 parent (1) 917:1 Paris (2) 795:13;985:18 parse (1) 959:15 part (31) 794:1;816:2; 823:16;824:24; 825:2;850:8,25; 861:13;862:8,22; 871:6;876:22; 884:14;896:11,14, 16,17;897:12; 902:22;903:21; 904:7;917:19; 942:23;954:8; 959:14;961:20; 974:7;975:15; 978:21;994:11;</p>	<p>1001:3 participants (2) 910:24;1005:11 participate (32) 821:17;822:10,15; 825:6;826:13;828:2, 15;833:10,11,14,17, 22;834:24;835:11; 847:8,16;850:17; 851:4,11;852:22; 853:10,13;856:5,15, 17,21,22;857:1; 865:20;867:16; 869:12,13 participated (13) 804:15;806:3; 808:9;832:1;852:21; 855:12,25;866:4; 868:12,18,25; 869:18;880:25 participating (7) 795:20;820:21; 821:4,25;825:24; 865:21;875:12 participation (4) 822:15,18;905:21; 908:2 particular (10) 803:23;806:9; 871:4;929:18,18; 945:18;959:20; 972:20;996:20; 1006:21 particularly (3) 824:19;850:24; 884:20 parties (7) 793:7;816:7,25; 817:5;875:14; 899:22;944:17 parties' (1) 840:18 partners' (1) 809:7 parts (1) 897:11 Party (3) 814:12;817:10; 874:12 Party's (1) 817:6 passed (1) 899:15 passing (1) 851:23 past (1) 947:10 Pat (1) 806:22 paths (1) 841:9 Paul (3) 807:8,11;812:15</p>	<p>pause (1) 965:19 pay (13) 841:21;842:10,14; 844:1,24;845:12; 860:1;961:21,23; 962:15;963:18,25; 964:12 paying (2) 823:22;859:17 payment (10) 811:13;823:14; 843:21;881:5; 906:11;909:9,24; 962:14;971:24,24 payments (2) 841:2;843:5 pays (1) 964:14 PDF (2) 798:15;966:24 Peg (1) 886:20 pendency (1) 885:24 pending (10) 885:5;891:6; 894:3;943:13;946:4; 949:8,23;976:23; 992:16;998:4 Pennsylvania (1) 969:15 penultimate (1) 979:20 people (9) 824:13;830:6; 831:25;832:4; 887:20;892:23; 902:18;923:20; 994:12 per (2) 863:24;1005:19 percent (13) 799:18,21;800:18; 843:4,19;923:15,16; 929:22;960:7;962:9, 17,24;963:3 percentage (1) 923:12 perfectly (1) 993:17 perform (1) 814:9 performing (1) 920:12 perhaps (4) 892:4;911:25; 968:25;978:14 period (7) 797:5;899:20; 949:7,22;971:1,9; 972:17 periodically (2)</p>
	P			
	<p>Pacific (1) 1007:3 package (1) 797:24 page (56) 798:14,14,16,17; 812:23;813:5,25; 816:4;824:22;829:8; 836:14;843:22; 844:18;847:22,22; 849:3,22;850:12; 864:25;866:20; 875:5;880:17;902:5, 7;909:20;915:12,13, 15;920:5,7,8,9; 951:24;952:7;953:4, 12,13;964:20; 966:22,23,24; 967:17;968:4,9; 969:12;970:16,22; 994:22;995:5,12,13; 997:1,12,16; 1003:24,24 pages (3) 952:6;995:7,13 paid (9) 802:5;823:13; 844:4,14,20;961:8;</p>			

885:20;916:17 periods (2) 815:24;998:6 permission (1) 819:3 permits (1) 826:12 permitted (2) 821:16;831:12 person (7) 812:3,7,14;817:9; 830:8;874:7;879:3 personally (5) 805:10;859:13; 931:21,23;943:1 persons (2) 911:5;1005:21 perspective (1) 878:13 phone (11) 796:25;806:14; 808:12,16;812:4; 876:5,23;886:7; 889:25;892:21; 893:17 phrase (2) 823:25;828:10 pick (1) 834:9 picky (1) 956:17 Pierre (3) 795:10;912:18; 973:23 place (12) 801:10;850:6; 892:13;893:4; 918:17;919:11,13; 926:23;945:18,19; 981:2;983:21 placed (2) 1000:6;1003:19 places (1) 969:13 plan (5) 905:18;960:14,24; 961:3,5 players (2) 805:21;907:18 pleadings (1) 932:3 please (31) 798:5;839:12; 850:19;871:2;894:7; 896:21;901:9,13; 902:7;908:3,25; 909:21;929:12; 932:23;939:13; 942:11;951:11,24; 952:6;964:19; 966:25;967:18,22; 968:5,13;969:9; 970:7;986:4;1002:6,	20;1003:4 pm (2) 849:6;1007:13 point (39) 796:19;804:14; 808:3;810:1,14; 823:3,17;826:22; 835:7;847:10; 851:10;852:14; 853:8;859:11; 863:10,14;870:4; 874:20;880:8; 881:21;892:16; 894:20;897:8; 899:16;904:11,17; 905:15;906:19; 907:13;909:11; 910:8;929:3;933:2; 934:21;945:10; 953:5;954:4;1002:2; 1005:19 points (2) 904:25;987:16 policy (17) 849:18,19,20; 885:7;953:10; 956:13,18,21,23,23, 24;957:3,4;964:7; 993:6,24;995:18 polite (2) 858:18;860:4 poll (2) 935:11,24 portal (8) 796:22;797:4; 861:23;885:22; 886:6,7;903:2;910:3 Porter (3) 882:3,14;931:5 portion (2) 811:17;963:1 portions (2) 803:15,18 position (22) 835:8;850:18; 851:14;855:18; 866:3;869:6;876:1; 974:10,11,13,25; 976:13,15;982:12; 983:11,20;984:5; 985:7,9;989:8,12,18 positive (1) 999:2 possibility (4) 835:20;866:2; 875:12;996:9 possible (13) 870:2;871:13; 872:4;889:22; 905:24;944:19; 959:13,13,19;967:5; 992:2;996:12,14 possibly (3)	895:3;907:19; 973:18 Post (2) 839:24;1004:19 posted (3) 803:16;959:5; 998:9 postponement (3) 853:3,5;874:21 potential (6) 805:5;823:16; 860:7;888:9;902:21; 908:2 potentially (3) 856:12;889:10; 908:22 Power (3) 879:16,25;909:24 powers (2) 854:20;877:3 practice (26) 847:3;935:19; 936:23;938:16,24; 939:11;946:18; 956:17,21;957:3,11, 14,19,24;958:8,13, 23;959:2,3,10; 982:23;983:5; 984:21;996:5;998:8; 1000:2 practices (2) 937:8;957:6 preaction (6) 866:13;876:11; 928:11,16,21;943:4 precisely (4) 874:19;875:3; 941:18,19 preempt (1) 942:15 prefer (4) 870:24;942:9; 964:2;970:4 preference (1) 973:22 pre-investigation (1) 928:19 preliminary (2) 793:6;794:14 premature (1) 893:7 premise (1) 856:4 preparation (1) 892:3 preparatory (1) 892:24 prepared (3) 883:6;903:24; 975:1 preparing (4) 805:15;846:8; 867:2;892:8	present (10) 828:22;923:9,12; 924:11,20;929:21, 23;939:17;948:6; 980:12 presented (2) 945:24;955:24 preserve (7) 818:2,22;819:15; 836:8;837:4,18,21 president (4) 887:25;917:22; 970:19;971:7 press (6) 877:25;878:3,9, 15;905:7;909:17 pressure (1) 863:4 presume (1) 846:11 pretend (3) 819:12;831:22; 860:13 pretty (8) 793:12;803:1; 821:10;823:7;834:3; 842:7;846:13; 861:25 prevail (3) 804:4,12;840:3 prevent (2) 817:13;819:18 previous (4) 893:25;895:22; 930:16;973:4 previously (7) 800:20;837:12; 855:14;890:14; 902:21;946:15; 959:10 price (4) 805:1,23;821:12; 830:21 primaries (1) 809:20 primarily (9) 796:21;797:3; 802:24;809:1; 811:13;839:19; 843:23;849:17; 872:8 primary (3) 810:14;830:10; 878:17 principle (1) 972:7 principles (2) 919:15;920:16 prior (33) 813:8,15;818:15; 821:8;824:7,17; 826:9;827:6;828:22; 829:3;834:17;836:5,	23;837:1,8;838:1; 863:22;864:7; 868:15;873:7,8; 875:20;881:2;887:1; 898:9;907:10; 948:13;976:12; 978:17,18;999:3; 1003:15;1004:19 private (60) 802:17;805:2; 814:15,18;815:9; 825:15,16;833:10, 12,15,18,22;834:2,6, 9,15,19,24;835:3,11, 13,17;846:25;847:8; 851:4,11,18;852:4, 19,23;853:10,14; 855:12,25;856:5,15, 17,21,23;857:2; 858:16;863:5; 865:18,20,25; 867:16,23;868:12, 18,25;869:12,13,18, 22;871:19;872:2,16; 873:12;875:13,22 privately (3) 805:25;852:10; 867:12 privilege (11) 823:23;888:23; 918:16;921:1,8; 922:8;927:16,18,20; 932:17;989:7 privileged (25) 882:5,6;919:9; 920:25;922:11,12, 17,20;932:15;933:5, 7,12;934:7,9,11,15, 17;959:8,11,21; 974:6,6,18;975:6; 996:1 proactively (4) 938:19,20,20; 939:2 probable (1) 881:24 probably (18) 794:18;802:14; 807:22;841:18; 847:11;851:25; 857:22;860:19; 881:20;886:6; 887:23;891:20; 892:23;908:1; 911:15;927:24; 930:6;944:4 problem (5) 882:7;919:24; 938:7;988:6; 1005:23 proceed (15) 829:20,25;831:2; 833:20;839:12;
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891:7;901:9;942:12; 946:12,21;969:9; 970:7;997:25; 1002:7;1003:21 proceeded (1) 879:24 proceeding (2) 903:14,17 proceedings (6) 885:16;968:17; 975:21;976:4; 983:20;1007:12 proceeds (25) 842:15,24;843:9, 17;877:17;879:13; 880:2;959:23;960:2, 12;962:11;963:8; 966:12;967:2; 971:11,13,21;972:2, 4,11,11,13,23;973:1, 8 process (36) 801:13;803:2; 828:2;830:13; 831:25;883:24; 887:3,10;891:4,10, 11;892:1,17,18,25; 894:6,10;899:23; 902:23;903:22; 904:8;909:25; 910:12,24;948:15; 968:19;973:3; 978:24;981:1,8,13; 982:23;1001:23; 1003:17,22;1005:11 processes (2) 886:1;984:22 procurement (1) 801:10 Professor (5) 795:12;912:19; 986:15;990:1;991:2 proffering (1) 889:9 Program (24) 801:15,19;805:6; 806:23;808:1,10; 809:11;854:18; 857:17;866:11; 897:19,22;898:14; 900:4;910:3;918:2; 959:25;963:12,17; 971:19,25;973:3; 974:12;989:21 prohibited (2) 818:14;819:22 prohibiting (1) 820:6 projected (1) 870:20 projects (1) 967:8 prompted (2)	882:2,14 promptly (6) 814:1,10;829:9; 832:9;844:23; 981:22 pronounce (4) 898:15;983:15; 989:19,23 pronounced (2) 807:10;976:24 proper (1) 989:13 properly (1) 915:3 proportion (1) 961:25 proposal (1) 803:3 proposals (1) 961:4 proposed (2) 817:22;818:7 protect (2) 864:5;899:21 provide (14) 793:9;815:1,6; 819:1;831:24; 848:22;921:4; 933:23;934:10; 952:19;954:3;964:2; 995:21;1003:12 provided (25) 800:15;817:11,12, 20;818:4,9;820:24; 829:13;832:24; 836:4;858:21; 871:13;883:14; 889:17,21;916:18; 926:12;932:13,19; 933:4,9;974:8; 994:3;995:2,14 provider (10) 814:14,15,16; 815:8,9;826:12,16; 827:10,21;830:22 Provider' (1) 814:17 providers (2) 851:6,18 provides (4) 816:13;830:22; 840:17;842:22 providing (7) 815:13;818:1,21; 819:18;822:4,22; 871:17 provision (14) 813:25;815:11; 816:6;818:13; 821:23;826:7,15; 835:9,19,23;836:14; 869:2,3,8 provisions (5)	813:24;815:15; 816:5;824:6;825:21 proviso (3) 817:2,12;864:3 provisos (2) 818:18;820:18 prudent (4) 820:9,14;942:14; 943:10 public (20) 801:7;803:15,16, 21,22;821:10,14; 824:10;830:16; 847:16;852:7; 880:25;907:12; 917:19;918:4; 975:13;987:13; 994:19;995:21; 998:6 publication (2) 992:21;993:2 publicly (3) 803:16;940:5; 994:14 published (4) 994:16;996:9,16, 21 pull (1) 964:18 purely (1) 984:2 purpose (5) 801:18;825:9; 909:7;944:14,20 purposes (1) 982:4 pursuant (7) 919:19;951:22; 952:17;953:6;954:1, 4;991:12 pursue (1) 938:22 put (20) 798:13;830:12; 832:19;849:12; 856:1,18;858:13; 870:16;871:1; 901:13;902:4; 904:20;908:3;915:2; 923:7;938:21,21; 941:24;960:18; 1000:8 putting (7) 827:24;828:12; 833:4;863:4;908:11, 13;967:21	questionnaires (2) 931:9,11 quick (2) 892:5;904:6 quickly (5) 861:16,20,25; 903:22;906:22 quirky (1) 821:10 quite (4) 860:5;887:17,17; 915:5 quote (55) 802:18;804:4,11, 21;806:13;813:6; 814:7;817:5;818:22; 820:19;825:6;826:7; 827:6;828:1;833:7; 836:2,5,15;839:23; 840:16;844:19; 848:11;849:23; 850:5,14;853:1; 854:10;859:12; 861:7;862:2;865:15; 867:6,14;869:9; 870:1,9;871:4,8,11; 873:13;874:8;875:6; 880:21;885:19; 893:24;935:7,8,23; 936:6,7,11;938:12, 12;940:4;968:12 quoting (1) 836:10	822:21 rather (9) 810:2;851:11; 875:22;883:1;887:3; 952:9;964:8;971:13; 984:25 rationale (2) 957:22;958:8 rationales (1) 957:23 re (1) 863:6 reach (4) 809:13;853:23; 890:5;984:17 reached (7) 804:18;882:25; 886:13;887:5; 891:25;899:15; 901:24 reaching (1) 882:19 read (25) 814:7;815:10,20; 817:3;818:25; 820:16;822:17; 844:19;848:24; 862:16;869:8; 870:25;881:22,24; 883:17,18,20;893:1; 899:19;981:13; 993:15,17;996:25; 997:10;999:23 reading (2) 912:6;985:3 reads (1) 902:20 ready (9) 863:2;866:14; 901:2,6,8;912:1; 966:4;967:23; 1004:7 real (1) 891:1 real-estate-related (1) 799:7 realize (1) 950:14 really (21) 805:17;806:6; 807:19;811:20; 820:8;834:16; 849:16;855:2,3; 856:1,8;858:13; 862:25;872:7;893:5; 897:5;906:22;925:1; 934:20;974:16; 975:6 reason (2) 845:12;850:18 reasonable (4) 817:21;818:6; 962:16;964:9
R				
R-33 (2) 996:16;998:18				
Radix (1) 849:7				
raise (2) 793:7;794:14				
raised (6) 835:1;865:16,24; 866:1;917:13; 1006:5				
Ramchandani (1) 849:6				
Rasco (31) 793:11;795:8,20; 796:13;797:5,21; 798:6,20;811:11; 837:23;838:21,22; 839:7,14;850:3; 864:24;867:7; 870:21;895:17,21, 24;898:11;900:11, 13,22;901:13,20; 902:7,25;910:22; 911:3				
Rasco's (1) 867:20				
rate (1)				
Q				
questionnaire (6) 883:6;884:8; 928:6;931:15,18; 999:13				

reasonably (2) 989:16;991:6	927:11;930:21; 931:11,14;939:2; 955:6;979:21; 1003:16	843:3,12	841:4,5	relation (4) 795:23;796:6; 913:2;984:18
reasoning (1) 855:19	receiving (6) 848:5;850:23; 854:3;880:5;881:2; 886:10	recross (7) 1000:19;1001:3, 10,10,14,15;1003:6	regard (1) 922:24	relationship (3) 830:10;858:14; 864:5
reasons (3) 875:8;929:15; 940:12	recent (1) 875:6	redirect (13) 858:13,18;900:22; 901:10,11;969:24; 991:24,25;992:7; 1001:2,20,24;1002:4	regarding (29) 793:10;867:9; 878:10;885:5,22; 886:7;894:1;905:7; 916:18,23;917:5,14; 921:1,13;922:14; 924:2;925:18; 926:11,22;931:19; 936:8;947:6,17,25; 949:3;951:19; 954:15;975:12; 977:23	relative (1) 961:25
recall (154) 803:18;804:6,7,9, 23;807:1,16,19,23; 808:15;810:7,8,11; 811:1,4,7,8;812:6; 815:12,13;825:19; 830:12,16;836:20, 24;843:1,2;846:22; 847:6;848:15,25; 849:2;850:6,9,11,23, 24;851:2,9;852:20; 854:3,6;861:3,20; 862:6;863:12;864:8, 13,14,18;865:4,9; 866:1,6,7,10,15; 869:2,3;870:3,11; 873:22;874:5,19; 875:3,19,24;876:12, 21;877:15,23;878:1, 22;880:5,7,10,12,14; 881:18,22,25; 882:17,18;883:5,14, 21;884:13,19,20; 886:9,13,24;887:23; 889:8,8,11,13,16,19, 20,21;890:8,12; 892:3,3,9,11,14,19; 893:3,6,8,10,17; 896:13,15,20,23; 902:12,15;905:17; 907:10,23;918:19; 924:22,23;926:15, 16,17,19,21;929:7; 931:16,17,24;932:5; 935:12,14,16;937:1; 938:10;941:17; 943:15;946:4; 954:25,25;960:16; 992:13;994:6; 996:16;999:8; 1002:12,21;1003:1	recently (1) 976:5	refer (10) 835:22;867:5; 915:11;924:1;925:6, 16,18;964:20; 968:25;977:11	regardless (1) 875:7	relief (2) 982:16;983:3
recalls (1) 848:16	recess (13) 839:6;895:13; 901:5;912:13; 937:22;939:14; 950:13,19;951:5; 966:2;969:19;970:6; 1001:6	reference (3) 818:10;820:25; 996:8	Regards (1) 850:4	remain (2) 803:21;875:15
receipt (2) 814:11;880:2	recipient (1) 848:7	referenced (2) 797:6;871:4	registrars (1) 849:17	remained (2) 829:24;977:6
receive (7) 844:10,16;845:7; 880:3,8;910:1;928:3	recognition (1) 998:8	references (1) 993:20	registries (1) 802:10	remaining (3) 808:2;809:3; 844:23
received (29) 806:14;814:2,12; 822:17;848:9;861:1; 866:8,8;874:1,3; 879:13;880:7,22; 887:1;894:25;895:1; 909:8,24;914:18; 921:2;926:19;	recognize (4) 892:14;899:5,8,11	referencing (1) 818:14	registry (45) 801:3;802:10; 806:23;814:20; 818:3,23;820:23; 821:6,19;822:12; 823:2;837:6;840:8, 10,20,24;842:1; 845:1,2,6,20;849:16; 887:16;891:13,14; 892:1;894:2,7,25; 895:1;899:16; 905:22;909:25; 910:12;978:3; 980:18;981:21; 1002:13,23;1003:12, 16,19,25;1004:7,14	remains (3) 928:25;991:9; 1005:10
recalls (1) 848:16	recognized (1) 804:3	referred (10) 812:19,20;814:16; 854:4;883:8;884:17; 885:14;973:1; 974:10;977:15	registry/registrar-related (1) 849:19	remember (35) 803:19;806:18,19; 848:5,8;850:7; 851:5;878:14,19; 879:1;881:16; 884:12;887:22; 924:18;926:7; 929:16;930:13,14, 15;932:6;943:7; 948:17,20;953:9; 955:19;960:18,20; 963:15;964:10; 972:20;979:10; 980:9;990:6;993:22; 996:11
recalls (1) 848:16	recommend (1) 889:6	referring (21) 825:16;854:12; 855:4,8,9;857:20,21, 25;867:6;874:14; 876:20;877:2; 886:17,20;903:1; 915:14;921:1,2; 925:7;928:14; 940:22	regret (1) 915:5	repaid (1) 963:10
recalls (1) 848:16	recommendation (1) 987:15	refers (4) 825:14;953:8; 973:4;994:12	regular (6) 849:14;861:13; 919:2;950:3,4,5	repay (1) 842:18
recalls (1) 848:16	recommendations (5) 988:17,18;990:14, 20,23	reflect (2) 975:1;997:12	regularly (2) 996:22,23	repayment (2) 971:18;973:2
recalls (1) 848:16	recommended (2) 888:12;955:16	reformulate (3) 907:1;921:24; 975:24	regulation (1) 816:8	repeat (5) 868:22;938:4,6; 989:25;1001:9
recalls (1) 848:16	reconnect (2) 937:12,20	refrain (1) 900:20	regulations (1) 813:21	repeating (1) 974:5
recalls (1) 848:16	reconnecting (1) 968:19	refresh (2) 1004:5,9	reimbursed (1) 879:17	rephrase (11) 821:21;867:1; 871:21;882:8,10; 884:4;889:1;928:2, 20;962:5;986:3
recalls (1) 848:16	reconsideration (21) 940:25;941:6,12, 20;943:24;944:5; 946:24;949:19; 950:17;954:7,9,11, 15,19;955:10,17,23; 956:5;977:22; 982:25;1000:4	refund (4) 841:1;961:20; 962:14;963:1	reinitiate (1) 1003:21	replaced (1) 888:5
recalls (1) 848:16	record (8) 936:2;937:6; 956:8;965:11;968:3, 22;1001:1,5	refunded (1) 963:17	rejected (1) 881:1	replenishment (1) 972:16
recalls (1) 848:16	recording (1) 903:7	refunding (1) 962:25	related (6) 814:18,23;815:3, 9;923:5;953:15	replied (1)
recalls (1) 848:16	recoup (2)	refusal (1) 875:9	relating (2) 921:14;999:6	

848:11 reply (1) 926:5 report (3) 862:24;877:8; 961:6 reported (2) 861:10;862:4 reporter (2) 940:16;988:5 Reporting (1) 918:3 represent (8) 797:22;918:15,23; 929:1;933:21; 935:21;949:9; 951:17 representation (1) 889:23 Representations (1) 812:24 representatives (1) 828:21 represented (5) 936:5;960:11,16; 966:10,11 representing (1) 918:18 represents (2) 813:6;962:9 Republic (1) 801:11 request (44) 833:16;840:25; 854:19;922:21; 940:17,24,25;941:3, 7,12,20;944:2,5; 946:24;949:19; 950:13;951:19,21; 952:13,19;953:6,19; 954:1,7,8,9,11,15,16, 19,22;955:1,3,10,17, 23;956:4;977:22; 982:16;993:23,24; 995:19;996:2; 1000:4 requested (3) 875:10;954:4; 956:4 requesting (1) 954:22 requests (8) 819:14;943:24,25; 950:17;953:14; 956:5;977:23; 982:25 require (4) 819:16;863:20; 940:3;993:2 required (26) 818:2;819:20; 824:16;828:15; 832:16;836:6,7;	837:2,4,17;838:4,7, 8;841:12;844:1; 850:10;896:4,9,10; 897:22;961:19,23; 962:14;963:1; 992:21;1004:14 requirements (1) 815:12 requires (3) 813:25;989:13; 1005:20 research (1) 958:19 reserve (16) 963:8,11,18,22,23; 964:3,6,9,12,15; 970:24;971:8,22; 972:17,22;973:6 reserved (1) 967:2 resolution (21) 805:2;820:21; 821:4,17,25;822:11; 844:21;846:25; 875:7;885:24;936:8; 947:6,6;948:24; 949:4;958:7;959:15; 971:6,17;972:15; 973:4 resolutions (4) 957:23;958:1; 967:14;968:7 resolve (6) 856:6,25;865:17; 867:12;875:13; 989:22 resolved (9) 805:24;808:2; 844:9;917:15;946:7; 970:17;972:2; 986:14;991:10 resolving (2) 852:10;875:15 resort (2) 856:8;926:5 respect (22) 802:4;804:19; 818:2,23;819:15; 829:11;832:10,15, 23;921:18;926:20; 937:4;945:21;954:7; 957:11;982:23; 984:25;985:3;987:7, 17;990:11,17 respectfully (1) 952:18 respective (1) 793:17 respects (1) 989:25 respond (9) 838:1;854:9; 894:14;908:10;	932:22;933:14; 934:1;950:16; 1001:11 responded (9) 861:16;864:14; 865:2;885:23; 903:22;953:21,23; 955:3,5 respondent (1) 991:7 respondent's (1) 1006:10 responding (2) 861:20;995:18 responds (1) 909:22 response (24) 854:21;865:8; 872:25;888:24; 902:23;903:20; 904:7;909:5,20; 927:10;928:4;931:9; 938:14;940:23,24; 941:2;951:14;993:7, 8;994:3,12;995:7; 996:1;1002:4 responses (14) 793:20;883:6,15, 20;884:1,18;885:20; 922:22;931:10,17; 939:4,24;995:8; 1000:21 responsibility (3) 987:11,11,12 responsible (1) 917:25 responsive (4) 870:2;871:13,17; 872:3 rest (1) 839:17 restate (2) 882:23;922:3 restful (1) 1007:7 result (2) 996:6;998:10 resulted (1) 983:12 resume (3) 966:4;1006:5,24 retained (1) 828:12 Retтино (1) 886:20 return (4) 805:14;841:23; 846:13;992:11 returned (3) 895:2;981:22; 982:7 reveal (7) 817:7;837:7;	922:16,19;930:2; 957:21,22 revealing (1) 820:6 reveals (1) 957:19 revenues (1) 960:3 revert (1) 930:16 review (2) 875:10;915:7 reviewed (1) 863:16 reviewing (2) 796:18;865:11 RFP (1) 801:9 Richard (2) 795:13;912:21 right (93) 799:19,21;801:4,5, 16,16,19,20,25; 802:6,7;804:19; 806:11;809:8;814:4; 816:10,14;817:14; 818:16;819:5,23; 820:19;821:2;823:5, 10;826:22;827:20; 828:9;830:3;831:13; 832:17,22,25; 836:18;837:8,19; 838:1;841:12;842:4, 11,15;845:9,25; 846:1,13;847:1; 850:2;855:1,11,24; 856:10,19,21,22; 857:3,8,11;859:18; 860:8;865:7;873:18; 883:15;884:24; 885:3;902:9;903:7; 904:2;905:2;918:2; 927:2,24;940:14; 942:17;943:7,22; 944:12,15,19,23; 945:3,13;946:9,22; 949:14;960:5; 963:20;966:3; 969:17;971:15; 977:3,4;981:15; 999:25 right-hand (3) 915:13,16,17 rights (18) 806:15;818:2,22; 819:15;823:8;836:3, 8;837:4,10,18,21; 840:2,18;841:7; 842:23;856:4; 897:10;906:15 rigorously (1) 984:21 Robert (1)	998:17 role (1) 927:25 Ronald (1) 931:4 room (5) 794:15;830:2; 895:10;912:3;940:2 rough (1) 846:6 roughly (2) 972:9,9 round (5) 831:2,3,6,12,21 rounds (2) 830:15,16 routine (2) 862:13,25 Ruby (11) 880:23;907:12; 916:22,25;926:25; 927:1,3;929:5;932:1, 3;942:23 ruled (1) 934:3 rules (13) 813:20;897:20,21, 22;898:15;900:4; 922:8;952:23; 976:17;980:22; 986:8;989:21; 1001:3 run (2) 853:21;947:9 running (8) 801:6;854:18; 857:16;881:21; 883:23;957:13; 958:13;992:17 runs (1) 963:19
S				
				safe (1) 922:22 sale (3) 842:24;843:7,11 same (16) 799:24;800:13; 804:18;807:17; 829:13;884:14; 886:17;902:2,3; 909:20;914:22; 946:12;954:23; 955:7;973:8;982:4 San (1) 1000:15 Sandeep (2) 849:6;850:3 Santoyo (2) 800:6,23 Saturday (1)

866:21 saw (3) 850:16,25;888:8 saying (21) 818:13;825:5,18; 827:14;837:1;868:7; 870:5;925:24,25; 936:4;960:17,17,18, 18;962:22;974:24; 975:3;988:13; 990:21;996:8; 999:11 scan (1) 995:12 scenario (2) 839:19;843:24 scenarios (2) 839:16;843:23 Schedule (3) 843:22;849:25; 886:22 scheduled (4) 846:19;865:22; 886:21;911:5 scope (6) 908:5;984:23; 985:24;987:17; 989:13;990:15 scrap (1) 915:9 screen (10) 795:16;870:20; 912:21;941:24; 965:1,4;966:17,19; 968:18;993:10 scroll (1) 952:5 scuttlebutt (1) 907:14 second (22) 836:1;844:17,19, 24;845:8,13;849:5; 886:4;906:11; 913:24;915:22; 939:12;954:22; 955:1,3;965:13; 967:1,20;968:13; 996:25;997:1; 1002:16 secondly (2) 979:9;984:23 seconds (1) 1002:18 second-to-last (1) 865:14 secretary's (1) 968:18 section (19) 804:7;812:24; 816:4,22;817:11; 825:4;826:20; 836:10,16,20;840:1, 17;845:4,24;863:24;	864:3;902:19; 920:10;997:18 sections (2) 802:25;902:17 seeing (3) 892:4,9;932:6 seek (5) 823:1;824:16; 840:10;852:18; 905:21 seeking (7) 820:22;821:5,18; 822:10,12;853:2; 854:22 seem (2) 882:24;942:14 seemed (1) 866:3 seems (3) 840:22;843:20; 963:2 segregated (2) 960:13;966:13 selected (1) 932:20 sell (2) 841:6;842:23 send (5) 811:5;882:14; 978:2;994:17; 1006:16 sending (3) 859:21;961:6; 980:17 sensitive (1) 928:1 sent (23) 846:18;847:23; 864:23;865:4,6,10; 876:14;882:2; 883:11;899:4,25; 909:4;928:6;931:9; 934:14;940:15; 951:18;953:19; 954:16;999:10,11; 1003:10,13 sentence (5) 859:11;870:19; 896:3;899:23; 979:20 separate (3) 960:19;972:15; 999:17 September (1) 880:21 sequestration (1) 1005:19 series (3) 922:14;988:17; 990:19 seriously (6) 987:10,14;988:8, 19;990:14,23	serve (1) 795:11 service (3) 861:23;885:22; 886:5 services (6) 814:14,15,16; 815:8,9;886:7 session (20) 918:9,14,17; 920:25;922:15; 923:5,21,24,25; 924:21,25;925:17; 938:13;959:4;974:4, 8;975:11,19;976:10, 21 sessions (2) 925:13;949:24 set (72) 801:5;805:3,9,22, 24;806:10;820:22; 821:5,18;822:1,11; 825:17;836:16; 839:16,18;841:8,24; 844:8,21;846:19,24; 847:1,7,15,24; 850:16;851:1;852:1, 5,7,10,18;853:9; 856:25;857:5;863:4; 865:17;875:14,15; 894:24;910:9; 917:14;920:25; 929:1,4;936:9; 940:19;946:7,20; 947:7;948:25;949:4; 950:6;951:21; 952:14,21;953:16; 956:24;972:20; 975:15;978:2,19; 979:6;980:15; 982:14,17;990:5,8,9; 997:3;1000:5; 1003:18 set-off (1) 841:5 sets (6) 802:18;826:20; 840:1;856:6;996:5, 17 set's (1) 946:18 settlement (1) 802:17 seven (6) 940:5;971:1,10; 972:17;973:7;992:1 several (11) 802:25;810:22; 830:15;846:11; 854:19;856:13; 857:18;864:11; 875:8,20;995:12 shall (14)	814:10,16;817:13, 18;818:9;826:7; 827:3,7;828:2,20; 844:20;937:14; 950:22;973:20 share (3) 817:15;843:9; 865:15 shareholders (8) 799:16,25;855:7, 9;857:22;858:7,9; 871:9 shares (1) 858:6 sharing (1) 817:17 SHOP (1) 859:15 short (2) 911:15;912:5 shortly (1) 878:11 show (3) 935:13;968:21; 994:4 showed (1) 913:25 showing (1) 1003:9 shown (5) 901:21;902:10; 993:5,6,21 side (6) 885:11;981:2,4,5; 1006:8,11 sides (2) 981:3,6 sign (3) 887:16;894:25; 1004:7 signature (1) 1004:15 signed (14) 795:22;823:17; 824:25;845:6,20; 855:10;856:19; 858:22;874:4,5; 895:2;913:1;981:22; 1002:14 significant (2) 809:21;923:8 signing (6) 809:15;813:12; 843:25;887:15; 894:1;900:7 similar (4) 866:15;883:21; 884:16;885:25 simple (1) 841:15 simply (12) 822:13;838:6; 858:8;865:24;883:1;	884:17;903:21; 904:25;988:12,13; 1004:10,14 sit (2) 898:11;976:1 sits (2) 854:18;857:17 sitting (8) 830:2;831:20; 841:17;912:8;921:6; 922:6;930:7;958:21 situation (3) 819:2;883:22; 977:5 skip (5) 798:10;835:21; 867:16;872:2; 873:11 Skipping (2) 804:1;849:4 slightly (3) 948:1;982:24; 990:25 Smith (1) 1000:15 smoothly (1) 832:21 snippets (1) 870:17 sold (1) 823:10 sole (11) 817:14;820:19; 821:2;825:9;826:8; 833:9;835:10; 844:23;868:24; 869:11,17 solely (2) 828:2;833:23 solemnly (2) 796:7;913:9 solicit (2) 827:8,16 someone (9) 806:24;878:11,22, 23;879:2;891:24; 892:15,22;907:15 sometimes (1) 798:15 somewhere (3) 957:9;960:7; 962:16 soon (5) 807:20,20;878:24; 890:20;961:7 sooner (1) 887:3 sorry (27) 819:17;821:21; 836:1;838:21; 853:16;854:10; 855:19;868:20,22; 872:10;881:17;
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884:4;895:14; 896:19;900:15; 936:14;941:16; 952:10;956:17; 968:10,12;973:3; 980:9;988:4;998:23; 1001:2;1004:19 sort (4) 883:18;926:10; 986:24;995:12 sought (3) 941:18,20;942:3 sound (2) 884:14;930:18 sounds (9) 812:13;825:19; 885:3;903:10; 940:14;943:7; 946:22;949:14; 998:25 source (1) 831:14 sources (3) 831:17,20;858:24 space (1) 799:6 spark (1) 863:13 speak (6) 824:19;847:12; 855:7;889:10; 979:15;984:4 speaking (10) 807:24;851:5; 859:21,24;892:19; 917:25;972:9,9; 985:18;989:5 specific (7) 831:21;842:25; 923:21,24,25; 932:19;937:1 specifically (11) 816:23;848:8; 877:1;878:19; 881:16;922:11; 925:7;948:7;954:6; 957:12;973:5 speculate (2) 924:13;1002:25 speculated (1) 802:20 speculating (1) 925:22 speed (2) 798:11;926:18 spend (1) 833:6 spent (1) 895:16 spilled (1) 903:11 spite (2) 813:21,22	spoke (2) 887:22;929:24 spoken (2) 807:11;850:15 spread (1) 969:13 spring (1) 915:21 staff (11) 891:25;923:18; 924:11,20,22; 939:16;946:6;974:9, 13,25;978:7 stage (2) 972:14;1001:22 stages (1) 811:15 stamps (1) 861:24 stand (1) 845:19 standard (6) 902:23;903:21; 904:7;909:25; 910:11;938:23 standing (1) 891:12 standpoint (1) 897:14 stands (1) 849:13 start (7) 828:23;829:4; 847:5;922:5;923:7; 936:17;1002:19 started (5) 808:16,17,24; 809:11;897:8 starting (1) 971:2 starts (2) 796:16;825:5 state (10) 804:1,21;806:12; 836:18;863:3;920:1; 941:14;942:13; 943:17;946:3 stated (8) 836:21;842:4; 854:25;855:14; 916:16;935:5,22; 947:13 statement (51) 795:22;796:1,2, 18;798:7;799:10,15; 804:2;805:21; 806:13,17;820:1; 826:5;835:22,24; 846:17;861:6; 864:24;866:19; 869:25;870:5,13,23; 880:16,18;885:13, 23;895:25;903:24;	904:4,6;913:1,5,6, 25;914:1;916:17; 920:23;929:8; 930:20;935:6; 936:10;938:11; 942:14;943:17; 946:3;947:19; 955:18;977:9;994:2; 999:19 statements (3) 870:9,16,17 states (3) 821:23;826:15; 833:7 Stathos (1) 924:5 stating (1) 880:23 status (18) 885:22;886:8; 916:18;940:18; 946:6,8,11,19; 952:19;954:4;978:1; 982:18;996:17; 997:2,3,7;998:11; 999:9 statuses (2) 997:13,20 stay (4) 851:20,21,22; 983:3 stayed (1) 864:1 staying (1) 992:9 step (10) 828:9;894:6; 942:4,4;948:14,14; 978:24;980:25; 981:13,14 stepped (1) 983:25 stepping (1) 957:12 steps (3) 848:2;952:21,24 Steve (1) 796:17 stick (1) 934:4 still (10) 798:20;838:22,23; 853:22;854:14,17; 857:16;900:18; 961:5;968:17 stock (1) 821:12 stop (2) 818:12;907:13 STRAAT (3) 800:2,3,9 strange (4) 824:11;882:24;	883:2;884:14 strategy (2) 805:13;820:9 straw (2) 935:11,24 stretch (2) 984:24;986:6 strike (5) 820:15;833:20; 837:16;889:5; 958:14 string (4) 806:7,8;847:4; 894:5 strings (8) 801:18,22;802:4, 9;803:8;805:7; 808:11;809:10 stroke (2) 859:13,17 strong (1) 965:3 strongly (2) 944:10,10 structuring (2) 810:16,23 stuck (1) 984:21 stuff (3) 821:11;906:10; 924:9 subject (5) 809:17;855:17; 918:19;942:16; 956:14 submission (2) 991:5,7 submit (3) 914:5;934:23; 994:12 submitted (2) 802:12;862:15 submitting (1) 885:19 Subparagraph (9) 813:5;820:16; 827:6;828:1,2,3; 829:8;832:8;833:7; 840:6 Subparagraphs (1) 816:11 subsequent (4) 822:25;905:18; 906:7;907:20 subsequently (1) 905:21 substance (5) 899:17;922:16; 928:13;948:23; 954:23 substantive (1) 811:12 successful (2)	845:1;894:5 successfully (1) 845:7 sufficient (2) 793:22;894:8 suggest (5) 838:11;850:21; 923:14;983:25; 986:24 suggested (1) 871:9 suggesting (2) 988:11,12 suggestions (2) 889:9,24 suggests (2) 871:5;980:2 sum (1) 954:23 summarize (3) 938:8;942:5;989:8 summary (3) 890:14;891:20; 902:6 supplemental (1) 1001:24 supplementary (4) 973:21;1001:19; 1002:7,10 support (2) 830:8;848:12 supported (1) 976:13 supporting (1) 956:24 supposed (1) 992:2 suppositions (1) 907:17 Sure (42) 796:17;799:4; 802:21;808:8; 813:19;820:10; 821:11;826:3,23; 827:18,22;830:7,9; 831:16;837:13; 848:16,24;853:21; 854:24;864:1; 865:13;874:2,2; 877:7;885:17;886:3; 889:15;890:15; 897:25;904:18; 906:4;915:6;927:15, 16,17;928:1;937:16; 958:6;963:4;975:23; 980:10;1001:21 Surely (1) 950:18 surprise (3) 881:2;910:17; 924:10 surprised (7) 810:8;853:2,5;
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924:7;926:6;930:17; 988:1 surrounding (1) 888:9 swear (2) 796:1;913:5 sympathize (1) 866:3 system (1) 861:22	Termination (2) 816:5;845:3 terms (23) 810:24;811:12,13, 17;817:15,19; 820:23;821:14; 822:14;824:12,18; 826:6;827:24;828:4; 829:19;843:21; 859:10;863:15; 869:4;900:20; 981:10;987:21; 995:18	895:15;899:21; 909:15 thoughts (1) 808:19 thousand (1) 846:12 threatening (1) 979:22 three (12) 795:15;809:2,20, 25;853:21,22; 854:11,14;858:1,3,4; 952:10 threshold (1) 830:22 throughout (4) 812:19;837:11; 894:10;1006:20 thumb (1) 952:1 timeline (3) 808:15;954:13; 956:3 timely (1) 808:7 times (5) 793:10;803:1,1; 810:22;812:6 tip (1) 858:23 title (1) 806:22 titled (2) 816:23;825:4 TLD (13) 800:25;801:3; 823:19;854:17; 857:12;874:12; 878:10;900:6;905:8, 11;907:9;909:14; 981:6 TLDs (1) 809:14 today (25) 793:9;794:2,19; 796:7;838:11; 841:17;847:12,18; 895:18;898:11; 902:11;910:2; 913:10;921:6;922:7; 927:25;930:7; 933:23;955:16; 956:12;958:21; 959:1;976:1;984:4; 1006:22 together (2) 833:16;944:18 told (30) 808:8;835:16; 847:10;851:9; 853:12;857:8; 860:19;867:18,20, 21;872:1,5,18,19,19,	20,22;873:11; 876:25;878:5,14; 893:8;903:19;904:3, 5;909:16;968:1; 978:23;979:12; 981:9 tomorrow (3) 850:4;878:10; 905:7 took (18) 801:10;828:9; 850:6;860:14;867:8; 877:6;893:3;895:15; 900:15;918:17; 919:11,13;926:9,23; 936:11;938:12; 962:23;982:12 top (13) 865:1;893:14; 909:19,21;951:23; 958:18;963:5,14; 964:10;970:22; 972:21;990:7; 997:17 topic (3) 926:9;935:2; 996:10 topics (4) 900:17;925:2,11, 14 top-level (1) 799:6 total (1) 970:25 touched (1) 897:5 Toward (1) 997:6 towards (2) 869:22;950:14 track (1) 850:20 transaction (1) 884:24 transactions (2) 814:21;816:9 transcript (4) 918:16;937:25; 959:5;998:16 transcripts (1) 958:23 Transfer (10) 814:20;823:2; 842:1;844:7,15,17, 19,24;845:8,13 transferred (4) 823:8;856:11,21; 874:10 transferring (2) 897:6,10 transmission (1) 934:16 transmit (1)	817:7 transparency (1) 952:18 transparent (1) 967:7 transpired (1) 843:24 treading (1) 989:7 treat (2) 817:5;988:18 treated (1) 981:7 Treatment (1) 816:23 trees (1) 915:6 Tribunal (1) 968:15 tried (4) 811:15;860:15; 874:20;974:23 trouble (1) 897:2 true (9) 809:23;818:20; 838:25;861:12; 870:10;872:5; 873:13;913:6;963:6 Trust (1) 999:1 truth (7) 796:8,8,9;858:20; 913:10,11,11 truthful (1) 860:18 try (7) 803:7;809:9; 811:16;856:6;897:3; 907:12;964:8 trying (20) 797:2;807:3; 816:3;858:13,17,18; 860:4,21;872:20; 887:12;904:25; 925:9;927:15,16,17; 967:4;968:25; 969:11;988:22; 996:7 turn (18) 813:5;816:4; 824:22;841:20; 849:3;850:12;868:2; 873:19;902:5;920:2, 5;953:4,12;966:22; 967:17;995:5,11; 997:16 turned (3) 898:13;980:3,6 Turning (1) 974:3 turns (1) 949:6
T				
Tab (29) 798:8;812:18; 847:21;853:16,17; 861:5;864:22,24; 866:17;868:2; 870:23;873:19; 878:7;881:14; 886:18;892:6; 893:12;899:4,6; 901:16,17;902:13; 904:21;909:1,2; 920:2,3;965:2; 999:20 talk (1) 805:6 talked (2) 834:3;892:24 talking (19) 808:16,24,25; 809:11;841:15; 842:7;847:5;851:17; 852:9;858:5;871:22; 872:10,11;874:15; 898:10;923:21; 924:25;982:2; 1004:24 team (7) 888:8;910:3; 941:23;950:15; 968:1,24;1004:2 technically (2) 846:5;854:14 telling (8) 831:20;878:20,23; 910:6;924:8,9; 971:20,23 tells (1) 837:9 ten (1) 1002:18 term (5) 800:24;825:13,15; 956:17;960:16 terminate (4) 816:7,14,16; 845:23 terminated (2) 845:9;949:10 terminates (1) 845:11	terrible (1) 962:6 testified (8) 819:25;826:5; 837:12;862:12; 869:25;870:8; 939:16;956:12 testify (2) 799:9;904:12 testifying (2) 906:23;913:22 testimony (18) 804:6,7,23; 823:24;835:18; 863:18;867:3,25; 868:15;871:16; 873:10,13;892:8; 902:11;911:5; 955:15;972:24; 996:11 Thanks (3) 796:17;854:10; 894:9 theorize (1) 803:7 thereafter (1) 807:20 therefore (5) 836:3;922:21; 943:9;952:17; 981:15 thinking (3) 855:22;860:14; 925:24 third (1) 874:12 Thirteen (1) 801:23 thorough (4) 870:2;871:12,17; 872:3 though (5) 822:6;855:10; 865:18;900:18; 984:13 thought (14) 802:13,14;804:11; 820:1,14;824:2; 860:11,18;862:12; 865:24;871:14;			

<p>twenty (1) 886:10</p> <p>twenty-four (1) 814:11</p> <p>two (22) 799:16;816:1; 828:21,22;829:3,6; 830:15;865:12; 866:6;884:1;892:7; 900:23;913:20; 952:9;955:20; 965:12;969:6;981:1, 3;984:19;1000:22; 1003:14</p> <p>two-minute (1) 895:6</p> <p>two-month (1) 853:25</p> <p>types (2) 848:22;908:18</p> <hr/> <p style="text-align: center;">U</p> <hr/> <p>ultimate (1) 858:24</p> <p>ultimately (3) 801:21;833:5; 906:1</p> <p>unable (2) 840:19,23</p> <p>unaddressed (1) 991:10</p> <p>uncertain (1) 981:10</p> <p>unchanged (1) 977:6</p> <p>uncomfortable (1) 974:17</p> <p>under (21) 801:10;815:20; 820:2;821:15; 831:12;836:21; 843:13;845:17,24; 848:21;850:10; 897:9;899:4;934:6; 955:25;956:4; 987:21;989:6;993:6, 24;1001:25</p> <p>understood (8) 803:15;813:12; 825:23;839:3;897:4; 909:13;921:20; 930:18</p> <p>undisclosed (1) 874:12</p> <p>unequivocally (2) 870:9;873:13</p> <p>unfortunately (1) 846:16</p> <p>unique (1) 915:13</p> <p>Uniregistry (1) 875:11</p>	<p>United (1) 913:21</p> <p>unless (3) 829:17;876:1; 939:8</p> <p>unlikely (1) 834:23</p> <p>unmute (1) 900:16</p> <p>unofficial (1) 887:2</p> <p>unopened (1) 915:1</p> <p>unprecedented (1) 842:8</p> <p>unquote (25) 802:18;804:5,13; 806:16;814:24; 817:11;818:11,24; 836:9,17;840:17; 849:10;850:22; 853:24;861:15; 865:22;869:15; 870:2,10;871:8,15; 873:14;874:12; 878:13;881:5</p> <p>unrelated (1) 925:4</p> <p>unscheduled (3) 911:17,19,23</p> <p>up (48) 798:11;801:5; 803:8;806:5;809:8, 15,23;826:20; 827:25;828:12; 829:6;834:9;843:12; 848:10;849:21; 852:24;870:16; 871:1;879:10; 885:15;891:17; 894:11;901:13; 902:4;904:20;908:3, 12;922:25;923:15; 926:18;934:24; 936:2;949:25; 951:10,15;952:8; 964:1,18;966:19,24; 967:13,21;968:4,9; 993:8,16;997:17; 1003:3</p> <p>update (11) 896:4,9;927:3; 928:3;951:20; 952:13,19;954:4; 978:22;993:23; 1003:12</p> <p>updated (1) 891:22</p> <p>updates (7) 851:6;916:18,21; 917:16;926:12,20; 996:17</p> <p>updating (1)</p>	<p>851:25</p> <p>upon (11) 826:9,17;833:1,2, 12;840:8;843:25; 845:2;869:14; 983:15;989:23</p> <p>upset (1) 834:11</p> <p>use (8) 817:7;820:18; 915:8;957:4;960:14, 24;961:3;966:14</p> <p>used (6) 801:14;825:14; 827:2;867:11; 963:18;983:2</p> <p>useful (1) 984:15</p> <p>uses (2) 967:3,5</p> <p>using (3) 867:8;968:18; 1000:10</p> <p>usually (2) 849:15;935:18</p> <hr/> <p style="text-align: center;">V</p> <hr/> <p>vague (4) 872:20;874:9,13; 927:13</p> <p>vaguely (1) 899:11</p> <p>validly (1) 986:7</p> <p>valuations (1) 803:8</p> <p>value (2) 806:4;961:25</p> <p>variable (1) 937:7</p> <p>various (7) 798:8;808:18; 839:16;841:8; 881:11;902:17; 916:21</p> <p>VAUGHAN (1) 951:12</p> <p>verbatim (3) 884:1,10;891:8</p> <p>VeriSign (183) 806:14,20;807:6; 808:6,13;809:18; 810:15,19,21;811:1, 5;812:20,21;813:15; 814:1,8,9;815:1,6, 20;816:3,13;817:18, 20;818:5,5;819:1,3, 18;820:2,5;821:2,24; 822:21,24;823:5,8, 13,22;824:13,16; 825:8,25;826:4; 827:8,10,11,16,18;</p>	<p>828:3,7,8,11;829:10, 14,18;830:5;831:24; 832:10,14,24;833:2, 4,9,12,14,16,23; 834:14,23,25;835:9, 12,15;836:5;837:2, 19,24;840:10,20,24; 841:6,19;842:9,15, 18,19,19;843:3,14, 18;844:1,4,9,14,20, 23;845:2,7,9,11,17, 21,23;848:22;849:1; 850:10;851:9,24,25; 854:7;855:2,11,11, 24;856:19;857:8; 858:21;859:2,4,7,17; 868:11,17;869:11, 14,17,22;873:4; 874:25;875:21; 876:7,8,11;877:24; 878:2,4,9,11,14,22, 23;879:3,4,7,16,18, 21;888:13;889:6,8,9, 17,21;890:3,5; 891:17,24;892:2,16; 896:12,17,25;897:7; 898:7;905:6,13,16; 906:17;907:7,19; 908:2,22;909:14; 931:5,15;953:1; 961:8,20;962:15,25; 976:14;980:23</p> <p>VeriSign-24 (1) 993:9</p> <p>VeriSign-NDC (1) 930:25</p> <p>VeriSign's (48) 812:9;813:8; 814:9;817:14,22; 818:11,15;819:23; 820:7,19;821:7; 824:7;826:8,8,9,17, 17;828:16;830:3; 833:13,15,17;834:1; 835:8;836:23;837:7, 25;845:3;856:2; 859:25;860:1; 863:22;864:7; 868:24;869:15; 873:23;874:6; 877:18;881:9; 882:20,25;883:20; 884:8,18;905:10,20; 906:7;910:13</p> <p>via (6) 829:13;844:9; 865:17;875:16; 910:3;1003:20</p> <p>view (6) 822:9;863:16; 903:12;910:8; 984:12,16</p> <p>viewed (1)</p>	<p>822:19</p> <p>viewpoint (1) 887:11</p> <p>violated (3) 897:17;952:23; 984:6</p> <p>violating (1) 897:15</p> <p>Virginia (5) 812:10;828:16,18; 829:1;873:23</p> <p>Vistaprint (1) 847:25</p> <p>voicing (2) 992:14,15</p> <p>void (1) 1003:19</p> <p>vote (2) 935:9,24</p> <hr/> <p style="text-align: center;">W</p> <hr/> <p>Wait (2) 965:13;970:4</p> <p>waiting (1) 943:9</p> <p>waive (3) 927:16,17;932:17</p> <p>waiving (1) 927:20</p> <p>walk (2) 877:14;951:16</p> <p>wants (2) 915:21;990:19</p> <p>Wardi (2) 800:6,22</p> <p>warm (1) 985:22</p> <p>warranted (1) 896:4</p> <p>Warranties (1) 812:24</p> <p>warrants (1) 813:7</p> <p>wasting (1) 852:12</p> <p>watchful (1) 1001:25</p> <p>Wave (1) 901:1</p> <p>way (33) 802:20;805:4; 814:18,23;815:3,10; 822:19;823:25; 825:13;828:10; 830:20;841:20,21; 842:25;891:12; 893:1;897:4;905:1; 909:14;930:8; 943:10;945:7; 959:19;967:7;981:7; 982:24;986:3; 987:15;994:21;</p>
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1000:5,7,9;1002:24 ways (1) 858:15 WEB (108) 801:22;802:8,23; 804:19,22,25;805:6, 9,15,22;806:16; 808:23;809:3,14,17, 20;814:3;815:2; 822:1,13;823:19; 836:4;837:10;840:3, 8,24;841:7;842:24; 846:3,20;850:17; 853:3;874:12; 878:10;879:13; 880:25;881:4,5; 885:5,22,24;886:8; 891:7;894:2;896:4; 905:7,11;907:9; 908:19;909:14; 916:19,23;917:2,5, 14;918:10;923:5; 924:2;925:4,18,20; 926:11,20,22;929:2, 10,14;930:5;931:20; 932:1;935:8;936:9; 939:18;940:18,19; 942:17,20;943:13, 20;946:6;947:6,17, 25;948:25;949:4,8; 950:1,8;951:20; 952:14,20;953:1,16; 960:6;962:9;972:7, 11,13;974:4;975:12; 978:2,3;983:12; 999:7,18;1003:12, 16,18 WEB/WEBS (1) 1003:18 WEBS (1) 850:1 website (5) 893:1;918:24; 957:18,21;998:9 week (7) 850:21;853:20; 874:9;894:9;1006:9, 18,20 weekend (5) 1006:13,23; 1007:7,9,11 weeks (1) 898:22 weight (1) 981:2 welcome (5) 795:20;839:14; 912:14,18,25 well-established (2) 933:3,17 well-taken (1) 904:17 weren't (3)	826:3;827:22; 867:22 West (1) 793:4 what's (10) 847:20;866:17; 873:19;887:13; 893:11;904:16,23; 973:22;998:14; 1004:21 whatsoever (1) 863:17 whenever (1) 901:6 whereas (3) 957:25;958:1; 959:16 Whereupon (12) 839:6;895:13; 901:5;912:13; 937:22;939:14; 951:5;966:2;969:19; 970:6;1001:6; 1007:12 whichever (1) 870:24 white (1) 860:20 whole (4) 796:8;913:11; 920:15;952:1 whose (2) 888:6;986:12 Wi-Fi (2) 937:17,18 Willett (38) 864:16;865:23; 866:21;867:15; 868:6;871:18,23; 872:1,15,25;873:3, 11;876:6,24;877:13, 24;878:8;879:11; 880:2,22;881:3; 883:7,11;901:23; 903:1,7,16,19;904:5; 905:4;907:7;909:7, 13,22;924:17; 974:23,24;1004:1 Willett's (6) 866:18;902:6; 909:5,20;928:11,16 willing (4) 804:16;847:8; 850:17;851:3 win (2) 802:15;833:18 wind (1) 963:25 window (1) 998:23 Winner (2) 839:24;844:10 winning (11)	802:13;822:25; 825:9;839:20;841:1; 843:5;877:19; 879:13;961:9;962:8, 14 wire (2) 879:15,24 wired (1) 879:21 wish (3) 951:7;1006:17; 1007:7 wishes (1) 1006:15 wishing (2) 981:2;1006:12 withdraw (3) 904:14;907:2; 935:1 withdrawal (1) 977:19 withdrawn (2) 898:20;997:21 withhold (1) 862:23 within (13) 814:10;815:1,6; 824:13;844:24; 861:23;868:24; 940:5;955:11; 975:14;987:10,12; 990:15 without (29) 813:8,15;818:11, 15;819:22;820:7; 821:7;824:7;828:6; 829:12;832:11,16; 836:23;837:7;841:5; 845:12;863:22; 864:7;890:17; 905:25;906:9,12; 914:24;933:2; 958:19;981:1; 983:13;985:12; 993:16 witness (162) 794:6,15,17;795:2, 5,9,17,22,24;796:1,4, 10,15,17,18;797:8; 798:7;799:10,14; 804:2;805:20; 806:12,17;819:25; 826:5;835:22,24; 838:23;839:3,5,9; 846:17;861:6; 864:24;866:18; 869:25;870:5,12,22; 880:15,18;882:22; 885:13;888:17; 895:10,19,22,25; 896:1,7,13,19;897:2, 24;898:4,17,23; 899:2,6,7,10;900:5;	902:14,15;903:24; 904:4,6,12;906:23; 908:15;911:1,7,10, 12,13,25;912:1,2,22; 913:1,3,7,12,17,23, 25;914:1,3,11; 916:17;919:22; 920:23;921:16,19; 927:19;929:8; 930:20;935:6; 936:19;937:7,11,14, 18;938:2,7;942:14; 943:17;946:3; 947:19;950:22; 951:4;964:22;965:3, 11,14,21,25;969:2; 973:17;974:14; 975:16,22;976:6,18; 977:1,7,9,10,13,17, 20,24;978:4,9,12; 980:1,8,24;981:23; 982:19,22;983:17; 984:8,19;985:10,20; 986:9,15;988:6,10, 22,25;989:10,24; 991:1,11;999:19; 1005:14,16,23; 1006:1,25 witnesses (6) 793:17,20,23; 794:2,19;1005:21 won (3) 801:8;877:21; 887:18 wonder (2) 820:5;969:20 wondering (1) 882:18 word (8) 827:2;887:2; 954:19;957:4; 963:14;978:13; 1004:21,22 words (3) 841:23;867:8; 910:16 work (8) 808:19;827:10,17; 830:1;833:16;841:6; 879:18;1006:20 worked (3) 793:12;831:1; 879:15 working (10) 806:15;821:9; 960:23;967:11,12; 972:6,6,12;975:10; 976:21 workings (1) 858:12 works (1) 830:20 workshop (27)	918:9,17;919:1,8; 920:25;922:15,18; 923:4,19;924:1,21, 25;925:3,7,11,17; 929:6;938:13; 939:17;941:4; 949:24;959:4,5; 974:4;975:19;976:3; 992:22 workshops (2) 950:1;993:3 worries (1) 915:25 worry (1) 916:3 wound (1) 964:1 wow (2) 907:14,17 wrapping (1) 894:11 write (9) 846:17;850:3; 865:15;893:23; 894:12;905:5; 920:22;947:19; 1000:8 writers (1) 803:4 writes (7) 849:23;850:3,14; 853:19;861:7; 952:17;1003:11 writing (8) 817:10;829:14; 848:15;858:10; 908:1,1,909:7; 934:23 written (11) 813:8,15;826:9, 17;828:6;837:8,19; 881:9;917:13; 933:23;948:17 wrong (1) 999:12 wrote (4) 849:7;877:24; 878:7;879:12
Y				
			year (4) 808:21;868:10; 971:2;977:12 years (9) 807:12;812:1; 823:21;849:15; 862:15;971:2,10; 972:18;973:7 yep (17) 848:4;920:9,9,9; 941:1;970:21; 971:17;993:22;	

995:1,4,10;997:15, 22,24;998:1,7; 1000:1 yes-or-no (3) 889:4;925:1; 928:12 York (1) 933:18 young (1) 803:5	850:21 14 (4) 866:18;902:13; 949:11,16 15 (10) 799:20;800:17; 838:20;868:2; 873:19;893:16; 895:7;926:4,7;950:8 15-minute (1) 950:19 15th (2) 893:18;950:3 16 (4) 824:22;880:22; 995:5,7 17 (2) 829:8;836:14 170 (1) 1003:4 18 (5) 848:11;878:7; 904:21;909:1,2 185,000 (1) 802:5 li (1) 869:9 lk (3) 836:10,14;863:25 1st (1) 913:2	983:15;989:15; 991:9;992:12; 996:21 2017 (6) 884:23;886:14,19, 21;887:20;893:18 2018 (30) 885:2;891:25; 893:16,18;940:17; 946:5;947:7,20,23; 949:2,11,12,19; 953:13,20;954:17; 968:8;977:5,12,15; 978:1;982:11,14; 993:12,20;998:20; 999:3;1002:15,23; 1003:13 2019 (1) 971:2 2020 (3) 793:1;795:23; 913:2 203 (1) 966:23 20th (1) 1003:13 23 (2) 843:22;993:20 23rd (10) 881:8;931:4; 949:19;953:13,20; 954:14,21,24;955:2, 11 24 (4) 815:1,7,19;993:12 24-hour (1) 815:23 24th (1) 953:22 25 (1) 844:18 25th (3) 812:11;930:25; 968:8 26 (3) 873:21;874:1,4 27 (4) 846:20;873:16; 877:17;982:14 27th (1) 861:1 28 (1) 995:13	31 (2) 886:18;893:12 314 (3) 965:8;967:14; 968:1 31st (5) 877:23;878:8; 905:5;907:7;909:4 32 (3) 892:6;971:1,9 33 (2) 899:4;998:17 36 (3) 963:13;972:1,3 38 (1) 880:17 3rd (31) 918:9,18;919:8; 920:24;922:14; 923:4,19;924:1,21, 25;925:3,6,17; 926:23;928:10; 929:6,10,14;930:4, 22;932:9;935:6,9; 936:6;938:13; 939:17;941:4; 942:19;943:12; 947:13;959:4	6 6 (10) 799:14;816:4; 847:21;849:22; 853:19;864:12; 953:14;965:2,7; 994:22 66 (1) 970:16 7 7 (6) 793:1;843:13; 845:19,25;853:1; 864:12 7th (2) 854:9;859:12 8 8 (3) 853:16,17;864:12 8:00 (1) 1007:3 80 (4) 870:7,25;871:2,3 80-something (1) 972:10 85 (1) 799:17 8th (3) 864:16,24;865:6 9 9 (3) 816:4;840:15; 866:21 90 (1) 870:8 9b (2) 845:4,24 9th (2) 850:2;949:24
Z				
zone (1) 861:19				
1				
1 (13) 798:8;812:23; 825:4;839:23; 843:22;850:12; 870:23;902:20; 952:21;962:24; 963:3;996:20; 1003:24 1.2a (1) 920:10 1:18 (1) 1007:13 10 (7) 816:22;817:11; 836:16,20;842:22; 861:5;864:3 100 (2) 843:4,19 104 (2) 880:16,21 107 (3) 796:20;797:7; 885:12 10a (3) 816:24,24;820:17 11 (1) 850:13 11:44 (1) 849:6 11th (1) 949:24 12 (1) 977:9 12:05 (1) 862:1 12:45 (1) 862:1 12th (2) 847:22;886:19 13 (10) 801:21;802:4; 803:1;864:23,24; 901:17,18;977:9; 978:5;979:21 13th (1)	2 2 (7) 812:18;849:3; 875:5;951:24;952:7, 24;1003:24 20 (2) 881:14;883:8 2011 (2) 805:5;916:11 2012 (4) 799:11;801:17; 802:9,16 2015 (7) 804:1,2;806:13; 824:25;847:23; 848:11;930:25 2016 (43) 812:12;846:18,20; 849:4,6,22;850:13; 866:21;873:17,21; 877:23;878:8; 880:10,12,22;881:5, 9;884:23;885:20; 886:10;894:6; 898:12;903:8,16; 905:5;916:16; 917:21;918:6,9; 931:4;932:9;942:19; 943:12;974:4; 975:10;976:9,21,25;	3 3 (3) 813:5;839:22; 866:20 30 (1) 795:23 30th (1) 949:10	4 4 (13) 812:24;847:22; 902:5,7;920:2,3; 953:13;964:19; 965:7;966:16,19; 994:23,24 41 (1) 806:16 4-19 (2) 964:20;966:22 433 (1) 998:16 45 (2) 967:18;968:4 48 (3) 835:22,23;836:2 4th (3) 879:12;909:6,7 5 5 (5) 813:25;867:5; 920:5,8,9 50 (6) 923:14,16;929:22; 960:7;962:9,16 58 (1) 895:25 5th (5) 849:5;880:1; 918:25;955:9,13	8 8 (3) 853:16,17;864:12 8:00 (1) 1007:3 80 (4) 870:7,25;871:2,3 80-something (1) 972:10 85 (1) 799:17 8th (3) 864:16,24;865:6 9 9 (3) 816:4;840:15; 866:21 90 (1) 870:8 9b (2) 845:4,24 9th (2) 850:2;949:24

EXHIBIT PC-7

STEVEN A. MARENBERG
1 (310) 620-5710
stevenmarenberg@paulhastings.com

July 23, 2021

VIA E-MAIL AND FEDEX

Mr. Maarten Botterman
Chair, Board of Directors
Internet Corporation for Assigned Names
and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536
maarten.botterman@board.icann.org

Re: *Afilias Domains No. 3 Limited v. Internet Corporation for Assigned Names and Numbers, ICDR Case No. 01-18-0004-2702 - Request that Afilias be disqualified from all .WEB proceedings based on violations of the Blackout Period*

Dear Mr. Botterman, Chair, and Members of the ICANN Board:

This letter is submitted on behalf of Nu Dotco, LLC (“NDC”), Awardee of the new .WEB gTLD, and VeriSign, Inc. (“Verisign”), an interested party, together *Amici* in the .WEB Independent Review Proceedings (“IRP”) initiated by Afilias and subject to the Panel’s 20 May 2021 Final Decision. This letter requests that ICANN reject any and all claims and objections by Afilias regarding the auction, Award or assignment of .WEB on the grounds that Afilias should be disqualified from all such proceedings and thus lacks standing to assert any objections with respect to the auction, Award or any related assignment.¹

The grounds for this request are that Afilias intentionally committed serious violations of the Blackout Period rules mandated by the Auction Rules Clause 6, and the new gTLD Bidder Agreement Section 2.6, by engaging in negotiations and other prohibited conduct with other contention set members during the Blackout Period. The Blackout Rules are clear on their face and admit of no exception. The violation by Afilias is confirmed in written documents authored by Afilias and is beyond dispute.

This request is further made on grounds that Afilias’ Blackout Period violations were in furtherance of an improper scheme to coerce another contention set member, NDC, to accept terms of a “private auction” in which (i) pricing would be fixed in advance of the auction and (ii) Afilias would guarantee that proceeds of the auction be paid to other participants in exchange for losing the auction. The conduct by Afilias and others in furtherance of their collusive scheme included,

¹ NDC and Verisign reserve the right to submit at a later date additional evidence and argument relevant to other issues raised by ICANN’s review of the Panel’s Final Decision.

Mr. Maarten Botterman
July 23, 2021
Page 2

among other acts: (a) coordinated, serial objections to the .WEB auction based on false representations to ICANN regarding a change in ownership or control of NDC—properly rejected by ICANN in a decision confirmed by the Panel in its Final Decision; (b) baseless litigation against ICANN to delay the public auction for .WEB—dismissed by two courts as without merit; and (c) attempts to rig the .WEB auction by dividing auction participants into “strong” and “weak” participants, with “weak” participants predetermined to lose the auction in exchange for the payment of a pre-defined sum.

These collusive schemes by Afilias and other members of the contention set have delayed the delegation of .WEB for almost 5 years. This has operated to the detriment of the entire DNS community.

NDC refused to be part of Afilias’ collusive schemes. A fair and competitive public auction thus proceeded on 27-28 July 2016. NDC submitted the highest bid at the auction, approximately \$142,000,000, and the Award was in its favor.

As a result of NDC’s successful bid, the proceeds of the auction were deposited with ICANN to be used for the benefit of the entire Internet community through their investment in the Domain Name System as determined by ICANN and the community. Contrary to Afilias’ Blackout Period scheme, those proceeds were *not* paid to participants who had colluded in advance that they would lose the auction.²

I. The Final Decision by the IRP Panel

In its Final Decision, the Panel dismissed Afilias’ requests that the Panel should either (i) order the disqualification of NDC’s bid or (ii) order ICANN “to disqualify NDC’s bid for .WEB, proceed with contracting the Registry Agreement for .WEB with the Claimant ..., and specify the bid price to be paid by the Claimant.” (Final Decision, 20 May 2021, ¶ 126.) The Panel further rejected Afilias’ demand that the Panel *not* remand those issues to the ICANN Board for its determination as required by the Bylaws.³ Instead, the Panel directed that all remaining

² The relevant correspondence and other documents evidencing the conduct of Afilias and other members of the .WEB contention set described herein are submitted as exhibits to this letter. In addition, the particulars regarding Afilias’ violations of the Blackout Period are set forth herein and previously have been described in detail in *Amici’s* briefs submitted in the IRP and in *Amici’s* October 2016 responses to ICANN’s Topics for Comment. *Amici* refer ICANN to those submissions for further information regarding Afilias’ Blackout Period violations.

³ Afilias falsely argued -- an argument rejected by the Panel -- that the Panel should not “remand the matter to the very ICANN Board that sought to rubber-stamp Verisign’s acquisition of .WEB.” (Afilias’ 24 July 2020 Claimant’s Response to *Amicus Curiae* Briefs, ¶ 3). “Given ICANN’s conduct that led to these proceedings, and the positions that ICANN has adopted in these proceedings -- to say nothing of its conduct -- the only fair and final way for Afilias’ claims to be considered is for the Panel to resolve this Dispute.” (*Id.* ¶ 216.)

Mr. Maarten Botterman
July 23, 2021
Page 3

objections by Afilias or NDC regarding the auction and/or Award be directed to the ICANN Board for decision. (*Id.* ¶ 319.)

Pursuant to the Final Decision, ICANN should determine NDC’s objection that Afilias violated the Blackout Period and should be disqualified from all proceedings related to the auction or any potential assignment of the .WEB Registry Agreement. ICANN already has acknowledged the importance of the Blackout violations to the relief sought by Afilias in the IRP. ICANN’s List of Issues for the IRP dated 12 October 2020 provides the following: “Are [Afilias’] remedies appropriate in light of all relevant circumstances, *including Afilias’ alleged violation of the Auction Rules and Bidder Agreement?*” (Emphasis added.) According to the Panel, ICANN should now consider these issues whether or not they have been raised through a formal accountability mechanism in order to preserve and promote the integrity of the New gTLD Program. (Final Decision, 20 May 2021, ¶ 319.)

The Panel further decided on the merits, and rejected, Afilias’ claim that the Auction Award to NDC, or a subsequent assignment of the .WEB Registry Agreement to Verisign, would be contrary to ICANN’s Bylaw commitments to promote competition. As explained in dispositive terms by the Panel: “ICANN does not have the power, authority, or expertise to act as a competition regulator by challenging or policing anticompetitive transactions or conduct.”⁴

II. Afilias’ Violations of the Blackout Period

Afilias’ Blackout Period violations were part of a broader effort by Afilias and certain other members of the .WEB contention set to coerce NDC to agree to resolve the contention set in a rigged manner where pre-determined auction losers would be paid for their losing bids. While NDC instead pursued a public auction administered by ICANN—where the proceeds of the auction would be invested in the improvement of the Domain Name System—Afilias and others repeatedly sought to derail the public auction at any cost and by any means in order to coerce an agreement

⁴ Final Decision, 20 May 2021, ¶ 60. The Panel found ICANN’s evidence “compelling” that it fulfills its mission to promote competition through the expansion of the domain name space and facilitation of innovative approaches to the delivery of domain name registry services -- not by acting as an antitrust regulator. The Panel further quoted Afilias’ own statements to this effect, which were made outside of the IRP proceedings when Afilias had different interests it wished to pursue. Emphasizing Afilias’ contradictory positions, the Panel quoted Afilias’ earlier statement, placing emphasis on Afilias’ contradictory language outside the IRP:

While ICANN’s mission includes the promotion of competition, this role is best fulfilled through the measured expansion of the name space and the facilitation of innovative approaches to the delivery of domain name registry services. *Neither ICANN nor the GNSO have the authority or expertise to act as anti-trust regulators.* Fortunately, many governments around the world do have this expertise and authority, and do not hesitate to exercise it in appropriate circumstances. *Id.* ¶ 349 (emphasis in original).

Mr. Maarten Botterman
July 23, 2021
Page 4

to a “private auction,” in which they could control the winner and share the auction proceeds. Afilias’ violation of the Blackout Period was part of its continuation of these efforts to settle .WEB and represents a serious and culpable breach of community ethics and ICANN policy.

A. *Afilias’ Improper Attempt to Induce NDC to Abandon a Public Auction in Favor of a Private Auction*

Prior to the auction, Afilias, Donuts, and other members of the .WEB contention set agreed to settle the contention set via a private auction and undertook efforts to coerce NDC to join that agreement. Private resolution of contention sets is permitted under the New gTLD Program and may be perfectly acceptable, depending on the terms of the accompanying agreement. A private auction, however, cannot be used as a disguise for collusive behavior that violates ICANN’s rules or price fixing.⁵ Indeed, ICANN’s Board has recognized, in connection with its ongoing review of the New gTLD Program rules for future new gTLD rounds, that private auctions increase the risks of “gaming” the system in a manner that may be inconsistent with ICANN’s Commitments and Core Values.⁶

On 27 April 2016, ICANN scheduled a public auction for the .WEB gTLD, notified all members of the contention set, and provided them with instructions and deadlines to participate in the auction. Thereafter, the members of the .WEB contention set other than NDC reached an agreement to resolve the contention set by private auction, and pressured NDC to join that agreement.⁷ NDC declined.

On 6 June 2016, Donuts again asked NDC to agree to a private resolution of the contention set and to postpone the auction, scheduled for 27 July 2016, by two months. NDC declined again.⁸

⁵ Authorities cited at Section II. E., *infra*.

⁶ See Ex. A (26 Sept. 2018 Letter from C. Chalaby, Chair, ICANN Board of Directors, to C. Langon-Orr and J. Neuman, Co-Chairs GNSO New gTLD Subsequent Procedures PDP Working Group re: New gTLD Subsequent Procedures PDP WG Initial Report (“[T]he Board believes that applications should not be submitted as a means to engage in private auctions, including for the purpose of using private auctions as a method of financing their other applications . . . [W]e are concerned about how gaming for the purpose of financing other applications, or with no intent to operate the gTLD as stated in the application, can be reconciled with ICANN’s Commitments and Core Values”); see also Ex. B (30 Sept. 2020 Letter from M. Botterman, Chair, ICANN Board of Directors, to C. Langon-Orr and J. Neuman, Co-Chairs GNSO New gTLD Subsequent Procedures PDP Working Group re: New gTLD Subsequent Procedures PDP WG Initial Report (“The Board encourages the PDP WG to provide a rationale why the resolution of contention sets should not be conducted in a way such that any net proceeds would benefit the global Internet community rather than other competing applicants.”)).

⁷ Witness Statement of John L. Kane (“Kane Witness Statement”), <https://www.icann.org/en/system/files/files/irp-afilias-witness-statement-kane-redacted-26nov18-en.pdf>, ¶¶ 20-21.

⁸ See Ex. C (6-7 June 2016 emails between Juan Calle of NDC and Jon Nevett of Donuts); see also Witness Statement of Jose Ignacio Rasco III, 1 June 2020 (“Rasco Witness Statement”), <https://www.icann.org/en/system/files/files/irp-afilias-witness-statement-rasco-iii-redacted-01jun20-en.pdf>, ¶ 6.

Mr. Maarten Botterman
July 23, 2021
Page 5

The following day, 7 June 2016, Afilius asked NDC to reconsider, stating that *Afilius would “guarantee” that NDC would “score at least 16 mil if you go into the private auction and lose.”* NDC again declined, whereupon *Afilius offered to increase the payment to NDC to “\$17.02” million.* NDC again declined.⁹

When NDC refused Afilius’ latest offer, Afilius and other members of the contention set undertook concerted efforts to interfere with the scheduled auction.

B. *False Claims of a Change in Management or Control of NDC -- Rejected by ICANN and the IRP Panel*

On 23 June 2016, in an effort to interfere with the upcoming auction, Donuts and its wholly-owned subsidiary Ruby Glen falsely represented to ICANN that NDC had changed its ownership and/or management structure, but had not reported that change to ICANN as required. Donuts and Ruby Glen moved ICANN to delay the public auction based on these misrepresentations.¹⁰ On or about 30 June 2016, Donuts filed a complaint with ICANN’s Ombudsman repeating its false allegations against NDC.¹¹

On 11 July 2016, Schlund Technologies GmbH (“Schlund”) and Radix FZC (“Radix”)—both members of the .WEB contention set—submitted separate yet identically worded letters to ICANN requesting postponement of the Auction to allow ICANN to investigate NDC and potentially disqualify it. Both Schlund and Radix misrepresented to ICANN: “We support a postponement of the .WEB auction to give ICANN and the other applicants time to investigate where there has been a change of leadership and/or control of another applicant, NU DOT CO LLC. To do otherwise would be unfair, as we do not have transparency into who leads and controls the applicant as the auction approaches.”¹²

Despite these concerted efforts, on 13 July 2016, ICANN properly denied the requests for a postponement of the .WEB public auction. ICANN found “no basis to initiate the application change request process or postpone the auction” based on any alleged change in NDC’s

⁹ See Ex. D (7 June 2016 text messages between Juan Calle of NDC and Steve Heflin of Afilius); see also Ex. E (Text messages between Jose Rasco of NDC and John Kane of Afilius).

¹⁰ See Ex. F (23 June 2016 email from Jon Neveit of Donuts to ICANN’s customer portal).

¹¹ Witness Statement of Christine A. Willett, 31 May 2019 (“Willett Witness Statement”), <https://www.icann.org/en/system/files/files/irp-afilius-witness-statement-willett-31may19-en.pdf>, ¶ 24.

¹² See Ex. G (11 July 2016 letter from Thomas Moarz of Schlund to Akram Attallah, Christine Willett and John Jeffrey of ICANN); Ex. H (11 July 2016 email from Brijesh Joshi of Radix to Akram Attallah, Christine Willett and John Jeffrey of ICANN).

Mr. Maarten Botterman
July 23, 2021
Page 6

management.¹³ NDC and Verisign understand that ICANN’s Ombudsman similarly determined that there were no grounds for a delay of the auction.

On 17 July 2016, Donuts and Radix jointly submitted a reconsideration request to ICANN, again seeking a delay of the public auction based on the same misrepresentations. ICANN properly rejected this request on 21 July 2016.¹⁴

Afilias repeated these false accusations regarding NDC in its IRP, alleging that ICANN violated its Bylaws by not properly investigating and deciding the claims. Contrary to Afilias’ claims, in its Final Decision, following a full hearing, the Panel found no fault with ICANN’s pre-auction investigation, and “reject[ed] the Claimant’s [Afilias] contention that the Respondent violated its Bylaws by the manner in which it investigated and resolved the pre-auction allegations of change of control within NDC.” (Final Decision, 20 May 2021, ¶ 295).

C. *The Spurious Court Action to Stop the Public Auction -- Rejected by Both the District Court and Court of Appeals*

After the false claims of material changes in NDC’s ownership and/or control were rejected by ICANN three times, on 22 July 2016, Ruby Glen filed a civil action against ICANN in the United States District Court for the Central District of California (Case No. 16-5505) seeking a temporary restraining order (“TRO”) postponing the public auction. The civil action was based on the same meritless accusations that ICANN had repeatedly rejected.

The district court denied Ruby Glen’s TRO on 26 July 2016. In its Order, the court specifically noted “the weakness of Plaintiff’s efforts to enforce vague terms contained in the ICANN bylaws and Applicant Guidebook” and concluded that Ruby Glen had failed to “establish that it is likely to succeed on the merits” and failed to demonstrate that its allegations “raise[d] serious issues.”¹⁵ Ruby Glen’s action subsequently was dismissed with prejudice, and its appeal of that dismissal was rejected by the Ninth Circuit Court of Appeals.¹⁶ Nonetheless, Afilias repeated these false claims in the IRP. As explained above, Afilias’ claims were rejected by the Panel in its Final Decision.

¹³ See Ex. I (13 July 2016 Letter from Christine A. Willett, Vice President, GDD Operations of ICANN, to the .WEB contention set).

¹⁴ Ex. J (21 July 2016 Determination of the Board Governance Committee (“BGC”) Reconsideration Request 16-9).

¹⁵ See Ex. K (*Ruby Glen, LLC v. Internet Corporation for Assigned Names and Numbers*, United States District Court for the Central District of California, Case No. 2:16-cv-05505-PA-AS (“*Ruby Glen Action*”), Dkt. No. 21 (Order denying Ruby Glen’s Application for Temporary Restraining Order)).

¹⁶ See Ex. L (*Ruby Glen Action*, Dkt. No. 53 (Order from the Court of Appeals for the Ninth Circuit affirming dismissal of Ruby Glen’s complaint)).

Mr. Maarten Botterman
July 23, 2021
Page 7

D. *The Schlund Private Auction Proposal*

Alongside the other efforts to interfere with the public auction, on 5 July 2016, Oliver Mauss of Schlund emailed NDC pushing a proposal for an “alternative private auction,” claiming its numerous advantages over a public auction. The so-called “benefits” of this alternative form of private auction, according to Mr. Mauss, included that the *winning participant would pay less for the gTLD* than it would in a competitive public auction. The agreement would include the following “principles”: “It divides the participants into groups of strong and weak”; “the weak *players are meant to lose and are compensated for this with a pre-defined sum*”; “the strong players bid for the asset”; “the losing strong players receive a higher return than in the Applicant Auction”; and “the losing weak players receive a lower return than in the Applicant Auction.”¹⁷ (emphasis added). Through his proposal, Mr. Mauss contended, the “winning party” would pay “less for the asset in comparison to both” a public auction organized by ICANN and a private auction organized by the applicants themselves. *Id.* NDC did not respond to Mr. Mauss’ email. An agreement to the terms of the Schlund proposal, like the proposals made directly by Afiliast to “guarantee” NDC a specific amount to lose a private auction, could have involved NDC in a collusive scheme that may have raised issues under the antitrust laws.

E. *Afiliast’s Reiteration of the Settlement Proposals During the Blackout Period in Order to Resolve .WEB*

Once the deposit deadline for an ICANN administered auction passes, both the Bidder Agreement and the Auction Rules for new gTLD auctions explicitly prohibit all applicants within a contention set from “cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other’s, or any other competing applicants’ bids or bidding strategies or discussing or negotiating settlement agreements...” until the auction has completed and full payment has been received from the winner. (Bidder Agreement, § 2.6; Auction Rules, Clause 68). Violation of this “Blackout Period” is a “serious violation” of ICANN’s rules under the Bidder Agreement and Auction Rules—so much so that applicants are expressly warned in writing that such violations may result in forfeiture of the violator’s application. (Bidder Agreement, § 2.10; Auction Rules, Clause 61).

Afiliast’s continuation of negotiations to resolve the contention set during the Blackout Period represents a clear and intentional violation of the Blackout Rules. Afiliast is a sophisticated applicant with full knowledge and awareness of the rules, including those pertaining to the Blackout Period. Moreover, Larry Ausubel of Power Auctions LLC (the administrator appointed by ICANN to conduct the Auction) sent every member of the .WEB contention set an email on 20

¹⁷ See Ex. M (5 July 2016 email from Oliver Mauss of Schlund to Juan Calle of NDC with attachment proposing an “Alternative Private Auction”).

Mr. Maarten Botterman
July 23, 2021
Page 8

July 2016, expressly reminding them that “the Deposit Deadline for .WEB/.WEBS has passed and we are now in the Blackout Period.”¹⁸

Nonetheless, on 22 July 2016, five days before the Auction’s 27 July 2016 commencement date and after the deposit deadline for the auction had passed—plainly within the Blackout Period—Afilias continued to seek a settlement of .WEB in accordance with its earlier offers, thereby engaging in a discussion regarding bids, bidding strategies and settlement contrary to the Blackout Rules. Specifically, Afilias sent the following text message to NDC with reference to its earlier proposals seeking a settlement of the auction: “If ICANN delays the auction next week would you again consider a private auction? Y-N.”¹⁹ This proposal to continue settlement discussions was an indisputable violation of the Blackout Rules. NDC did not respond to Afilias’ proposal.

The direct communication from Afilias to NDC on 22 July 2016 was in furtherance of Afilias’ earlier offers to settle the .WEB contention set by paying the proceeds of a private auction to the losing bidders in exchange for their losing the auction. Indeed, Afilias already had guaranteed NDC a payment of \$17.2 million for settling the contention set on Afilias’ terms.

NDC told Afilias and others on multiple occasions before the Blackout Period started that NDC was not interested in participating in a private settlement of the contention set. Despite these repeated rejections, Afilias chose to make a last ditch effort during the Blackout Period to salvage the potential windfall it and other members of the contention set sought to secure for themselves via the private settlement they were pushing.

Afilias’ plain violation of the Blackout Rules should result in its disqualification from the auction and all proceedings related to .WEB. The Blackout Period rules are specific and clear, and Afilias’ violation of the rules is express and in writing.

Further, Afilias’ Blackout Period violation is directly relevant to ICANN’s consideration of Afilias’ claims against ICANN, NDC and Verisign. By reason of its violations, Afilias should be disqualified and therefore lacks standing to pursue its objections against NDC’s application. In addition, based on its disqualification (among other reasons addressed in this IRP), Afilias cannot be awarded the .WEB gTLD, the relief it seeks on its claims against ICANN for alleged violations of the ICANN Bylaws.

Afilias has delayed the delegation of .WEB for 5 years, at a cost of tens of millions of dollars to the affected parties, based on convoluted and false claims of technical violations of the

¹⁸ See Ex. N (20 July 2016 email from Larry Ausubel of Power Auctions LLC to Jose Rasco of NDC regarding the commencement of the Blackout Period).

¹⁹ See Ex. O (22 July 2016 Text messages from Jonathan Kane of Afilias to Jose Rasco of NDC).

Mr. Maarten Botterman
July 23, 2021
Page 9

New gTLD Program Rules.²⁰ By contrast, Afilias' undeniable violation of the Program rules is clear and far more culpable than its manufactured claims of violations against NDC and Verisign.

During the IRP proceedings, Afilias offered no meaningful response to the evidence of its Blackout Period violation. On the contrary, during the IRP, Afilias actively took steps to prevent its witnesses from being questioned regarding the Blackout Period violation (among other issues). For example, Mr. Kane's written message to Mr. Rasco on 22 July 2016 was a violation of the Blackout Rules. Rather than ask Mr. Kane to testify to respond to the serious questions raised by his message, Afilias chose not to call him as a witness and, in fact, withdrew his witness statement so that others could not cross-examine him during the hearings. By contrast, Afilias offered only the baseless views of its counsel regarding Mr. Kane's conduct and intentions.²¹ *See Graves v. United States*, 150 U.S. 118, 121 (1893) (“[I]f a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable.”).

During the IRP, Afilias *admitted* that the Blackout Period was designed to prevent bid rigging. (Afilias' Response to the *Amicus Curiae* Briefs, ¶¶ 179–84). Yet that is precisely what Afilias attempted. Its Blackout Period conduct *was* an attempt at bid rigging. Under the auction format and explicit terms proposed by Afilias, Schlund and other members of the contention set, *see* Ex. M, the winner would be able to obtain .WEB for a lower price than in a public auction administered by ICANN by paying pre-determined amounts to its competitors in exchange for their losing the auction. Such a collusive auction is the type of agreement that the Blackout Period is designed to prevent. Furthermore, bid rigging and other forms of collusive price fixing are considered “*per se*” illegal. *See United States v. Joyce*, 895 F.3d 673, 679 (9th Cir. 2018) (holding bid rigging is a “*per se*” antitrust violation); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application*, ¶ 2005(b) (4th ed. 2013-2018) (“Bid-rigging schemes are commonly thought to be more harmful than ordinary price fixing because bid-rigging is much easier for cartel members to enforce...For this reason, bid-rigging has been treated with greater hostility than price fixing generally.”).

Afilias' conduct deserves the most serious sanctions, including a disqualification from all proceedings regarding .WEB. The sanctions should set an example of enforcement of the Program rules, and against gaming the system, for future gTLD rounds. As the ICANN Board has

²⁰ All of Afilias' claims are contrary to the clear testimony of ICANN witnesses during the IRP that NDC's and Verisign's conduct was consistent with ICANN and industry practices. *See, e.g.*, Ms. Willett, Head of the New gTLD Program, IRP Transcript at 707:16–708:3 (“my general understanding based on Verisign's press release is that they had some future intention... to operate the TLD if ICANN approved of a TLD assignment. I also understood from the press release that they had committed funds that were put forward towards the auction. So to me that was akin to and consistent with the auction rules...”)

²¹ *See* Afilias' Response to the *Amicus Curiae* Briefs, ¶¶ 179–84. *Amici* could not compel Mr. Kane's testimony.

Mr. Maarten Botterman
July 23, 2021
Page 10

recognized, it is important to prevent gaming of the Program rules in future new gTLD rounds. (Fn. 6, *supra.*) That is especially true where the form of gaming ICANN's system may also be a violation of the antitrust laws, casting doubt on the fairness and legality of DNS activities.

Here, Afilias sought to game the Program rules through collusive activity. Its conduct went far beyond proposing a fair private auction of the kind that ICANN supports. Instead, the express terms of the proposals by Afilias and other contention set members were intended to limit competitive bidding in exchange for pre-auction guarantees of payments by competitors and potential pre-selection of winning and losing participants. Further, the effect of these proposals would be to deprive the Internet community of funds that otherwise could be invested in DNS security and reliability, instead diverting those funds to be split among the losing competitors solely for their own private benefit.

NDC and Verisign request that ICANN confirm that it will consider and reach a determination regarding Afilias' Blackout Period violation as part of its post-IRP process for .WEB. If ICANN would like this request to be endorsed in any other form, please advise us.

Respectfully submitted,

/s/ Steven A. Marenberg

Steven A. Marenberg
PAUL HASTINGS LLP

cc: John Jeffrey, Esq.
Jose I. Rasco
Thomas Indelicarto, Esq.
Ronald L. Johnston, Esq.

Exhibit A

26 September, 2018

RE: New gTLD Subsequent Procedures PDP WG Initial Report

Cheryl Langdon-Orr, Co-Chair
Jeff Neuman, Co-Chair
GNSO New gTLD Subsequent Procedures PDP Working Group

Dear Ms. Langdon-Orr and Mr. Neuman,

I am writing in response to the request in your 10 July 2018 [letter](#) for the Board to provide feedback on the New gTLD Subsequent Procedures Policy Development Process (PDP) Working Group's Initial Report. The Board is impressed by the level of detail that the Working Group has gone to in analyzing the results of the current new gTLD round and the serious effort that is being made to reach consensus on the policies related to each of the issues. We understand that the policy recommendation for the Generic Names Supporting Organization (GNSO) will be built upon existing policies and the Application Guidebook (AGB) instructions unless, and except, for where they have been modified based on Subsequent Procedures PDP consensus. The Board also appreciates the efforts the GNSO and the PDP leadership have taken to include other stakeholders in the discussions on the various issues in the PDP working group and subgroups. Since there are a number of areas the PDP Working Group is still considering, the Board may have comments in the future as discussions advance.

There were a few issues that the Board would like to comment on:

- In regard to Global Public Interest, section 2.3.2, with the growing reliance on PICs as a method of resolving public interest issues within an application, the Board remains concerned with the lack of definition of the global public interest in the context of Public Interest Commitments (PIC) and the Public Interest Commitments Dispute Resolution Procedure (PICDRP). As discussed further below, the Board would like to see additional work fleshing out what is meant by the public interest in this context and additional recommendations concerning PIC enforceability.
- The Board appreciates the approach being taken to deal with the serious issue of Closed Generics, especially with the complex issues related to the public interest and public interest goals in the use or restriction of generic terms in any language. We are aware of the continuing conflicts among competing aspects of the public interest in this area and are concerned about the scalability of any proposed solution. This issue has been pending for some time. In 2015, the Board enacted a resolution on closed generics that provided as follows:

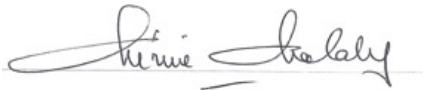
“The NGPC is also requesting that the GNSO specifically include the issue of exclusive registry access for generic strings serving a public interest goal as part of the policy work it is planning to initiate on subsequent rounds of the New gTLD Program, and inform the Board on a regular basis with regards to the progress on the issue.”

Because these difficult questions on how to define the public interest and public interest goals have been pending for several years, the Board re-emphasizes that it remains critical for the Subsequent Procedure group to further flesh out these concepts in all proposed options for addressing closed generics.

- Regarding question 2.7.4.e.2 on “gaming” or abuse of private auction, the Board believes that applications should not be submitted as a means to engage in private auctions, including for the purpose of using private auctions as a method of financing their other applications. This not only increases the workload on processing but puts undue financial pressure on other applicants who have business plans and financing based on their intention to execute the plan described in the application. In particular, we are concerned about how gaming for the purpose of financing other applications, or with no intent to operate the gTLD as stated in the application, can be reconciled with ICANN's Commitments and Core Values.
- Regarding Applicant reviews, section 2.7.7, the Board is interested in recommendations for a mechanism that can be used when there are issues that block an application moving forward.
- The Board is concerned about unanticipated issues that might arise and what mechanism should be used in such cases. The Board understands that the PDP Working Group is discussing a Predictability Framework that could potentially be used to address these types of issues. The Board looks forward to the outcomes of these discussions.
- Regarding timelines for future rounds, the Board requests that the PDP Working Group consider the issue of round closure and what criteria or mechanism could be used to close a round.
- The Board looks forward to further discussions in the PDP on Name Collisions, Applicant Support and the Predictability Framework as each of these may have significant operational impact. On Name Collisions there may be an opportunity to combine work being done by SSAC on the collision risk with the work being done in the PDP to achieve a consensus solution to this issue.

Again, the Board appreciates the efforts and time being devoted by the Subsequent Procedure Working Group and its leadership. We are available to respond to any specific questions the PDP WG might have for the Board.

Best regards,



Cherine Chalaby
Chair, ICANN Board of Directors

Exhibit B

30 September 2020

RE: New gTLD Subsequent Procedures PDP WG Draft Final Report

Cheryl Langdon-Orr, Co-Chair
Jeff Neuman, Co-Chair
GNSO New gTLD Subsequent Procedures PDP Working Group

Dear Ms. Langdon-Orr and Mr. Neuman,

I am writing in response to your [letter](#) from 20 August 2020, in which you informed the Board of the new gTLD Subsequent Procedures PDP Working Group's (PDP WG) publication of the draft Final Report for public comment. The Board recognizes the PDP WG's dedication and hard work, including the PDP WG's alignment of GNSO Policy with existing advice, such as on Reserved Names (Topic 21) and Name Collisions (Topic 29). The Board appreciates the PDP WG's affirmation of the importance of Universal Acceptance, as well as its encouragement of the ongoing efforts taking place through the Universal Acceptance Initiative and the Universal Acceptance Steering Group. The Board also appreciates the organization of the draft Final Report, in which the PDP WG recognizes existing policy and affirms the existing Applicant Guidebook (AGB) and New gTLD Program Committee (NGPC) implementation practices in absence of new consensus policy modifying or clarifying existing policy recommendations. Overall, the Board is impressed with the progress that has been made since the publication of the Initial Report. On behalf of my fellow Board members, I would like to congratulate you and the members of the PDP WG on achieving this important milestone.

In your letter you encouraged the Board to review the draft Final Report and provide feedback on the draft recommendations and implementation guidance. In addition, you sought input from the Board specifically on the topics of private resolution of contention sets and closed generics. We hope that our input on these and other topics will provide you with helpful feedback, contributing to the successful conclusion of the PDP WG. In this context, the Board notes that our comments provided in this letter do not preclude us from providing additional comment or input at a later stage.

Topic 2: Predictability (Pg. 15-19)

- A. The Board welcomes recommendations to support predictability in future new generic top-level domains (gTLDs), and is encouraged by the thoughtful discussion that has taken place on this subject within the PDP WG.
- B. The Board encourages the PDP WG to provide as much detail as possible to ensure clarity around the roles and responsibilities of the GNSO Council, ICANN org, applicants, objectors, other SO/ACs as well as the Board vis-a-vis the predictability framework. To inform implementation, the PDP WG may find it useful to provide case studies to illustrate roles and responsibilities of these different actors if and when changes to future application round processes are proposed and/or required.

- C. With regard to the proposed Standing Predictability Implementation Review Team (SPIRT), the Board encourages the PDP WG to consider whether there are established processes within the GNSO (or within ICANN's multistakeholder model) that might serve the intended role(s) of the SPIRT, rather than creating new ones.
- D. The Board encourages the PDP WG to consider whether recommendations are needed to avoid any unintended impact of the predictability framework on the necessary effectiveness and flexibility of ICANN org when implementing future new gTLD rounds. In this context, the Board notes Annex E that states "The SPIRT shall strive towards achieving Consensus on all advice and/or recommendations from the SPIRT. Even if consensus is not reached, the SPIRT can provide input on any particular issue received, as long as the level of consensus/support within the SPIRT is reported using the standard decision making methodology outlined in section 3.6 of the GNSO WG Guidelines." The Board believes it might be helpful to recommend a timeframe by which the SPIRT needs to reach a decision. (Pg. 16)
- E. It may also be useful for the PDP WG to consider the role of precedent in the Predictability Framework, e.g., can SPIRT recommendations form a body of decisions to guide handling of issues and increase efficiencies? (Pg. 16)
- F. The Board notes that the Predictability Framework cannot replace the ICANN Board or org's need to act in emergency situations, including taking actions in line with the Board or officers' fiduciary responsibilities.

Topic 6: Registry Service Provider Pre-Evaluation (Pg. 28-33)

The Board notes the affirmation of the revenue-neutral approach for future new gTLDs. (Pg. 31)

Topic 9: Registry Voluntary Commitments/Public Interest Commitments (PICs) (Pg. 36-48)

- A. The Board notes that as part of the restatement of ICANN's mission as reflected in the post-IANA Stewardship Transition Bylaws, the current form of the Registry Agreements were explicitly excluded from challenge on grounds that they exceeded ICANN's mission. See Bylaws, Section 1.1(d)(ii)(A)(1) and (2). This exclusion was brought about in large part by concerns from some in the community that some of the PICs within the Registry Agreements were outside of ICANN's technical mission. The community did not wish to invalidate those contracts through the revised mission statement. The language of the Bylaws, however, could preclude ICANN from entering into future registry agreements (that materially differ in form from the 2012 round version currently in force) that include PICs that reach outside of ICANN's technical mission as stated in the Bylaws. The language of the Bylaws specifically limits ICANN's negotiating and contracting power to PICs that are "in service of its Mission." The Board is concerned, therefore, that the current Bylaws language would create issues for ICANN to enter and enforce any content-related issue regarding PICs or Registry Voluntary Commitments (RVCs). Has the PDP WG considered this specific language in ICANN's Bylaws as part of its recommendations or implementation guidance on the continued use of PICs or the

future use of RVCs? Can the PDP WG provide guidance on how to utilize PICs and RVCs without the need for ICANN to assess and pass judgment on content?

- B. In its comment on the Initial Report, the Board asked the PDP WG to give more clarity on how to frame “public interest” in the context of a PIC and the PIC Dispute Resolution Procedure (PICDRP). We note that this has not yet been developed. We would like to reiterate our view that clear guidance on this issue will be valuable, and we encourage the PDP WG to work to that end. Specifically, we ask that the PDP WG provide clear and consistent implementation guidance on “public interest” in this context, to ensure that objective enforceability lies within ICANN’s mission. (See also our comment on Topic 24 below.)

Topic 15: Application Fees (Pg. 62-66)

The Board notes the PDP’s Recommendation 15.7: *“In managing funds for the New gTLD Program, ICANN must have a plan in place for managing any excess fees collected or budget shortfalls experienced. The plan for the management and disbursement of excess fees, if applicable, must be communicated in advance of accepting applications and collecting fees for subsequent procedures.”* The Board asks the PDP to more carefully examine the concept of “excess” or shortage of fees, especially in the light of the likely need for ICANN org, a not-for-profit organization, to increase resources for the application process and the continued support of the new gTLD program. The proposed principle of cost recovery of the next round, as for the 2012 round is understood as a clear mechanism to state to the public that the fee to be paid by applicants is designed to only cover for the cost of the program and not to support non-program operations of ICANN org. The proposed principle does not require a dollar-to-dollar return of any potential excess. The lack of a clear definition of “closure” and “round” for any new gTLD subsequent procedures future ‘round’ is also problematic in this context and the Board encourages the PDP WG to contemplate including such definition in its Final Report. (Pg. 63)

Topic 17: Applicant Support (Pg. 67-79)

- A. The Board notes that *“The Working Group recommends expanding the scope of financial support provided to Applicant Support Program beneficiaries beyond the application fee to also cover costs such as application writing fees and attorney fees related to the application process”* (Recommendation 17.2). The expansion of applicant support to affirmative payments of costs beyond application fees could raise fiduciary concerns for the Board. We encourage the PDP WG to ensure that applicant support is well scoped by preventing, to the extent possible, the possibility of inappropriate use of resources, e.g. inflated expenses, private benefit concerns, and other legal or regulatory concerns. (Pg. 68)
- B. Implementation Guidance 17.14 states that “ICANN org should seek funding partners to help financially support the Applicant Support Program, as appropriate.” The ICANN Board notes that this would change the role of ICANN, as ICANN is not a grant-seeking organization. Alternatively, ICANN org – through the Pro Bono Assistance Program –

could act as a facilitator in the introduction of industry players or potential funding partners to the prospective entrants.

Topic 18: Terms and Conditions

- A. The Board notes that the PDP WG recommends “[u]nless required by specific laws, ICANN Board members’ fiduciary duties, or the ICANN Bylaws, ICANN must only reject an application if done so in accordance with the provisions of the Applicant Guidebook. In the event an application is rejected, ICANN org must cite with specificity the reason in accordance with the Applicant Guidebook, or if applicable, the specific law and/or ICANN Bylaws for not allowing an application to proceed. This recommendation constitutes a revision to Section 3 of the Terms and Conditions from the 2012 round.” (Recommendation 18.1). The Board is concerned that this recommendation may limit the Board’s authority to act as needed. The Board would like to understand what problems the PDP WG identified with regard to Section 3 of the Terms and Conditions in the 2012 Application Guidebook “*Applicant acknowledges and agrees that ICANN has the right to determine not to proceed with any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to review, consider and approve an application to establish one or more gTLDs and to delegate new gTLDs after such approval is entirely at ICANN’s discretion. ICANN reserves the right to reject any application that ICANN is prohibited from considering under applicable law or policy, in which case any fees submitted in connection with such application will be returned to the applicant.*” The revision, as proposed by the PDP WG in Recommendation 18, may bind the Board unless one of the specific conditions is met. Such limitations could lead to unforeseen challenges, and so we encourage the PDP WG to provide details on how the proposed text in Recommendation 18.1 addresses any identified problems in Section 3 and also provide guidance on how to avoid limitations on the Board’s authority to act in unanticipated circumstances. (Pg. 79)
- B. The Board notes Recommendation 18.3: “*In subsequent rounds, the Terms of Use must only contain a covenant not to sue if, and only if, the appeals/challenge mechanisms set forth under Topic 32 of this report are introduced into the program (in addition to the accountability mechanisms set forth in the current ICANN Bylaws).*” The Board understands the intent behind this recommendation, but is concerned that dissatisfied applicants or objectors might argue based on this policy recommendation that the covenant not to sue is not valid because they did not like the way the appeals/challenge mechanism was built or operated. Accordingly the Board asks the PDP WG to review this recommendation, as anything that could weaken the covenant not to sue might preclude the ability to offer the program due to an unreasonable risk of lawsuits. The Board also asks the PDP WG to provide guidance on who would make the determination that the conditions set forth in Recommendation 18.3 are met and how.

Topic 20: Application Change Request

The Board notes Recommendation 20.6: “The Working Group recommends allowing application changes to support the settling of contention sets through business combinations or other forms

of joint ventures. In the event of such a combination or joint venture, ICANN org may require that re-evaluation is needed to ensure that the new combined venture or entity still meets the requirements of the program. The applicant must be responsible for additional, material costs incurred by ICANN due to re-evaluation and the application could be subject to delays.” Also Recommendation 20.8: *“The Working Group recommends allowing .Brand TLDs to change the applied-for string as a result of a contention set where (a) the change adds descriptive word to the string, (b) the descriptive word is in the description of goods and services of the Trademark Registration, (c) such a change does not create a new contention set or expand an existing contention set, (d) the change triggers a new public comment period and opportunity for objection and, (e) the new string complies with all New gTLD Program requirements.”* The Board acknowledges that recommendations 20.6 and 20.8 may lead to more flexibility, permitting applicant changes while also increasing the complexity of future new gTLD procedures. We note that this increase in flexibility and complexity is likely to lead to higher costs beyond applicant fees and result in possible delays, thereby making subsequent rounds potentially less predictable.

Topic 22: Registrant Protections

The Board notes the PDP WG’s recommendation that *“TLDs that have exemptions from the Code of Conduct (Specification 9), including .Brand TLDs qualified for Specification 13, must also receive an exemption from Continued Operations Instrument (COI) requirements or requirements for the successor to the COI.”* In the rationale provided for Recommendation 22.7, the PDP WG also states that an Emergency Back-end Registry Operator (EBERO) event would not be necessary because *“there are no registrants in need of such protections in the event of a TLD failure.”* The Board encourages the PDP WG to provide more details in its rationale and to ensure there are no hypothetical cases in which an EBERO might be appropriate. In addition, the Board encourages the PDP WG to consider the potential impact on end users and consumers in the event of a short-term or long-term technical or business failure of a .BRAND TLD.

Topic 23: Closed Generics (also known as Exclusive Generics) (Pg. 96-102)

- A. As previously [noted](#) by the Board, we believe that *“[closed generics] require input from the GNSO through the bottom-up policy development process”* and we continue to appreciate the PDP WG’s work on this topic. As noted in our 2018 [letter](#), the questions on how to evaluate the public interest and public interest goals of an application have been pending for several years, and we continue to encourage the PDP WG to reach consensus¹ on one or more recommendations concerning closed generics, taking into account relevant public comment and advice from ICANN’s Advisory Committees.
- B. You quoted the language of a [2015 Board letter](#) in your communication that is based on a [2015 resolution](#) of the New gTLD Program Committee (NGPC), stating: *“Resolved (2015.06.21.NG02), to address the GAC’s Category 2.2 Safeguard Advice, the NGPC requests that the GNSO specifically include the issue of exclusive registry access for*

¹ Consensus here is referred to as defined in the [GNSO Working Group Guidelines](#).

generic strings serving a public interest goal as part of the policy work it is planning to initiate on subsequent rounds of the New gTLD Program, and inform the Board on a regular basis with regards to the progress on the issue.” You asked “whether this [resolution] meant that the ICANN Board resolved that all future closed generics must serve a public interest goal if they were to be allowed, or whether it was just attempting to understand the GNSO’s thoughts on closed generics in general.” While the NGPC requested a discussion on the issue of closed generics that serve a public goal, requesting a specific outcome of such a discussion lies outside the Board’s purview. Pursuant to the Bylaws, we will consider any consensus-based recommendation that is adopted by the GNSO Council and put before us and base our decision on whether we reasonably believe that the policy proposal is or is not in the best interests of the ICANN community and ICANN (Bylaws Annex A, Section 9 (a)).

- C. The PDP WG also enquired about the [three recent proposals](#) on the future treatment of Closed Generics and “whether any of these proposals at a high level are heading in a direction in line with the Board’s views.” The Board read all three proposals with great interest. As stated above, the Board is not in a position to request policy outcomes. It is therefore not in the Board’s purview to indicate a preference. As stated above, we will base our decision on whether we reasonably believe that the policy proposal is or is not in the best interests of the ICANN community or ICANN (Bylaws Annex A, Section 9 (a)), if and when such a policy is recommended by the GNSO Council and put before us.

Topic 24: String Similarity Evaluations (Pg. 102-109)

- A. The Board notes the PDP WG’s strong reliance on the intended use of applied-for strings when it comes to similarity evaluations in Recommendation 24.3: “*Applications will not automatically be placed in the same contention set because they appear visually to be a single and plural of one another but have different intended uses.*” The Board asks the PDP WG to include recommendations and implementation guidance for objective evaluation criteria to determine “different intended uses” because we believe this will be invaluable to ensure consistent and transparent processes regarding this element in string similarity evaluations. (Pg. 103)
- B. The Board notes Recommendation 24.5: “*If two applications are submitted during the same application window for strings that create the probability of a user assuming that they are single and plural versions of the same word, but the applicants intend to use the strings in connection with two different meanings, the applications will only be able to proceed if the applicants agree to the inclusion of a mandatory Public Interest Commitment (PIC) in their Registry Agreement. The mandatory PIC must include a commitment by the registry to use the TLD in line with the intended use presented in the application, and must also include a commitment by the registry that it will require registrants to use domains under the TLD in line with the intended use stated in the application.*” As noted in our comment on Topic 9, the Board is concerned that the proposed reliance on PICs to restrict the use and potentially the content of names registered in delegated TLDs raises questions about compliance with ICANN’s Bylaws,

which state that ICANN will not restrict “services that use the Internet’s unique identifiers or the content that such services carry or provide [...]”.

Topic 25: Internationalized Domain Names (IDNs) (Pg. 109-113)

- A. The Board sees IDNs as a critical part of ICANN’s mission to support global access to the domain name system, and therefore appreciates the affirmation that IDNs are “*an integral part of the New gTLD Program.*”
- B. The Board appreciates that Root Zone Label Generation Rules (RZ-LGR), which have been developed by the efforts of the various script communities, have been integrated into the program to validate and determine the variant labels of the applied-for strings and that many of the [Recommendations for Implementing Variant TLDs \[icann.org\]](#) (Variant TLD Recommendations) have also been incorporated. (Pg. 109-110)
- C. The Board suggests that any applied-for string in a script not integrated in the RZ-LGR should not be processed until its validity and variant labels can be determined by RZ-LGR, following the [Recommendation 5 \[icann.org\]](#) of the RZ-LGR Study Group. (Pg. 110)
- D. The Board also suggests that [Recommendations 5 and 6 \[icann.org\]](#) of Variant TLDs Recommendations also be considered by the PDP WG for implementing variant TLDs.
- E. The Board notes that using RZ-LGR and adopting the Variant TLD Recommendations may have impact on other processes, including string similarity reviews, managing reserved labels, changes of control, and more, as also [analyzed \[icann.org\]](#) in the Variant TLD Recommendations, which are not currently addressed in the draft Final Report. (Pg. 110)
- F. In the context of the point above, the Board is concerned that additional recommendations (and implementation guidance) are needed for effectively processing gTLD applications along with their variant labels. Therefore, the Board asks that impact on these processes be assessed and finalized either by the PDP WG or by the GNSO’s further follow-up work in time for planning and implementation of the next gTLD application round.
- G. The Board notes that ICANN org is finding that some IDN tables previously approved for gTLD registries may have security or stability issues, based on more recent work by the technical and script-based communities. Taking such findings into consideration, the Board asks the PDP WG to clarify which IDN tables “pre-vetted by the community” could still be used to remove IDN table testing for the new gTLDs. The Board suggests that the PDP WG considers Reference IDN tables being published by ICANN org as the candidate pre-vetted IDN tables. (Pg. 178)

Topic 29: Name Collisions (Pg. 128-133)

The Board encourages the PDP WG to provide details on how future NCAP study results should be dealt with in future rounds. Would these need to initiate new policy processes and how would such processes affect ongoing rounds?

Topic 30: GAC Consensus Advice and GAC Early Warning (Pg. 133-139)

The Board is committed to working closely with the GAC to encourage the issuing of advice prior to the finalization of the Applicant Guidebook (AGB), with the goal of reducing, if not eliminating, the need for wide-ranging GAC advice.

Topic 31: Objections

The Board notes that the PDP WG affirms *“that the role of the Independent Objector (IO) should exist in subsequent procedures”* (Affirmation 31.8). As the PDP WG seems to be affirming the role and use of the IO (which was not part of the earlier policy recommendations). The Board encourages the PDP WG to identify the purpose of continuing the use of the IO role and the problems that the continued use of the IO is expected to solve. The Board also encourages the PDP WG to consider how the IO role was exercised in the 2012 round to help illustrate this work. (Pg. 142)

Topic 33: Dispute Resolution Procedure After Delegation (Pg. 156-157).

The Board notes Recommendation 33.2 that states: *“For the Public Interest Commitment Dispute Resolution Procedure (PICDRP) and the Registration Restrictions Dispute Resolution Procedure (RRDRP), clearer, more detailed, and better-defined guidance on the scope of the procedure, the role of all parties, and the adjudication process must be publicly available.”* The Board encourages the PDP WG to provide clear problem statements detailing any concrete deficiencies with the PICDRP and the Registration Restrictions Dispute Resolution Policy (RRDRP). Such statements may help the PDP WG provide details on what aspects of the guidance concerning the scope of the procedure, the role of all parties, and the adjudication process should be clearer, more detailed, and better-defined.

Topic 34: Community Applications (Pg. 157-162)

- A. The Board notes that the PDP WG recommended very few substantive changes related to the community application process, and more specifically to the Community Priority Evaluation (CPE) process. The PDP WG simply recommends that the *“Community Priority Evaluation (CPE) process must be efficient, transparent and predictable”* (Recommendation 34.2) and that *“ICANN org should examine ways to make the CPE process more efficient in terms of costs and timing”* (Recommendation 34.4). The Board is concerned that these are not sufficiently detailed recommendations to address the issues that arose during the 2012 round. The Board asks the PDP WG to raise specific concerns that the PDP WG sees with the CPE process, considering the fact that many of the CPE determinations were challenged in the 2012 round. The Board believes these clarifications are required in order for the Board to assess whether it is in the best interests of ICANN and the ICANN community to proceed with CPEs in the next round.
- B. In this context the Board also encourages the PDP WG to consider the mission-limitation that derives from the Bylaws, which state that ICANN will not restrict “services that use the Internet’s unique identifiers or the content that such services carry or provide”

(Section 1.1 (c)). The PDP WG may want to review the impact this provision might have on ICANN's ability to enforce the content of community TLDs post delegation.

Topic 35: Auctions: Mechanisms of Last Resort/Private Resolution of Contention Sets
(Pg. 163-172)

- A. The Board notes Recommendation 35.2, which states “[...] *the Applicant Guidebook (AGB) must reflect that applicants will be permitted to creatively resolve contention sets in a multitude of manners, including but not limited to business combinations or other forms of joint ventures and private resolutions (including private auctions).*” The Board encourages the PDP WG to provide a rationale why the resolution of contention sets should not be conducted in a way such that any net proceeds would benefit the global Internet community rather than other competing applicants.
- B. The Board notes that if “private” resolutions will be allowed or encouraged in subsequent procedures, the PDP WG is requested to provide a rationale for why these private processes should only partially be brought into the program rather than be kept outside of the program or be brought into the program. The Board also encourages the PDP WG to provide guidance on the kinds of transparency requirements that it would like to see applied in practice around private resolutions of contention sets.
- C. Recommendation 35.3 states that “*Applications must be submitted with a bona fide (good faith) intention to operate the gTLD. Applicants must affirmatively attest to a bona fide intention to operate the gTLD clause for all applications that they submit.*” The Board is supportive of applications needing to be submitted with “bona fide” intentions to operate the gTLD. However, it is unclear from Recommendation 35.3 whether these are specific and enforceable promises or statements of current intent that can be changed at a later time.
- D. The Board acknowledges the “*potential non-exhaustive list of ‘factors’ that ICANN may consider in determining whether an application was submitted with a bona fide (good faith) intention to operate the gTLD.*” We note that this non-exhaustive list of “factors” may put ICANN org or the ICANN Board into the position of subjectively trying to determine the state of mind of applicants, and take decisions that are subject to possible challenges. The Board asks the PDP WG to consider providing a clear problem statement of what types of behavior or abuse the requirement of bona fide applications is meant to address. PDP WG members could then use such a statement to provide objective criteria for assessing the bona fide nature of an application. (Pg. 164)
- E. The Board notes that a statement of “bona fide” intentions would be expected for all applications, not only those involved in auctions, particularly since when an application is submitted the applicant likely will not know if it will be in contention. (Pg. 164)
- F. In this context, the Board suggests that the PDP WG consider the hypothetical scenario of an applicant intending to operate up to five gTLDs. To avoid contention sets the applicant might apply for 20 strings, with the expectation to drop 15 applications based on contention and their own preference. Would those 15 applications not be considered “bona fide,” and what would be the consequence for such an applicant? Similarly, a large number of applications could be submitted by separate corporations; would ICANN org be required to establish each applicant’s investor(s) and other controlling parties in

order to affirm bona fide intent? The Board believes it would be helpful for the PDP WG to address these questions and provide guidance on making objectively enforceable rules to establish what constitutes a bona fide intention to run a gTLD. (Pg. 164)

Topic 41: Contractual Compliance (Pg. 181-183)

- A. The Board is aware of the need for increased resources to ensure the enforcement of compliance on a significantly larger number of TLDs.
- B. The Board notes that much of the data reporting that is being recommended by the PDP WG is already being published, see [ICANN Contractual Compliance Dashboard](#). (Pg.182)

Again, the Board would like to thank the Subsequent Procedure PDP Working Group, its leadership, and the support team for its dedication and hard work. The Board remains available to respond to any specific questions or comments the PDP WG might have.

Best regards,



Maarten Botterman
Chair, ICANN Board of Directors

Exhibit C

Begin forwarded message:

From: Jon Nevett Contact Information Redacted
Subject: Re: .web
Date: June 8, 2016 at 12:33:31 PM EDT
To: "Jose I. Rasco" Contact Information Redacted
Cc: Juan Diego Calle Contact Information Redacted

Thanks Jose. Would this be the same decision for .inc and .llc?

Contact Information Redacted

On Jun 7, 2016, at 11:32 AM, Jose Ignacio Rasco wrote:

Jon,
Thanks for the message, sorry for the delay. The three of us are still technically the managers of the LLC, but the decision goes beyond just us. Nicolai is at NSR full time and no longer involved with our TLD applications. I'm still running our program and Juan sits on the board with me and several others. Based on your request, I went back to check with all the powers that be and there was no change in the response and will not be seeking an extension. It pains me personally to stroke a check to ICANN like this, but that's what we're going to have to do just like others did on .app and .shop.
Best,
Jose

On Jun 6, 2016, at 1:08 PM, Jon Nevett Contact Information Redacted wrote:

Hi guys. Jose and I corresponded last week, but I wanted to take another run at the three of you. Not sure if you three are still the Board members of your applicant, but I wanted to reach out to discuss a couple of ideas. Until Monday, I believe that we have a right to ask for a 2 month delay of the ICANN auction with the agreement of all applicants. Would you be ok with an extension while we try to work this out cooperatively?

Please let me know.

Thanks.

jon

Jonathon Nevett
Co-Founder & EVP, Donuts Inc.

Contact Information Redacted

Exhibit D

From: Juan Diego Calle Contact Information Redacted
Subject: Thread
Date: June 7, 2016 at 4:36:40 PM EDT
To: "Jose I. Rasco" Contact Information Redacted

Attached.

••• AT&T

4:35 PM



Messages (119)

Steve

Details

Wednesday 7:32 PM

Amigo...how's life?
Got time to chat today?

Yesterday 12:53 PM

Hey bro, not sure if you got my message last week. Would appreciate a few mins today if you're free, thanks

Steve! Hope you are well. Sorry I was out last week with kids.

Ahhhhh I see. You free to talk sometime today or tomorrow?

I think I know why you're reaching out. Unfortunately all I can say is that we have to go to ICANN auction.

I understand...you gotta do what is best for you. still like to talk if you're amicable.



Take a picture

Send

Can't give up...how about I guarantee you score at least 16 mil if you go into the private auction and lose? \$\$\$

Today 2:52 PM

No. [Redacted]

Ok how about...17.02m?

No. ;)

Ok..np. I think Kane just got the deal with Jose anyway 😊

[Redacted]

Today 4:22 PM

In all seriousness if it helps to delay the private auction a few days to get you back in, it's possible. Just throwing that out if it helps



Text Message

Send

Sent from my iPhone

Exhibit E

Messages

Details

[Redacted]

[Redacted]

[Redacted]

Thursday 6:34 PM

Can you talk?

Today 2:48 PM

Heard Heflin offered Juan \$17M;
I'll give you \$17.01M. 😊

Steve offered him \$16M. Are
you guys bidding each other

Exhibit F

Case Detail

[Edit](#) [Clone](#) [SPAM](#)

▼ Case Information

Case Number	00225003 [View Hierarchy]	Internal Status	● Closed
Account Name	Ruby Glen, LLC	Status	Closed
Contact Name	Daniel Schindler	Case Close Reason	Response Provided
Contact Type		Urgency	Moderate
Application ID	1-1527-54849	Severity	Sev 3
Registry		Case Record Type	General Case [Change]
Case Origin	Web	Category	Application Processing
Multiple Contacts Found	<input type="checkbox"/>	Sub Category	Initial Evaluation Process
Visible in Self-Service Portal	<input checked="" type="checkbox"/>	Case Owner	Jared Erwin [Change]
Suppress Notification	<input type="checkbox"/>	Assigned to	Jared Erwin
Updates On Case	<input type="checkbox"/>	Parent Case	
SLA Resolution status	SLA Exceeded		
Phone			

▼ Additional Information

Subject	.WEB Auction Postponement – Required Applicant Update
Description	<p>ICANN,</p> <p>It has come to our attention that one of the applicants for .WEB has failed to properly update its application. Upon information and belief, there have been changes to the Board of Directors and potential control of Nu Dot Co LLC ("NDC") that has materially changed its application. To our knowledge, however, NDC has not filed the required application change request.</p> <p>As you know, Section 1.2.7 of the Applicant Guidebook specifically states, "[i]f 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. This includes applicant-specific information such as changes in the financial position and changes in ownership or control of the applicant... Failure to notify ICANN of any change in circumstances that would render any information provided in the application false or misleading may result in denial of the application." As you also know, ICANN has been clear that such requirements are in full force and effect until the registry agreement is executed with the successful applicant.</p> <p>Failure by No Dot Co LLC to maintain the accuracy of its application is detrimental to the other competing applicants, especially in light of the pending ICANN auction, creating an unfair competitive advantage for NDC.</p> <p>We request that ICANN investigate the change in NDC's Board and potential control and that the ICANN auction scheduled for July 27 be immediately postponed. The auction should be rescheduled after the final investigation is complete and NDC's requisite change request is resolved.</p> <p>We do not make this request lightly and haven't done so in well over 100 other scheduled ICANN auctions.</p> <p>Thank you and best regards, Jonathon Nevett</p>

Case Comments

[New](#)

[Case Comments Help](#) [?](#)

Action	Public	Comment
		<p>Created By: Jared Erwin (6/27/2016 3:42 PM)</p> <p>Dear Daniel Schindler,</p> <p>Thank you for bringing this to our attention. We are reviewing the information provided, and we will work with the applicant directly should action be required. We note your request to postpone the auction for the .WEB/.WEBS contention set currently scheduled for 27 July 2016. Please continue to follow the standard auction process and monitor the Customer Portal for updates. If there are any changes to the auction date, we will notify you and all auction participants.</p>
Make Private	<input checked="" type="checkbox"/>	<p>Thank you for your attention. I will now resolve this case, but please do not hesitate to reopen it should you have any questions.</p> <p>Best regards,</p> <p>Jared Erwin New gTLD Operations</p>
		<p>Created By: Susan Yao (6/23/2016 10:17 AM)</p> <p>Dear Daniel Schindler,</p> <p>Thank you for your contacting ICANN Global Support on your request.</p>
Make Private	<input checked="" type="checkbox"/>	<p>Your request has been forwarded to our gTLD Team for processing. Someone from the team will be contacting you.</p> <p>Please do not hesitate to contact us if you have any other questions or concerns.</p> <p>Best regards, Susan Yao Global Support Analyst II ICANN Global Support</p>

Exhibit G



JUL 11 2016

Schlund Technologies GmbH | Maximilianstr. 6 | 93047 Regensburg | Germany

Internet Corporation for Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536
USA

To: Akram Atallah, Christine Willett, John Jeffrey
Via e-mail and fax

July 11, 2016

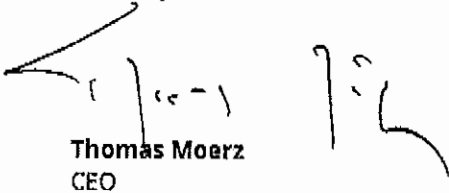
RE: Postponement of ICANN Auction .WEB/.WEBS

Dear Mr. Atallah, Ms. Willett, and Mr. Jeffrey,

Schlund Technologies GmbH is one of the applicants for .WEB with a scheduled ICANN Auction on July 27, 2016.

We support a postponement of the auction, to give ICANN and the other applicants time to investigate whether there has been a change of leadership and/or control of another applicant, NU DOT CO LLC. To do otherwise would be unfair, as we do not have transparency into who leads and controls that applicant as the auction approaches.

Sincerely,


Thomas Moerz
CEO

Schlund Technologies GmbH
Maximilianstr. 6
93047 Regensburg
Germany

Handelsregister B
Regensburg 9620

Geschäftsführer/CEO
RA Thomas Moerz

USt-IdNr. DE814286643

Commerzbank AG
Konto-Nr. 589279900

BLZ 60040000

IBAN-Nr.:

DE54600400000589279900

SWIFT-Code:

COBADEFFXXX

Exhibit H

From: Brijesh Joshi [REDACTED]
Date: Monday, July 11, 2016 at 12:07 AM
To: Akram Atallah [REDACTED], Christine Willett [REDACTED],
John Jeffrey [REDACTED], [REDACTED]
Cc: Sandeep Ramchandani [REDACTED]
Subject: Postponement of the .WEB auction

Hi,

We support a postponement of the .WEB auction to give ICANN and the other applicants time to investigate whether there has been a change of leadership and/or control of another applicant, NU DOT CO LLC. To do otherwise would be unfair, as we do not have transparency into who leads and controls that applicant as the auction approaches.

Brijesh Joshi
Director,
Radix FZC, Dot Web, Inc.

Exhibit I



The Internet Corporation for Assigned Names and Numbers

13 July 2016

Mr. Jose Ignacio Rasco, NU DOT CO LLC
Ms. Sarah Falvey, Charleston Road Registry Inc.
Mr. Robert Wiegand, Web.com Group, Inc
Mr. Brijesh Joshi, DotWeb Inc.
Mr. Daniel Schindler, Ruby Glen, LLC
Mr. John Kane, Afilias Domains No. 3 Limited
Mr. David Barron, Vistaprint Ltd
Mr. Thomas Moerz, Schlund Technologies GmbH
Mr. Jonathon Nevett, Ruby Glen, LLC

Re: .WEB/.WEBS Auction on 27 July 2016

Dear Members of the .WEB/.WEBS Contention Set,

We are writing in regards to inquiries we have received concerning potential changes of control of NU DOT CO LLC, an applicant in the .WEB/.WEBS contention set, and requests to postpone the auction to investigate the matter. We would like to provide some clarification regarding this issue and how it may or may not impact the .WEB/.WEBS auction scheduled for 27 July 2016.

Firstly, as a reminder, in regards to a request for postponement, Rule 10 of the Auction Rules for Indirect Contention states:

“...Postponement requests must be submitted by all members of the Contention Set by the due date specified within the ICANN Customer Portal, generally twenty eight (28) days after receipt of Intent to Auction notice from ICANN. If a postponement request is not submitted by the due date specified within the ICANN Customer Portal or is not accommodated by ICANN, an applicant may request an advancement/postponement request via submission of the Auction Date Advancement/Postponement Request Form. The form must be submitted at least 45 days prior to the scheduled Auction Date and ICANN must receive a request from each member of the contention set...” (<https://newgtlds.icann.org/en/applicants/auctions/rules-indirect-contention-24feb15-en.pdf>)

The date to submit the postponement form passed on 12 June 2016, and we did not receive consensus from the contention set. As such, no postponement was granted.

Secondly, in regards to potential changes of control of NU DOT CO LLC, we have investigated the matter, and to date we have found no basis to initiate the application change request process or postpone the auction.



The Internet Corporation for Assigned Names and Numbers

Finally, as you are aware, ICANN provided confirmation to all members of the .WEB/.WEBS contention set on 6 July 2016 that the auction will be proceeding as scheduled on 27 July 2016. Please follow all instructions provided to you by Power Auctions, the Auction Manager, regarding next steps, including mini and mock auctions as well as the deposit deadline.

Regarding the deposit deadline, Rule 28 of the Auction Rules for Indirect Contention states:

“All wires and all instructions associated with Deposits, including instructions regarding the allocation of funds among Contention Sets from wires and funds rolled over from previous Auctions, must be received no later than 16:00 UTC on the day that is seven (7) calendar days prior to the Commencement Date of the relevant Auction (the “Deposit Deadline”), unless this deadline is waived, at the Auction Manager’s sole discretion.”

As per Rule 28, the Deposit Deadline for the upcoming auction is 16:00 UTC on 20 July 2016.

While the auction is currently set to proceed as scheduled, applicants may continue to work toward self-resolution of the contention set. Applicants may withdraw their application up until the Deposit Deadline noted above. Once the Deposit Deadline is reached, there is a quiet period in which applicants are no longer allowed to withdraw their application until after conclusion of the auction.

I hope this information has been helpful to you. Please do not hesitate to respond with any additional questions or concerns. Should you have specific questions regarding next steps for the auction, you may submit a case to globalsupport@icann.org, and someone from my team will contact you promptly.

Sincerely,

Christine A. Willett
Vice President, GDD Operations
ICANN

Exhibit J

**DETERMINATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 16-9**

21 JULY 2016

The Requesters, Ruby Glen, LLC and Radix FZC, submitted a reconsideration request seeking urgent reconsideration of ICANN’s decision not to delay the .WEB/.WEBS auction (scheduled for 27 July 2016) following ICANN’s investigation into alleged material changes in Nu Dot Co LLC’s (Nu Dot’s) application for .WEB.

I. Brief Summary.

Seven applications for .WEB and one application for .WEBS are currently in a contention set (.WEB/.WEBS Contention Set) and scheduled to participate in an auction of last resort on 27 July 2016 (Auction). The Requesters and Nu Dot each submitted an application for .WEB and are Auction participants. The Requesters contacted ICANN staff on or about 23 June 2016 and submitted a complaint to the Ombudsman during ICANN56 in June 2016 alleging that Nu Dot had experienced changes in leadership and/or control without notifying ICANN, as it is obligated to do. The Requesters then submitted an urgent Reconsideration Request on 17 July 2016 (Request 16-9) claiming that: (a) the Auction should be postponed because there are pending accountability mechanisms (initiated by the Requesters); and (b) reconsideration is warranted because ICANN’s investigation of the alleged changes in Nu Dot’s application was insufficient and, in the Requesters’ view, comprises “a clear violation of the principles and procedures set forth in the ICANN Articles of Incorporation and Bylaws[,] and the ICANN gTLD Applicant Guidebook.”¹

¹ Request, Pg. 2.

The Requesters' claims do not warrant postponement of the Auction or reconsideration. First, the Requesters argue that their pending complaint with the Ombudsman and initiation of Request 16-9 require ICANN to postpone the Auction. However, there is no policy requiring ICANN to postpone the Auction here because these accountability mechanisms were not initiated before the .WEB/.WEBS Contention Set entered into the Auction process on 27 April 2016. Indeed, the timing parameters within the auction rules were established specifically so that auction participants could not game the system by filing last-minute accountability mechanisms. Second, reconsideration is not warranted because the Requesters do not identify any misapplication of policy or procedure by ICANN staff in its investigation of the allegations regarding Nu Dot's application.

Contrary to the Requesters' claims, ICANN diligently investigated the alleged potential changes to Nu Dot's application and found no basis to initiate the application change request process.² Because the Requesters have failed to show that ICANN staff acted in contravention of established policy or procedure, the BGC concludes that Request 16-9 be denied.

II. Facts.

A. Background Facts.

In June 2012, Ruby Glen, LLC, DotWeb Inc. (an affiliate of Radix FZC), Nu Dot, Charleston Road Registry, Inc., Web.com Group, Inc., Afilias Domains No. 3 Limited, and Schlund Technologies GmbH each submitted an application for .WEB; Vistaprint Limited filed two applications for .WEBS (one standard, and one community-based that was later withdrawn).

² Furthermore, even if ICANN *had* determined that an applicant change request was necessary, ICANN has discretion to determine whether a change request warrants postponing an auction.

Nu Dot's application listed three officers/directors: Jose Ignacio Rasco II, CFO; Juan Diego Calle, CEO; and Nicolai Bezsonoff, COO.³

The seven applications for .WEB and the remaining application for .WEBS are in the .WEB/.WEBS Contention Set.⁴

On 27 April 2016, ICANN initiated the Auction process by notifying all active members of the .WEB/.WEBS Contention Set that the Auction had been scheduled and providing instructions and deadlines to participate in the Auction.

According to the Requesters, on or about 7 June 2016 they contacted Nu Dot and asked Nu Dot to reconsider its decision to forego private resolution of the .WEB/.WEBS Contention Set. The Requesters have indicated that Nu Dot's reply included the following statement: "Nicolai [Bezsonoff] is at NSR full-time and is no longer involved with our TLD applications. [Jose Ignacio Rasco II is] still running our program and Juan [Diego Calle] sits on the board with me and several others."⁵ This communication apparently led the Requesters to believe that Nu Dot had experienced some change in ownership and/or leadership. Thereafter, on or about 23 June 2016, the Requesters contacted ICANN staff regarding their apparent belief that changes to Nu Dot's application were required. The Requesters also formally raised the issue with the ICANN Ombudsman during ICANN56 in June 2016.

After receiving the Requesters' notification that they believed Nu Dot's application needed to be changed, ICANN staff proceeded to investigate the claims. On 27 June 2016, ICANN sent Nu Dot's authorized primary contact a message to determine whether there had been any "changes to your application or the [Nu Dot] organization that need to be reported to

³ Nu Dot Application for .WEB, *available at* <https://gtldresult.icann.org/applicationstatus/applicationdetails/1053>.

⁴ Contention Set for .WEB/.WEBS, *available at* <https://gtldresult.icann.org/applicationstatus/contentionsetdiagram/233>.

⁵ Request, § 8, Pg. 9.

ICANN. This may include any information that is no longer true and accurate in the application, including changes that occur as part of regular business operations (e.g., changes to officers and directors, application contacts).” Jose Ignacio Rasco, CFO of Nu Dot, replied that same day to “confirm that there have been no changes to the [Nu Dot] organization that would need to be reported to ICANN.”

Subsequently, both ICANN staff and the Ombudsman reached out to Mr. Rasco to again inquire about the claims of potential changes in Nu Dot’s organization that the Requesters believed required notification to ICANN. Specifically, ICANN staff conducted a telephone conversation with Mr. Rasco on 8 July 2016 regarding the allegations. During that call, and later in a confirming email on 11 July 2016, Mr. Rasco stated that: “Neither the ownership nor the control of Nu Dotco, LLC has changed since we filed our application. The Managers designated pursuant to the company’s LLC operating agreement (the LLC equivalent of a corporate Board) have not changed. And there have been no changes to the membership of the LLC either.” Mr. Rasco also confirmed to ICANN that he provided this same information to the ICANN Ombudsman in responding to the Ombudsman’s investigation of the complaint lodged with him. According to Mr. Rasco, he informed the Ombudsman that there had been no changes to Nu Dot’s ownership, operating agreement, or LLC membership. After receiving information from Nu Dot and ICANN, the Ombudsman informed ICANN that, in his opinion, there was nothing to justify a postponement of the .WEB/.WEBS Auction based on unfairness to the other applicants.

On 11 July 2016, the Requesters sent an email to ICANN “support[ing] a postponement of the .WEB auction to give ICANN and the other applicants time to investigate whether there has been a change of leadership and/or control of another applicant, [Nu Dot,]” and stating that,

“[t]o do otherwise would be unfair, as we do not have transparency into who leads and controls that applicant as the auction approaches.”⁶

After completing its investigation of the allegations regarding Nu Dot’s application, ICANN sent a letter to the members of the .WEB/.WEBS Contention Set on 13 July 2016 stating, among other things, that “in regards to potential changes of control of [Nu Dot], we have investigated the matter, and to date we have found no basis to initiate the application change request process or postpone the auction.”⁷

On 17 July 2016, the Requesters filed Request 16-9, seeking postponement of the .WEB/.WEBS Auction and requesting a “thorough and transparent investigation into the apparent discrepancies and/or changes in [Nu Dot’s] .WEB/.WEBS application.”⁸

The .WEB/.WEBS Auction is scheduled to occur on 27 July 2016.⁹

B. Relief Requested.

The Requesters ask ICANN to:

1. “[D]elay the ICANN auction of last resort for the .WEB/.WEBS contention set *on an emergency basis*”, and;
2. “[C]onduct a thorough and transparent investigation into the apparent discrepancies and/or changes in [Nu Dot’s] .WEB/.WEBS application in accordance with ICANN’s Bylaws (including ICANN’s guiding principles to ensure transparency, openness and accountability), the Auction Rules, and the

⁶ Email from Brijesh Joshi to Akram Atallah, Christine Willett, and John Jeffrey, dated 11 July 2016, *available at* <https://www.icann.org/en/system/files/correspondence/joshi-to-atallah-et-al-11jul16-en.pdf>.

⁷ Letter from Christine Willett to Members of the .WEB/.WEBS Contention Set, dated 13 July 2016, *available at* <https://newgtlds.icann.org/en/program-status/correspondence>.

⁸ Request, § 9, Pg. 11. On 20 July 2016, ICANN received a letter of support from Donuts Inc. regarding Request 16-9. Donuts requested that the letter not be published.

⁹ Auction Schedule, *available at* <https://newgtlds.icann.org/en/applicants/auctions>.

Applicant Guidebook.”¹⁰

III. The Relevant Standard For Reconsideration Requests.

ICANN’s Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.¹¹ The Requesters challenge staff action. Dismissal of a request for reconsideration of staff action or inaction is appropriate only if the BGC concludes, and the Board agrees to the extent that the BGC deems that further consideration by the Board is necessary, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws.

IV. Analysis and Rationale.

A. No Established Policy Requires ICANN to Postpone the .WEB/.WEBS Auction.

The Requesters argue that the Auction should be postponed because of the pending accountability mechanisms. Those accountability mechanisms, however, were not pending at the required time—namely, the time when the .WEB/.WEBS Contention Set entered into the Auction process—and do not warrant postponement of the Auction.

The Requesters argue that a stay is “mandated by ICANN’s own rules governing Auction Eligibility given the pendency of (a) [the Requesters’] complaint to the ICANN Ombudsman and (b) this Request.”¹² In particular, the Requesters assert that “[a]s plainly stated on ICANN’s ‘New gTLD Program Auctions’, a string contention set will be eligible to enter into a New gTLD

¹⁰ Request, § 9, Pg. 11 (emphasis in original).

¹¹ Bylaws, Art. IV, § 2. Article IV, § 2.2 of ICANN’s Bylaws states 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:

(a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
(b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board’s consideration at the time of action or refusal to act; or
(c) one or more actions or inactions of the ICANN Board that are taken as a result of the Board’s reliance on false or inaccurate material information.

¹² Request, § 9, Pg. 12.

Program auction only where all active applications in the contention set have ‘no pending ICANN Accountability Mechanisms.’”¹³

Contrary to what the Requesters argue, there were no pending accountability mechanisms when the .WEB/.WEBS Contention Set entered into the Auction process. ICANN initiated the Auction process on 27 April 2016 by notifying all active members of the .WEB/.WEBS Contention Set that the Auction had been scheduled and providing instructions and deadlines to participate in the Auction. The Requesters did not lodge a complaint with the Ombudsman until two months later (and less than one month before the Auction) during ICANN56 in June 2016. Similarly, Request 16-9 was not filed until 17 July 2016. As such, there were no accountability mechanisms pending on the date that the .WEB/.WEBS Contention Set entered the Auction process. Indeed, the auction rules were designed to, among other things, prevent exactly this sort of last-minute attempt to delay. The Requesters have not identified any violation of process or procedure. The .WEB/.WEBS Auction will therefore proceed as scheduled on 27 July 2016.

B. ICANN Staff Complied with Established Policy when Investigating the Requesters’ Allegations Regarding Nu Dot.

The Requesters contend that ICANN’s investigation regarding Nu Dot “was taken without attention to, in contravention of, and with apparent disregard for its obligation to investigate the veracity of the representations made by [Nu Dot] and its potential changes of control, leadership, and/or ownership.”¹⁴ However, there is no established policy or procedure requiring ICANN to undertake an investigation in the manner that the Requesters would prefer. Nevertheless, ICANN did diligently investigate the Requesters’ claims and found nothing to support them.

¹³ Request, § 9, Pg. 12 (quoting ICANN’s New gTLD Program Auctions page, *available at* <https://newgtlds.icann.org/en/applicants/auctions>).

¹⁴ Request, § 10, Pg. 16.

The Requesters cite the “Top-Level Domain Application –Terms and Conditions” (Guidebook Terms and Conditions) in which gTLD applicants authorize ICANN to:

8. ... [C]onduct thorough background screening[s] ... [including] identifying information may be required to resolve questions of identity of individuals within the applicant organization investigations[; and]

10. (a) Contact any person, group, or entity to request, obtain, and discuss any documentation or other information that, *in ICANN’s sole judgment*, may be pertinent to the application; (b) Consult with persons of ICANN’s choosing regarding the information in the application or otherwise coming into ICANN’s possession, provided, however, that ICANN will use reasonable efforts to ensure that such persons maintain the confidentiality of information in the application that this Applicant Guidebook expressly states will be kept confidential.¹⁵

These provisions of the Guidebook Terms and Conditions do not support the Requesters’ argument. In the course of evaluating Nu Dot’s application, ICANN performed the above referenced background screening in accordance with the Applicant Guidebook and standard procedures, and the results were released with the Initial Evaluation Report on 7 June 2013.¹⁶ Thus, there is no dispute that ICANN performed all necessary checks of the application.

Rather, just one month before the scheduled Auction, the Requesters seemingly are suggesting that ICANN should have conducted another in-depth investigation and background check of Nu Dot because, according to the Requesters, certain unknown changes *may* have occurred with respect to Nu Dot’s organization which *might* require changes to Nu Dot’s application. Specifically, the Requesters claim that ICANN was obligated to investigate Nu Dot because the Applicant Guidebook grants ICANN “broad authority to investigate all applicants who apply to participate in the New gTLD Auction Program.”¹⁷ But the Requesters’ proposed level of investigation is not what is required at this stage of the process. While the Requesters

¹⁵ Guidebook, §§ 6.8, 6.10 (emphasis supplied).

¹⁶ Nu Dot New gTLD Program Initial Evaluation Report, *available at* ICANN’s New gTLD Program Auctions page, available at <https://newgtlds.icann.org/en/applicants/auctions>.

¹⁷ Request, § 10, Pg. 14.

are correct that the Applicant Guidebook gives ICANN the authority to conduct investigations, the Applicant Guidebook does not require ICANN to investigate the Requesters' claims regarding Nu Dot in the manner that the Requesters suggest. Furthermore, the Guidebook Terms and Conditions cited by the Requesters confirm that it is within "ICANN's sole judgment" to determine whether additional information may be pertinent to an application and, consequently, to determine whether any investigation is warranted.¹⁸ Accordingly, the Requesters fail to identify any policy or procedure that would require ICANN to investigate their claims.

Nevertheless, in response to the Requesters' allegations, ICANN *did* diligently investigate the claims regarding potential changes to Nu Dot's leadership and/or ownership. Indeed, on several occasions, ICANN staff communicated with the primary contact for Nu Dot both through emails and a phone conversation to determine whether there had been any changes to the Nu Dot organization that would require an application change request. On each occasion, Nu Dot confirmed that no such changes had occurred, and ICANN is entitled to rely upon those representations. For example, on 27 June 2016, ICANN sent Nu Dot's authorized primary contact a message to determine whether there had been any "changes to your application or the [Nu Dot] organization that need to be reported to ICANN ... [including] changes to officers and directors, [or] application contacts." Jose Ignacio Rasco, CFO of Nu Dot, replied that same day to "confirm that there have been no changes to the [Nu Dot] organization that would need to be reported to ICANN." Shortly thereafter, both ICANN staff and the Ombudsman reached out to Mr. Rasco to again inquire about the claims of potential changes requiring notification to ICANN. Specifically, ICANN staff conducted a telephone conversation with Mr. Rasco on 8 July 2016 regarding the allegations. During that call, and later in a confirming email on 11 July 2016, Mr. Rasco stated that "[n]either the ownership nor the control of Nu Dotco, LLC has

¹⁸ Guidebook, §§ 6.8, 6.10.

changed since we filed our application. The Managers designated pursuant to the company's LLC operating agreement (the LLC equivalent of a corporate Board) have not changed. And there have been no changes to the membership of the LLC either." Mr. Rasco also confirmed that he had provided this same information to the ICANN Ombudsman in responding to the Ombudsman's investigation of the complaint lodged with him. After completing its investigation of the Requesters' allegations regarding Nu Dot's organization, ICANN informed the Requesters that "we have investigated the matter, and to date we have found no basis to initiate the application change request process or postpone the auction."¹⁹

C. ICANN Staff Complied with Established Policy when Determining that No Changes Were Necessary to Nu Dot's Application.

The Requesters also suggest that ICANN violated its established policy of non-discriminatory treatment by allowing Nu Dot's application to proceed without a change request.²⁰ Specifically, the Requesters claim that ICANN engaged in "disparate treatment in favor of Nu Dot" by allowing Nu Dot's application to proceed despite "clear statements from [Nu Dot] that representations made in its application are, at best, misleading."²¹

The Applicant Guidebook provides that, "[i]f at any time during the evaluation process information previously submitted by an applicant becomes untrue or inaccurate, the applicant must promptly notify ICANN."²² First, Nu Dot never notified ICANN that there were any changes to the information provided in the application. Second, as discussed above, after investigating the Requesters' allegations that there were changes in Nu Dot's organization requiring changes to the application, ICANN concluded that there was no evidence to suggest

¹⁹ Letter from Christine Willett to Members of the .WEB/.WEBS Contention Set, dated 13 July 2016, *available at* <https://newgtlds.icann.org/en/program-status/correspondence>.

²⁰ Bylaws, Article II, § 3 ("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.")

²¹ Request, § 10, Pg. 20.

²² Guidebook, § 1.2.7.

that Nu Dot's application was no longer accurate. Thus, as ICANN explained to the Requesters, there was no need for Nu Dot to "initiate the application change request process."²³

Finally, the Requesters' claims rest upon one email (provided in redacted form), purportedly received from Nu Dot, stating that: "Nicolai [Bezsonoff] is at NSR full-time and is no longer involved with our TLD applications. [Jose Ignacio Rasco II is] still running our program and Juan [Diego Calle] sits on the board with me and several others."²⁴ This email does not indicate that these persons have left the organization or that the organization has "resold, assigned or transferred its rights in the application."²⁵ Moreover, after investigating the Requesters' allegations, ICANN found no evidence to suggest that Nu Dot experienced a change of leadership and/or control, and in fact received explicit confirmation from the primary contact for Nu Dot, Jose Ignacio Rasco, that no such changes had occurred, which ICANN is entitled to rely upon. Thus, there appears to be no need for an application change request, and ICANN acted in accordance with established policy and procedure in reaching this conclusion.

V. Determination.

Based on the foregoing, the BGC concludes that the Requesters have not stated proper grounds for reconsideration, and therefore denies Request 16-9. If the Requesters believe that they have somehow been treated unfairly here, they are free to ask the Ombudsman to review this matter.

The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that no Board consideration is required. As discussed above, Request 16-9 seeks reconsideration of a staff

²³ Letter from Christine Willett to Members of the .WEB/.WEBS Contention Set, dated 13 July 2016, *available at* <https://newgtlds.icann.org/en/program-status/correspondence>.

²⁴ Request, § 8, Pg. 9.

²⁵ *Id* at 10.

action or inaction. As such, after consideration of Request 16-9, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.

In terms of the timing, because the BGC agreed to consider the matter on an urgent basis, Section 2.19 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a reconsideration request within seven days, or as soon thereafter as feasible.²⁶ The Requesters submitted this Request on 17 July 2016. By issuing its Determination on 21 July 2016, the BGC has acted within the established time limit for urgent reconsideration requests.

²⁶ Bylaws Article IV, Section 2.19.

Exhibit K

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 16-5505 PA (ASx)	Date	July 26, 2016
Title	Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers		

Present: The Honorable	PERCY ANDERSON, UNITED STATES DISTRICT JUDGE		
Stephen Montes Kerr	None	N/A	
Deputy Clerk	Court Reporter	Tape No.	
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:		
None	None		

Proceedings: IN CHAMBERS — COURT ORDER

Before the Court is an Ex Parte Application for Temporary Restraining Order (“Application for TRO”) filed by plaintiff Ruby Glen, LLC (“Plaintiff”). Plaintiff seeks to temporarily enjoin defendant Internet Corporation for Assigned Names and Numbers (“ICANN”) from conducting an auction for the rights to operate the registry for the generic top level domain (“gTLD”) for .web. Currently, that auction is set for 6:00 a.m. on July 27, 2016. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument.

Plaintiff applied to ICANN in 2012 to operate the registry for the .web gTLD. Because other entities also applied to operate the .web gTLD, ICANN’s procedures require all of the applicants, what are referred to as “contention sets,” to first attempt to resolve their competing claims, but if they cannot do so, ICANN will conduct an auction and award the rights to operate the registry to the winning bidder. According to Plaintiff, one of the competing entities, Nu Dotco, LLC (“NDC”) is unwilling to informally resolve the competing claims and has instead insisted on proceeding to an auction. Plaintiff asserts that it learned on June 7, 2016, that NDC has experienced recent changes in its management and ownership since it initially submitted its application to ICANN but that NDC has not provided ICANN with updated information as required by ICANN’s application requirements. Specifically, the email from NDC’s Jose Ignacio Rasco stated:

The three of us are still technically the managers of the LLC, but the decision goes beyond just us. Nicolai [Bezsonoff]^{1/} is at [Neustar, Inc.] full time and no longer involved with our TLD applications. I’m still running our program and Juan [Diego Calle] sits on the board with me and several others. Based on your request, I went back to check with all the powers that be and there was no change in the response and [we] will not be seeking an extension.

(Docket No. 8, Decl. of Jonathon Nevett, Ex. A.)

^{1/} According to Plaintiff, Bezsonoff was identified on NDC’s ICANN application as NDC’s “secondary contact.”

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES - GENERAL

Case No.	CV 16-5505 PA (ASx)	Date	July 26, 2016
Title	Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers		

Plaintiff alleges that it requested that ICANN conduct an investigation regarding the discrepancies in NDC’s application beginning on June 22, 2016 and requested a postponement of the auction. At least one other applicant seeking to operate the .web registry has also requested that ICANN postpone the auction and investigate NDC’s current management and ownership structure. ICANN denied the requests on July 13, 2016, and stated that “in regards to potential changes of control of Nu DOT CO LLC, we have investigated the matter and to date we have found no basis to initiate the application change request process or postpone the auction.” Plaintiff and another of the applicants then submitted a request for reconsideration to ICANN on July 17, 2016. ICANN denied the request for reconsideration on July 21, 2016.

Plaintiff, relying on the Court’s diversity jurisdiction, filed this action in this Court on July 22, 2016. According to the Complaint, Plaintiff “is a limited liability company, duly organized and existing under the laws of the State of Delaware and operated by an affiliate located in Bellevue, Washington.” (Compl. ¶ 4.) The Complaint alleges that ICANN “is a nonprofit corporation, organized and existing under the laws of the State of California, with its principal place of business in Los Angeles, California.” (*Id.* ¶ 5.) Plaintiff asserts claims for: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) negligence; (4) unfair competition pursuant to California Business and Professions Code section 17200; and (5) declaratory relief. Plaintiff filed its Application for TRO at the same time it filed its Complaint.

As an initial matter, the Court notes that the Application for TRO fails to satisfy the requirements for a valid Ex Parte Application. Specifically, under Local Rule 7-19.1, an attorney making an ex parte application has a duty to give notice by making reasonable good faith efforts to orally advise counsel for the other parties, if known, of the proposed ex parte application, and “to advise the Court in writing of efforts to contact other counsel and whether any other counsel, after such advice, opposes the application or has requested to be present when the application is presented to the Court.” Here, Plaintiff did not notify the Court in writing of its efforts to notify opposing counsel of the Application for TRO or if ICANN intended to file an Opposition. These violations of the Local Rules are themselves sufficient to deny Plaintiff’s Application for TRO. *See* Standing Order 6:5-7 (“Applications which fail to conform with Local Rules 7-19 and 7-19.1, including a statement of opposing counsel’s position, will not be considered.”). Additionally, Plaintiff did not submit a proposed order with the Application for TRO as required by Local Rule 7-20. *See* Local Rule 7-20 (“A separate proposed order shall be lodged with any motion or application requiring an order of the Court, pursuant to L.R. 52-4.1.”). Finally, the Application for TRO was not accompanied by a proof of service as required by Local Rule 5-3.1. Indeed, according to ICANN, as of July 25, 2016, Plaintiff had not served ICANN with the Complaint or Application for TRO. Had ICANN not filed its Notice of Intent to File Opposition, the Court would have denied the Application for TRO as a result of these procedural deficiencies and violations of the Local Rules. *See, e.g., Reno Air Racing Ass’n, Inc. v. McCord*, 452 F.3d 1126, 1131 (9th Cir. 2006) (“[C]ourts have recognized very few circumstances justifying the issuance of an ex parte TRO [without notice].”). Despite these violations of the Local Rules, the Court will address the merits of Plaintiff’s Application for TRO because ICANN filed an Opposition. Future violations of the Local Rules, this Court’s Orders, or the Federal Rules of Civil Procedure may result in the striking of the offending documents or the imposition of sanctions.

UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA
 CIVIL MINUTES - GENERAL

Case No.	CV 16-5505 PA (ASx)	Date	July 26, 2016
Title	Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers		

The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction. See Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co., 887 F. Supp. 1320, 1323 (N.D. Cal. 1995). “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” Winter v. Natural Resources Defense Council, 555 U.S. 7, 20, 129 S. Ct. 365, 374, 172 L. Ed. 2d 249 (2008). “A preliminary injunction is an extraordinary remedy never awarded as of right.” Id. The Ninth Circuit employs a “sliding scale” approach to preliminary injunctions as part of this four-element test. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011). Under this “sliding scale,” a preliminary injunction may issue “when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff’s favor,” as long as the other two Winter factors have also been met. Id. (internal citations omitted). “[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.” Mazurek v. Armstrong, 520 U.S. 968, 972, 117 S. Ct. 1865, 1867, 138 L. Ed. 2d 162 (1997).

Plaintiff’s breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence claims are all based on provisions in ICANN’s bylaws and the ICANN Applicant Guidebook stating, for instance, that ICANN will make “decisions by applying documented policies neutrally and objectively, with integrity and fairness,” that ICANN will remain “accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness,” and that no contention set will proceed to auction unless there is “no pending ICANN accountability mechanism.” Plaintiff’s unlawful business practices act and declaratory relief claims allege that a covenant not to sue contained in the ICANN Application Guidebook is invalid and unlawful under California law. That release states:

Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN’s or an ICANN Affiliated Party’s review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant’s gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION . . .

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES - GENERAL

Case No.	CV 16-5505 PA (ASx)	Date	July 26, 2016
Title	Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers		

Even if, as Plaintiff contends, this release is not valid, and Plaintiff could therefore be considered likely to prevail on its unlawful business practices and declaratory relief claims, the potential invalidity of the release — an issue the Court does not reach — is a separate issue that is not related to the propriety of proceeding with the auction for the .web registry. As a result, those claims, and Plaintiff’s likelihood of success on them, are not relevant to Plaintiff’s Application for TRO and do not provide a basis for enjoining the .web auction.

In its Opposition to the Application for TRO, ICANN contends that Plaintiff has not established the requisite likelihood of success on the merits or irreparable harm to justify the issuance of the preliminary injunctive relief it seeks. Specifically, ICANN has provided evidence that it has conducted investigations into Plaintiff’s allegations concerning potential changes in NDC’s management and ownership structure at each level of Plaintiff’s appeals to ICANN for an investigation and postponement of the auction. During those investigations, NDC provided evidence to ICANN that it had made no material changes to its management and ownership structure. Additionally, ICANN’s Opposition is supported by the Declarations of Nicolai Bezsonoff and Jose Ignacio Rasco, who declare under penalty of perjury that there have been no changes to NDC’s management, membership, or ownership since NDC first filed its application with ICANN.

Based on the strength of ICANN’s evidence submitted in opposition to the Application for TRO, and the weakness of Plaintiff’s efforts to enforce vague terms contained in the ICANN bylaws and Applicant Guidebook, the Court concludes that Plaintiff has failed to establish that it is likely to succeed on the merits, raise serious issues, or show that the balance of hardships tips sharply in its favor on its breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence claims. Moreover, because the results of the auction could be unwound, Plaintiff has not met its burden to establish that it will suffer irreparable harm in the absence of the preliminary injunctive relief it seeks. The Court additionally concludes that the public interest does not favor the postponement of the auction.

Finally, the Court notes that Plaintiff’s Complaint has not adequately alleged a basis for this Court’s jurisdiction. Jurisdiction may be based on complete diversity of citizenship, requiring all plaintiffs to have a different citizenship from all defendants and for the amount in controversy to exceed \$75,000.00. See 28 U.S.C. § 1332; Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373, 98 S. Ct. 2396, 2402, 57 L. Ed. 2d 274 (1978). To establish citizenship for diversity purposes, a natural person must be a citizen of the United States and be domiciled in a particular state. Kantor v. Wellesley Galleries, Ltd., 704 F.2d 1088, 1090 (9th Cir. 1983). Persons are domiciled in the places they reside with the intent to remain or to which they intend to return. See Kanter v. Warner-Lambert Co., 265 F.3d 853, 857 (9th Cir. 2001). “A person residing in a given state is not necessarily domiciled there, and thus is not necessarily a citizen of that state.” Id. A corporation is a citizen of both its state of incorporation and the state in which it has its principal place of business. 28 U.S.C. § 1332(c)(1); see also New Alaska Dev. Corp. v. Guetschow, 869 F.2d 1298, 1300-01 (9th Cir. 1989). Finally, the citizenship of a partnership or other unincorporated entity is the citizenship of its members. See Johnson v. Columbia Props. Anchorage, LP, 437 F.3d 894, 899 (9th Cir. 2006) (“[L]ike a partnership, an LLC is a citizen of every state of which its owners/members are citizens.”); Marseilles Hydro Power, LLC v. Marseilles Land & Water Co., 299 F.3d 643, 652 (7th Cir. 2002) (“the relevant citizenship [of an LLC] for

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES - GENERAL

Case No.	CV 16-5505 PA (ASx)	Date	July 26, 2016
Title	Ruby Glen, LLC v. Internet Corp. for Assigned Names & Numbers		

diversity purposes is that of the members, not of the company”); Handelsman v. Bedford Village Assocs., Ltd. P’ship, 213 F.3d 48, 51-52 (2d Cir. 2000) (“a limited liability company has the citizenship of its membership”); Cosgrove v. Bartolotta, 150 F.3d 729, 731 (7th Cir. 1998); TPS Utilicom Servs., Inc. v. AT & T Corp., 223 F. Supp. 2d 1089, 1101 (C.D. Cal. 2002) (“A limited liability company . . . is treated like a partnership for the purpose of establishing citizenship under diversity jurisdiction.”).

The Complaint fails to establish that the parties are completely diverse. Specifically, by failing to identify and allege the citizenship of its own members, Plaintiff, a limited liability company, has not properly alleged its own citizenship. Accordingly, the Court is unable to ascertain whether it may exercise subject matter jurisdiction over this action. Without Plaintiff having adequately alleged a proper jurisdictional basis, the Court would not grant Plaintiff’s Application for TRO even if Plaintiff had otherwise satisfied the requirements for injunctive relief.

Despite Plaintiff’s failure to properly allege the Court’s subject matter jurisdiction, a district court may, and should, grant leave to amend when it appears that subject matter jurisdiction may exist, even though the complaint inadequately alleges jurisdiction. See 28 U.S.C. § 1653; Trentacosta v. Frontier Pacific Aircraft Industries, Inc., 813 F.2d 1553, 1555 (9th Cir. 1987). Therefore, the Court grants Plaintiff leave to amend the Complaint to attempt to establish federal subject matter jurisdiction. Plaintiff’s First Amended Complaint, if any, is to be filed by August 8, 2016. The failure to file a First Amended Complaint by that date or to adequately allege the Court’s jurisdiction may result in the dismissal of this action without prejudice.

For all of the foregoing reasons, the Court concludes that Plaintiff is not entitled to the injunctive relief it seeks. The Court therefore denies the Application for TRO.

IT IS SO ORDERED.

Exhibit L

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

OCT 15 2018

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

RUBY GLEN, LLC,

Plaintiff-Appellant,

v.

INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS and
DOES, 1-10,

Defendants-Appellees.

No. 16-56890

D.C. No.
2:16-cv-05505-PA-AS

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Percy Anderson, District Judge, Presiding

Argued and Submitted October 9, 2018
Pasadena, California

Before: SCHROEDER, M. SMITH, and NGUYEN, Circuit Judges.

Ruby Glen, LLC (“Ruby Glen”) appeals the district court’s dismissal of its First Amended Complaint (“FAC”) against Internet Corporation for Assigned Names and Numbers (“ICANN”). We have jurisdiction under 28 U.S.C. § 1291. “We review de novo dismissals for failure to state a claim under Rule 12(b)(6).”

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

McKesson HBOC, Inc. v. N.Y. State Common Ret. Fund, Inc., 339 F.3d 1087, 1090 (9th Cir. 2003). We affirm.

The district court properly dismissed the FAC on the ground that Ruby Glen’s claims are barred by the covenant not to sue contained in the Applicant Guidebook. As the district court found, the covenant not to sue is not void under California Civil Code section 1668. Ruby Glen is not without recourse—it can challenge ICANN’s actions through the Independent Review Process, which Ruby Glen concedes “is effectively an arbitration, operated by the International Centre for Dispute Resolution of the American Arbitration Association, comprised of an independent panel of arbitrators.” Thus, the covenant not to sue does not exempt ICANN from liability, but instead is akin to an alternative dispute resolution agreement falling outside the scope of section 1668. *See* Cal. Civ. Code. § 1668 (“All contracts which have for their object . . . to exempt anyone from responsibility for his own fraud, or willful injury . . . , or violation of law . . . are against the policy of the law.” (emphasis added)); *see also Cont’l Airlines, Inc. v. Goodyear Tire & Rubber Co.*, 819 F.2d 1519, 1527 (9th Cir. 1987) (holding that an “exculpatory clause” does not violate California Civil Code section 1668 where the clause bars suit, but “[o]ther sanctions remain in place”); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (“By agreeing to

arbitrate . . . , a party does not forgo [its] substantive rights . . . ; it only submits to their resolution in an arbitral, rather than a judicial, forum.”).

The district court also properly rejected Ruby Glen’s argument that the covenant not to sue is unconscionable. Even assuming that the adhesive nature of the Guidebook renders the covenant not to sue procedurally unconscionable, it is not substantively unconscionable. *See Sanchez v. Valencia Holding Co.*, 61 Cal. 4th 899, 910 (2015) (explaining that procedural and substantive unconscionability “must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability” (emphasis in original) (internal quotation marks omitted)); *Grand Prospect Partners, L.P. v. Ross Dress for Less, Inc.*, 232 Cal. App. 4th 1332, 1347–48 (2015) (holding that procedural unconscionability “may be established by showing the contract is one of adhesion”). Because Ruby Glen may pursue its claims through the Independent Review Process, the covenant not to sue is not “so one-sided as to shock the conscience.” *See Walnut Producers of Cal. v. Diamond Foods, Inc.*, 187 Cal. App. 4th 634, 647–48 (2010) (internal quotation marks omitted).

Finally, the district court did not abuse its discretion in denying Ruby Glen leave to amend because any amendment would have been futile. *See Carrico v. City & Cty. of San Francisco*, 656 F.3d 1002, 1008 (9th Cir. 2011).¹

AFFIRMED.

¹ Ruby Glen raises several additional arguments that it failed to raise below. We decline to consider those arguments because they were raised for the first time on appeal. *See Dream Palace v. Cty. of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2004).

Exhibit M

From: Oliver Mauss .Contact Information Redacted

Date: July 5, 2016 at 9:27:07 AM EDT

To: Contact Information Redacted

Subject: proposal

Juan,

it has been a while since we last spoke, I hope things are well on your side.

I understand that you have decided against joining the Applicant Auction for .web. I have no insight into your motivation for this decision, but perhaps you might be interested in a different approach to resolving the string contention.

We have designed an Alternative Private Auction that comes with some advantages against the Application Auction and also the ICANN auction. Here are the basic principles:

- It divides the participants into groups of strong and weak
- the weak players are meant to lose and are compensated for this with a pre-defined sum
- the strong players bid for the asset
- the highest bid wins, but the winner pays a price lower than the 2nd highest bid

In result, there are a number of advantages versus both ICANN and Applicant Auction:

- the winning party pays less for the asset in comparison to both ICANN and Applicant Auction
- the losing strong players receive a higher return than in the Applicant Auction
- the losing weak players receive a lower return than in the Applicant Auction

So essentially, the benefit for the strong bidders comes from a lower share of proceeds for the weak bidders than in the Applicant Auction.

I have attached a deck that describes the principles in detail and also gives some examples. It has been developed by Takon, a consultancy specialized in auctions.

I have already discussed this with other parties in the contention set and have received only positive feedback so far. I would appreciate if you could review as well and give me your view. Perhaps this approach achieves a better fit with your goals than the Applicant Auction.

I look forward to hearing from you.

Best

Oliver

Oliver Mauss
CEO

United Internet Ventures AG | Ernst-Frey-Strasse 9 | 76135 Karlsruhe | Germany

Phone: +49 721 91374-3400

E-Mail: Contact Information Redacted | Web: www.united-internet.de

Surplus Sharing Negotiation (SSN)

Ex ante agreement process for TLD *.web*
instead of the ICANN Last Resort Auction (IA)

June 2016

Surplus Sharing Negotiation (SSN)

Procedure and main advantages

- The SSN is a procedure to resolve the contention between the applicants for a TLD and is conducted instead of the ICANN Last Resort Auction (IA).
- The SSN generates higher surpluses for all applicants than the ICANN Auction (IA) in the case that the SSN-Auction (SSNA) is conducted.

SSN Procedure

How does the SSN work?

- The SSN consist of two stages:
 - (1) Participation Decision (SSNP)
 - (2) Auction (SSNA)
- In the SSNP, the applicants decide on their participation in the SSNA.
- If not more than three applicants decide to participate in the SSNA, the SSNA is conducted, otherwise, the SSN is terminated and instead the IA will take place.

SSN Procedure

How does the SSN-Participation-Decision (SSNP) work?

- The applicants simultaneously decide whether they want to participate in the SSN-Auction (SSNA) or not.
- If only one applicant decide to participate in the SSNA, this applicant immediately wins the TLD at price p (see below).
- If two or three applicants decide to participate in the SSNA, the SSNA will be conducted.
- If more than three applicants decide to participate, the SSN is terminated and the IA will take place.

SSN Procedure

How does the SSN-Auction (SSNA) work?

- Two or three SSNA-participants simultaneously submit their bid (one-shot sealed-bid mechanism).
- The SSNA-participants with the highest bid (SSNA-winner) wins the TLD.
- The group of the applicants that do not participate in the SSNA receives a predetermined payment p .
- The SSNA-losers receive from the SSNA-winner a compensation payment, which depends on the bids in the SSNA and the payment p .

Note: The SSNA makes only sense for two or three participants.



Rules and Properties of the Surplus Sharing Negotiation Auction (SSNA)

Surplus Sharing Negotiation Auction (SSNA)

Variables and notation

SSN	Surplus Sharing Negotiation Process
SSNA	Surplus Sharing Negotiation Auction
IA	ICANN Last Resort Auction
n	Number of applicants for <i>.web</i>
v_i	Applicant i 's value (willingness to pay) for <i>.web</i> , $i = 1, \dots, n$
π_i	Applicant i 's surplus (profit), $i = 1, \dots, n$
p	Payment for the non-participating applicants
$\varphi(b_1, b_2, p)$	Compensation payment for the SSNA-losers

Properties of the SSNA

The SSNA is a simple and an incentive compatible mechanism

- **One-shot sealed-bid auction:** Two or three strong applicants participate in the SSNA where they simultaneously submit their bids.
- **No sophisticated bidding strategy required:** The SSNA is designed that if the SSNA-participants consider themselves equally strong (i.e. equally likely to be weaker or stronger than each of the other SA-participants,
 - they have an incentive to bid their willingness to pay for the TLD in the SSNA (i.e. truthful bidding),
 - their optimal bid does not depend on the payments to the other applicants that do not participate in the SSNA.
- **Truthful bidding:** optimal bidding strategy in the SSNA.
- **Efficient outcome:** SSNA-participant with the highest valuation for the TLD wins the SSNA and thus the TLD.

SSNA Concept

Rules

- The two (three) applicants 1, 2 (and 3), that participate in the SSNA, simultaneously submit their b_1, b_2 (and b_3), we assume $b_1 > b_2 (> b_3)$
- The reservation price is determined by the compensation payment to the other applicants p , i.e. $b_1, b_2, b_3 \geq p$
- The SSNA-participant 1 with b_1 (highest bid) is called the SSNA-winner and the SSNA-participants 2 (and 3) are called SSNA-losers.
- The SSNA-winner wins the TLD.
- The group of non-participating applicants receives from the SSNA-winner the predetermined compensation payment p .
- Each of the SSNA-losers receives from the SSNA-winner the compensation payment $\varphi(b_1, b_2, p)$.

SSNA with two bidders

Compensation payments

The group of non-participating applicants receive from the SSN-winner the predetermined payment p .

The SSNA-loser receives from the SSNA-winner the payment $\varphi(b_1, b_2, p)$:

$$(1) \quad \varphi(b_1, b_2, p) = \frac{\frac{b_1+b_2}{2} - p}{2} = \frac{b_1+b_2-2p}{4} \quad \text{if } b_2 > \frac{b_1+2p}{3} \Leftrightarrow b_1 - b_2 < 2(b_2 - p)$$

The SSNA-loser receives half of the difference $\frac{b_1+b_2}{2} - p$ from the SSNA-winner if the difference between b_1 and b_2 is smaller than twice the difference between the SSNA-loser's bid b_2 and the compensation payment p to the other bidders.

This is considered to be the very probable case!

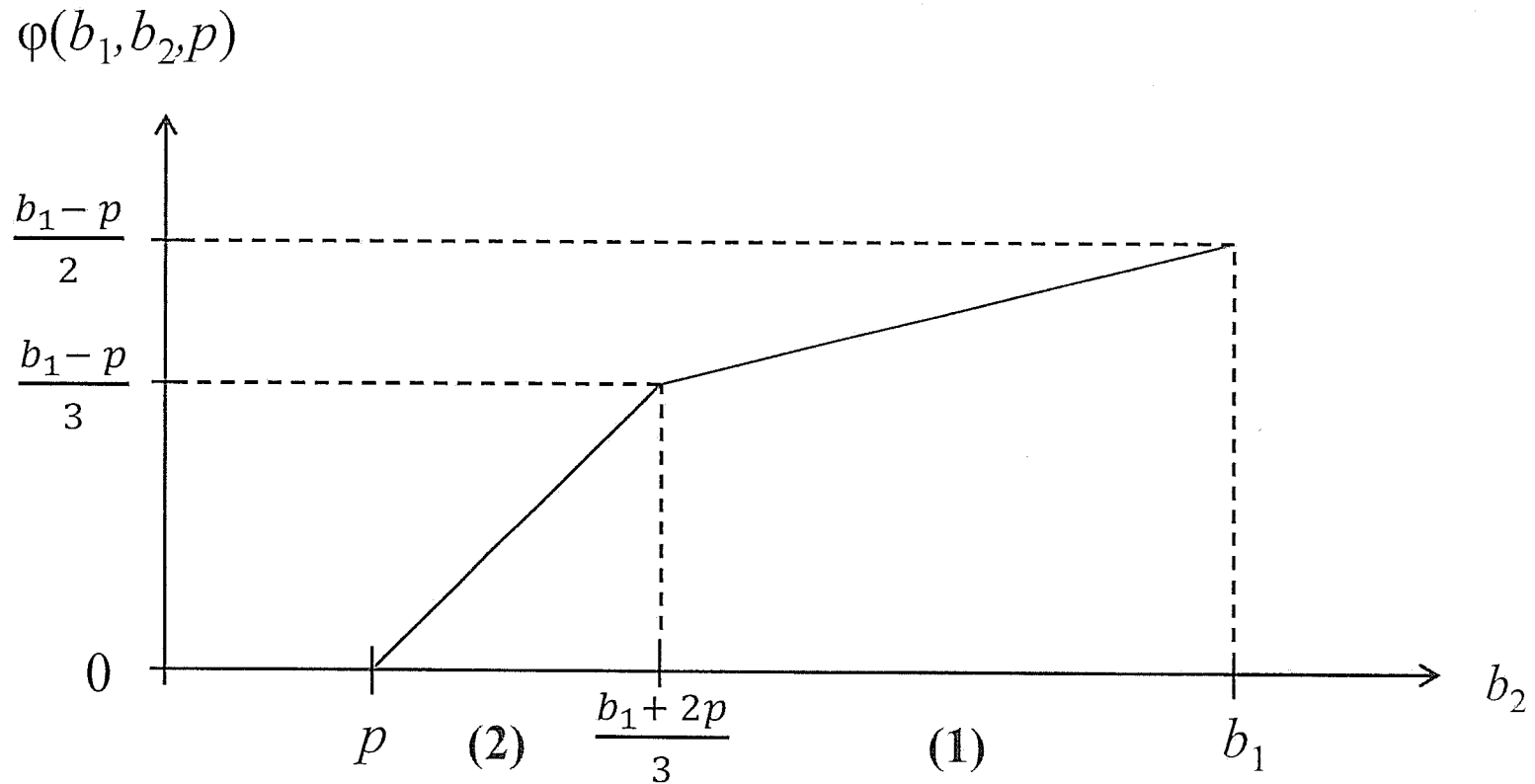
$$(2) \quad \varphi(b_1, b_2, p) = b_2 - p \quad \text{if } p < b_2 \leq \frac{b_1+2p}{3} \Rightarrow b_1 - b_2 \geq 2(b_2 - p)$$

The SSNA-loser receives the difference between its SSNA-bid b_2 and p if the difference between b_1 and b_2 is larger than twice the difference between b_2 and p .

This rule assures that the SSNA-winner is not worse off than in the IA.

SSNA with two bidders

Compensation payment for the SSNA-loser (illustration)



SSNA with two bidders

SSNA-participants' surpluses π_1 and π_2

➤ SNNA-winner

$$(1) \quad \pi_1 = v_1 - p - \frac{b_1 + b_2 - 2p}{4} \quad \text{if} \quad b_2 > \frac{b_1 + 2p}{3}$$

$$(2) \quad \pi_1 = v_1 - b_2 \quad \text{if} \quad p < b_2 \leq \frac{b_1 + 2p}{3}$$

➤ SNNA-loser

$$(1) \quad \pi_2 = \frac{b_1 + b_2 - 2p}{4} \quad \text{if} \quad b_2 > \frac{b_1 + 2p}{3}$$

$$(2) \quad \pi_2 = b_2 - p \quad \text{if} \quad p < b_2 \leq \frac{b_1 + 2p}{3}$$

v_1 and v_2 denote the two strong applicants' values (willingness to pay) for the nTLD *.web* and π_1 and π_2 denote their surpluses.

Example 1.1 (two SSNA-bidders)

Case (1): $v_2 > (v_1 + p)/3$

- $v_1 = 100, v_2 = 80, p = 20$
- Truthful bidding: $b_1 = v_1 = 100, b_2 = v_2 = 80$
- SSN
 - Applicant 1 wins the SSNA and thus the TLD
 - Applicant 1 pays $\varphi(b_1, b_2, p) = \frac{b_1 + b_2 - 2p}{4} = 35$ to Applicant 2 and $p = 20$ to the others
 - Applicant 1's surplus: $\pi_1(\text{SSN}) = v_1 - p - \varphi(b_1, b_2, p) = 100 - 35 - 20 = 45$
 - Applicant 2's surplus: $\pi_2(\text{SSN}) = \varphi(b_1, b_2, p) = 35$
 - Surplus of each of the $n - 2$ other applicants : $\pi_j(\text{SSN}) = 20/(n - 2)$
- ICANN Auction (IA)
 - Applicant 1 wins the IA at $b_2 = 80$
 - Applicant 1's surplus: $\pi_1(\text{IA}) = v_1 - b_2 = 100 - 80 = 20$
 - Applicant 2's surplus: $\pi_2(\text{IA}) = 0$
 - Surplus of each of the $n - 2$ other applicants : $\pi_j(\text{IA}) = 0$

Example 1.2 (two SSNA-bidders)

Case (2): $v_2 \leq (v_1 + 2p)/3$

- $v_1 = 100, v_2 = 40, p = 20$
- Truthful bidding: $b_1 = v_1 = 100, b_2 = v_2 = 40$
- SSN
 - Applicant 1 wins the SSNA and thus the TLD
 - Applicant 1 pays $\varphi(b_1, b_2, p) = b_2 - p = 20$ to Applicant 2 and $p = 20$ to the others
 - Applicant 1's surplus: $\pi_1(\text{SSN}) = v_1 - p - \varphi(b_1, b_2, p) = 100 - 20 - 20 = 60$
 - Applicant 2's surplus: $\pi_2(\text{SSN}) = \varphi(b_1, b_2, p) = 20$
 - Surplus of each of the $n - 2$ other applicants : $\pi_j(\text{SSN}) = 20/(n - 2)$
- ICANN Auction (IA)
 - Applicant 1 wins the IA at $b_2 = 40$
 - Applicant 1's surplus: $\pi_1(\text{IA}) = v_1 - b_2 = 100 - 40 = 60$
 - Applicant 2's surplus: $\pi_2(\text{IA}) = 0$
 - Surplus of each of the $n - 2$ other applicants : $\pi_j(\text{IA}) = 0$

Examples 1 (two SSNA-bidders)

Comparison

Case	$b_1 = v_1$	$b_2 = v_2$	p	$\varphi(b_1, b_2, p)$	$\pi_1(\text{SSN})$	$\pi_2(\text{SSN})$	$\pi_1(\text{IA})$	$\pi_2(\text{IA})$
(1)	100	80	20	35	45	35	20	0
(2)	100	40	20	20	60	10	60	0

For both SSNA-participants 1 and 2, the SSN is never worse than the IA.
For Applicant 1 the SSN is better in Case (1) and for Applicant 2 the SSN is better in Case (1) and Case (2).

For all other applicants that do participate in the SSNA, the SSN is better than the ICANN Auction (IA).

SSNA with three bidders

Compensation payments

The group of non-participating applicants receive from the SSNA-winner the predetermined payment p .

Each of the two SSNA-losers receives from the SSNA-winner the same compensation payment $\varphi(b_1, b_2, p)$:

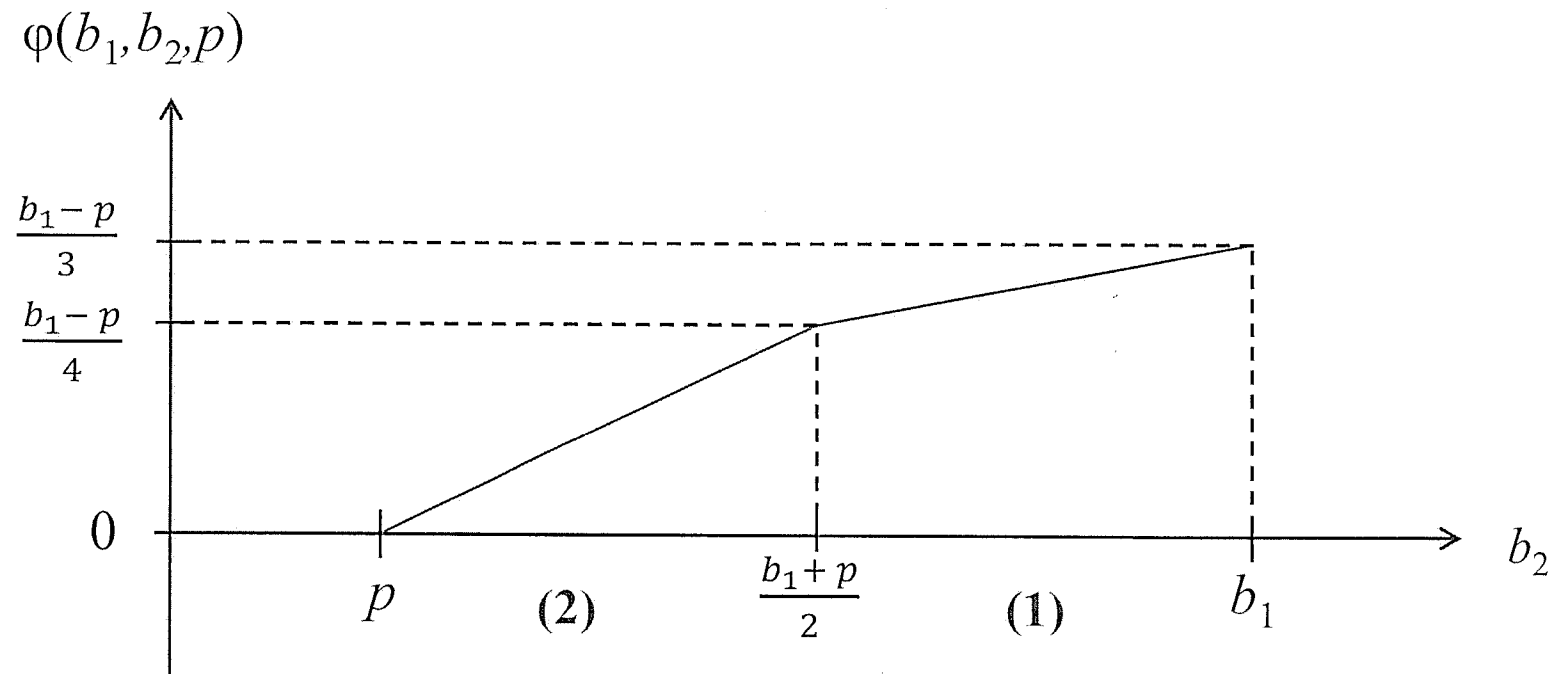
$$(1) \varphi(b_1, b_2, p) = \frac{\frac{b_1 + b_2}{2} - p}{3} = \frac{b_1 + b_2 - 2p}{6} \quad \text{if } b_2 > \frac{b_1 + p}{2}$$

This is considered to be the very probable case!

$$(2) \varphi(b_1, b_2, p) = \frac{b_2 - p}{2} \quad \text{if } p < b_2 \leq \frac{b_1 + p}{2}$$

SSNA with three bidders

Compensation payment for the SSNA-losers (illustration)



SSNA with three bidders

SSNA-participants' surpluses π_1 , π_2 , and π_3

➤ Applicant 1 (SNNA-winner)

$$(1) \quad \pi_1 = v_1 - p - \frac{b_1 + b_2 - 2p}{3} = v_1 - \frac{b_1 + b_2 + p}{3} \quad \text{if} \quad b_2 > \frac{b_1 + p}{2}$$

$$(2) \quad \pi_1 = v_1 - b_2 \quad \text{if} \quad p < b_2 \leq \frac{b_1 + p}{2}$$

➤ Applicant 2/3 (SNNA-losers)

$$(1) \quad \pi_{2/3} = \frac{b_1 + b_2 - 2p}{6} \quad \text{if} \quad b_2 > \frac{b_1 + p}{2}$$

$$(2) \quad \pi_{2/3} = \frac{b_2 - p}{2} \quad \text{if} \quad p < b_2 \leq \frac{b_1 + p}{2}$$

v_1 and v_2 denote the two strong applicants' values (willingness to pay) for the nTLD *.web* and π_1 the surplus on the winner and $\pi_{2/3}$ the surplus of each loser.

Example 2.1 (three SSNA-bidders)

Case (1): $v_2 > (v_1 + p)/2$

- $v_1 = 100, v_2 = 84, v_3 = 70, p = 20$
- Truthful bidding: $b_1 = v_1 = 100, b_2 = v_2 = 84, b_3 = v_3 = 70$
- SSN
 - Applicant 1 wins the SSN and thus the TLD
 - Applicant 1 pays $\varphi_{2/3}(b_1, b_2, p) = \frac{b_1 + b_2 - 2p}{6} = 24$ to Applicant 2 and 3 and $p = 16$ to the others
 - Applicant 1's surplus: $\pi_1(\text{SSN}) = v_1 - p - 2 \cdot \varphi_{2/3}(b_1, b_2, p) = 100 - 48 - 20 = 32$
 - Applicant 2's surplus: $\pi_2(\text{SSN}) = \varphi_2(b_1, b_2, p) = 24$
 - Applicant 3's surplus: $\pi_3(\text{SSN}) = \varphi_3(b_1, b_2, p) = 24$
 - Surplus of each of the $n - 3$ other applicants : $\pi_j(\text{SSN}) = 20/(n - 3)$
- ICANN Auction (IA)
 - Applicant 1 wins the IA at $p = b_2 = 80$
 - Applicant 1's surplus: $\pi_1(\text{IA}) = v_1 - p = 100 - 84 = 16$
 - Applicant 2's surplus: $\pi_2(\text{IA}) = 0$
 - Applicant 3's surplus: $\pi_3(\text{IA}) = 0$
 - Surplus of each of the $n - 3$ other applicants : $\pi_j(\text{SSN}) = 0$

Example 2.2 (three SSNA-bidders)

Case (2): $v_2 \leq (v_1 + p)/2$

- $v_1 = 100, v_2 = 40, v_3 = 30, p = 20$
- Truthful bidding: $b_1 = v_1 = 100, b_2 = v_2 = 40, b_3 = v_3 = 30$
- SSN
 - Applicant 1 wins the SSNA and thus the TLD
 - Applicant 1 pays $\varphi(b_1, b_2, p) = \frac{b_2 - p}{2} = 10$ to Applicant 2 and 3 and $p = 20$ to the others
 - Applicant 1's surplus: $\pi_1(\text{SSN}) = v_1 - p - 2 \cdot \varphi(b_1, b_2, p) = 100 - 20 - 20 = 60$
 - Applicant 2's surplus: $\pi_2(\text{SSN}) = \varphi(b_1, b_2, p) = 10$
 - Applicant 3's surplus: $\pi_3(\text{SSN}) = \varphi(b_1, b_2, p) = 10$
 - Surplus of each of the $n - 3$ other applicants : $\pi_j(\text{SSN}) = 20/(n - 3)$
- ICANN Auction (IA)
 - Applicant 1 wins the IA at $b_2 = 60$
 - Applicant 1's surplus: $\pi_1(\text{IA}) = v_1 - p = 100 - 40 = 60$
 - Applicant 2's surplus: $\pi_2(\text{IA}) = 0$
 - Applicant 3's surplus: $\pi_3(\text{IA}) = 0$
 - Surplus of each of the $n - 3$ other applicants : $\pi_j(\text{SSN}) = 0$

Examples (three SSNA-bidders)

Comparison

Case	$b_1 = v_1$	$b_2 = v_2$	p	$\Phi_{2/3}(b_1, b_2, p)$	$\pi_1(\text{SSN})$	$\Pi_{2/3}(\text{SSN})$	$\pi_1(\text{IA})$	$\pi_{2/3}(\text{IA})$
(1)	100	82	16	25	34	25	18	0
(2)	100	40	16	12	60	12	60	0

For the three SSNA-participants 1, 2, and 3, the SSN is never worse than the IA. For Applicant 1 the SSN is better in Case (1) and for Applicant 2 and 3 it is better in Case (1) and Case (2).

For all other applicants that do participate in the SSNA, the SSN is better than the ICANN Auction (IA).

Exhibit N

From: Ausubel, Lawrence M. Contact Information Redacted
Sent: Wednesday, July 20, 2016 10:59 AM
To: Contact Information Redacted
Cc: Contact Information Redacted
Subject: Reminders

Dear Jose Ignacio Rasco,

You are reminded that the Deposit Deadline for .WEB/.WEBS has passed and we are now in the Blackout Period. During the Blackout Period, all applicants for Contention Strings in the Auction are prohibited from cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other's, or any other competing applicants' bids or bidding strategies, or discussing or negotiating settlement agreements or post-Auction ownership transfer arrangements, with respect to any Contention Strings in the Auction.

You are also reminded of the following upcoming events in relation to the Auction:

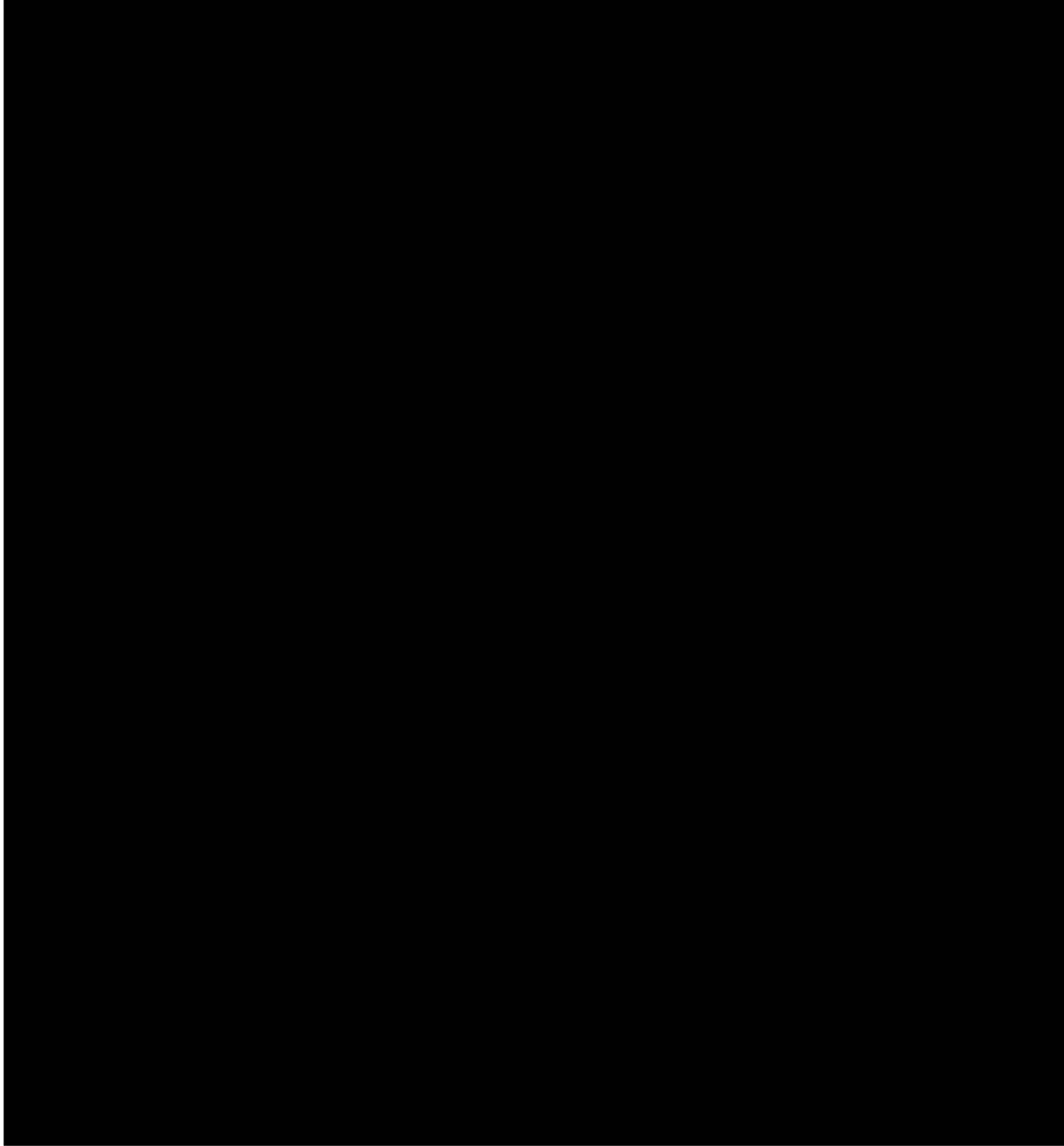
- Connectivity Test: 21 July 2016 at 13:00 UTC (9:00 am New York time).
- Mock Auction: 26 July 2016 at 13:00 UTC (9:00 am New York time).
- Auction: 27 July 2016 at 13:00 UTC (9:00 am New York time).

Please feel free to contact us if you have any questions.

Kind regards,

Larry Ausubel
Power Auctions LLC

Exhibit O



Yesterday 1:54 PM

Talk?

Today 10:24 AM

IF ICANN delays the auction
next week would you again
consider a private auction? Y-N



iMessage



EXHIBIT PC-8

EXHIBIT J

CONFIDENTIAL

Redacted – Third Party Designated Confidential Information

EXHIBIT PC-9

EXHIBIT K

CONFIDENTIAL

Redacted – Third Party Designated Confidential Information

EXHIBIT PC-10

EXHIBIT R

CONFIDENTIAL

Redacted – Third Party Designated Confidential Information

EXHIBIT PC-11

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS
BEFORE THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

ICDR Case No. 01-18-0004-2702

AFILIAS DOMAINS NO. 3 LIMITED,
Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,
Respondent

FINAL DECISION

20 May 2021

Members of the IRP Panel

Catherine Kessedjian
Richard Chernick
Pierre Bienvenu Ad. E., Chair

Administrative Secretary to the IRP Panel

Virginie Blanchette-Séguin

Table of Contents

	Page
I. INTRODUCTION	1
A. Overview	1
B. The Parties.....	4
C. The IRP Panel	5
D. The <i>Amici</i>	5
E. Place (Legal Seat) of the IRP	6
F. Language of the Proceedings	6
G. Jurisdiction of the Panel.....	6
H. Applicable Law	7
I. Burden and Standard of Proof.....	8
J. Rules of Procedure.....	8
II. HISTORY OF THE PROCEEDINGS.....	8
A. Phase I.....	8
B. Phase II.....	10
III. FACTUAL BACKGROUND.....	24
IV. SUMMARY OF SUBMISSIONS AND RELIEF SOUGHT.....	34
A. Claimant’s Amended Request for IRP.....	35
B. Respondent’s Response.....	36
C. Claimant’s Reply	39
D. Respondent’s Rejoinder	43
E. The <i>Amici</i> ’s Briefs	47
1. NDC’s Brief.....	47
2. Verisign’s Brief	49
F. Parties’ Responses to <i>Amici</i> ’s Briefs	52
1. Afilias’ Response to <i>Amici</i> ’s Briefs	52
2. ICANN’s Response to the <i>Amici</i> ’s Briefs	58
G. Post-Hearing Submissions	59
1. Claimant’s Post-Hearing Brief	59
2. Respondent’s Post-Hearing Brief.....	66
3. <i>Amici</i> ’s Post-Hearing Brief.....	70
H. Submissions Regarding the Donuts Transaction	72
V. ANALYSIS.....	73
A. Introduction.....	73
B. The Respondent’s Time Limitations Defence	76
1. Applicable Time Limitations Rule	76
2. Merits of the Respondent’s Time Limitations Defence	78
C. Standard of Review.....	83
D. Merits of the Claimant’s Core Claims	85
1. Relevant Provisions of the Articles and Bylaws	85
2. Pre-Auction Investigation.....	86

Table of Contents

	Page
3. Post-auction Actions or Inactions.....	87
(i) Overview.....	87
(ii) The Claimant’s 8 August and 9 September 2016 Letters	88
(iii) The 16 September 2016 Questionnaire	90
(iv) The Respondent’s Letter of 30 September 2016.....	94
(v) Findings as to the Seriousness of the Issues Raised by the Claimant, and the Respondent’s Representation that It Would Evaluate Them.....	94
(vi) The November 2016 Board Workshop	97
(vii) The Respondent’s Decision to Proceed with Delegation of .WEB to NDC in June 2018.....	100
(viii) Other Related Claims	106
E. The Rule 7 Claim	108
F. Determining the Proper Relief.....	109
G. Designating the Prevailing Party.....	111
VI. COSTS	113
A. Submissions on Costs	113
1. Claimant’s Submissions on Costs	113
2. Respondent’s Submissions on Costs	115
3. Claimant’s Reply Submission on Costs	115
4. Respondent’s Response Submission on Costs	116
B. Analysis Regarding Costs	117
1. Applicable Provisions.....	117
2. Discussion.....	118
VII. <i>DISPOSITIF</i>	125

GLOSSARY OF DEFINED TERMS

Afilias	Claimant Afilias Domains No. 3 Limited.
Afilias' First DIDP Request	Documentary Information Disclosure Policy request submitted by Afilias to ICANN on 23 February 2018.
Afilias' Response to the <i>Amici's</i> Brief	Afilias' Response to the <i>Amici Curiae</i> Briefs dated 24 July 2020.
Amended Request for IRP	Afilias's Amended Request for Independent Review dated 21 March 2019.
<i>Amici</i>	Collectively, Verisign, Inc. and Nu DotCo, LLC.
<i>Amici's</i> PHB	Verisign, Inc. and Nu DotCo, LLC's post-hearing brief dated 12 October 2020.
Articles	<i>Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers</i> , as approved by the Board on 9 August 2016, and filed on 3 October 2016, Ex. C-2.
Auction Rules	Power Auctions LLC's Auction Rules for New gTLDs: Indirect Contentions Edition, Ex. C-4.
Board	ICANN's board of directors.
Blackout Period	Period associated with an ICANN auction extending from the deposit deadline until full payment has been received from the prevailing bidder, and during which discussions among members of a contention set are prohibited.
Bylaws	Bylaws for Internet Corporation for Assigned Names and Numbers, as amended 18 June 2018, Ex. C-1.
CCWG	The Cross-Community Working Group for Accountability created by ICANN's supporting organizations and advisory committees to review and advise on ICANN's accountability mechanisms.
CEP	ICANN's Cooperative Engagement Process, as described in Article 4, Section 4.3(e) of the Bylaws, intended to help parties to a potential IRP resolve or narrow the issues that might need to be addressed in the IRP.

CEP Rules	Rules applicable to a Cooperative Engagement Process described in an ICANN document dated 11 April 2013, Ex. C-121.
Claimant	Afilias Domains No. 3 Limited.
Claimant's PHB	Afilias' post-hearing brief dated 12 October 2020.
Claimant's Reply	Afilias' Reply Memorial in Support of Amended Request by Afilias Domains No. 3 Limited for Independent Review dated 4 May 2020.
Claimant's Reply Submission on Costs	Afilias' reply dated 23 October 2020 to the Respondent's submissions on costs.
Covered Actions	As defined at Section 4.3(b)(ii) of the Bylaws : "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".
DAA, or Domain Acquisition Agreement	Domain Acquisition Agreement between Verisign, Inc. and Nu DotCo, LLC dated 25 August 2015, Ex. C-69.
Decision on Phase I	Panel's decision on Phase I dated 12 February 2020.
DIDP	ICANN's Documentary Information Disclosure Policy.
DNS	Domain Name System.
DOJ	United States Department of Justice.
Donuts	Donuts, Inc., the parent company of .WEB applicant Ruby Glen, LLC.
Donuts CEP	Cooperative engagement process invoked by Donuts on 2 August 2016 in regard to .WEB.
First Procedural Order	Panel's first procedural order for Phase II, dated 5 March 2020.
gTLD	Generic top-level domain.
Guidebook	ICANN's New gTLD Applicant Guidebook, Ex. C-3.
ICANN, or Respondent	Respondent Internet Corporation for Assigned Names and Numbers.
ICANN's Response to the <i>Amici's</i> Briefs	ICANN's response dated 24 July 2020 to the <i>amici curiae</i> briefs.

ICDR	International Centre for Dispute Resolution.
ICDR Rules	International Arbitration Rules of the ICDR.
Interim Procedures	Interim Supplementary Procedures for Internet Corporation for Assigned Names and Numbers' Independent Review Process, Ex. C-59.
IOT	Independent Review Process Implementation Oversight Team.
IRP	Independent Review Process provided for under ICANN's Bylaws.
Joint Chronology	Chronology of relevant facts dated 23 October 2020, agreed to by the Parties and the <i>Amici</i> pursuant to the Panel's communication dated 16 October 2020.
NDC	<i>Amicus Curiae</i> Nu DotCo, LLC.
NDC's Brief	Nu DotCo, LLC's <i>amicus curiae</i> brief dated 26 June 2020.
New gTLD Program Rules	Collectively, ICANN's New gTLD Applicant Guidebook, Ex. C-3, and the Power Auctions LLC's Auction Rules for New gTLDs: Indirect Contentions Edition, Ex. C-4.
November 2016 Workshop	Workshop held by the Board on 3 November 2016 during which a briefing was presented by in-house counsel regarding the .WEB contention set.
Ombudsman	ICANN's Ombudsman.
Panel	The Panel appointed to resolve Claimant's IRP in the present case.
Phase I	First phase of this Independent Review Process which concluded with the Panel's Decision on Phase I dated 12 February 2020.
Procedural Order No. 2	Panel's second procedural order for Phase II dated 27 March 2020.
Procedural Order No. 3	Panel's third procedural order for Phase II dated 27 March 2020.
Procedural Order No. 4	Panel's fourth procedural order for Phase II dated 12 June 2020.
Procedural Order No. 5	Panel's fifth procedural order for Phase II dated 14 July 2020.
Procedural Order No. 6	Panel's sixth procedural order for Phase II dated 27 July 2020.

Procedural Timetable	Procedural timetable for Phase II attached to the First Procedural Order dated 5 March 2020.
Questionnaire	Questionnaire issued by ICANN on 16 September 2016.
Radix	Radix FZC.
Reconsideration Request 18-7	Reconsideration request submitted by Afilias challenging ICANN's response to its First Documentary Information Disclosure Policy Request.
Reconsideration Request 18-8	Reconsideration request submitted by Afilias challenging ICANN's response to its Second Documentary Information Disclosure Policy Request.
Request for Emergency Interim Relief	Afilias' Request for Emergency Panelist and Interim Measures of Protection, dated 27 November 2018.
Respondent, or ICANN	Respondent Internet Corporation for Assigned Names and Numbers.
Respondent's Answer	ICANN's Answer to the Amended Request for IRP dated 31 March 2019.
Respondent's PHB	ICANN's post-hearing brief dated 12 October 2020.
Respondent's Rejoinder	ICANN's Rejoinder Memorial in Response to Amended Request by Afilias Domains No. 3 Limited for Independent Review dated 1 June 2020.
Respondent's Response Submission on Costs	ICANN's response dated 23 October 2020 to the Claimant's submissions on costs.
Revised Procedural Timetable	Revised procedural timetable for Phase II attached to the Procedural Order No. 3 dated 13 March 2020.
Ruby Glen	Ruby Glen, LLC.
Ruby Glen Litigation	Ruby Glen, LLC's complaint against ICANN filed in the US District Court of the Central District of California and application seeking to halt the .WEB auction.
Rule 7 Claim	Afilias' claim that ICANN violated its Bylaws in adopting the <i>amicus curiae</i> provisions set out in Rule 7 of the Interim Procedures.

Second DIDP Request	Documentary Information Disclosure Policy request submitted by Afilias to ICANN on 23 April 2018.
Staff	ICANN's Staff.
Supplemental Submission	Afilias' supplemental submission dated 29 April 2020 adding an additional argument in favour of a broader document production by ICANN.
Verisign	<i>Amicus Curiae</i> Verisign, Inc.
Verisign's Brief	Verisign, Inc.'s <i>amicus curiae</i> brief dated 26 June 2020.
10 June Application	Afilias' application dated 10 June 2020 regarding the status of the evidence originating from the <i>Amici</i> which had been filed with the Respondent's Rejoinder.
29 April 2020 Application	Afilias' application seeking assistance from the Panel regarding ICANN's document production and privilege log.

I. INTRODUCTION

A. Overview

1. The Claimant is one of seven (7) entities that submitted an application to the Respondent for the right to operate the registry of the .WEB generic Top-Level Domain (**gTLD**), pursuant to the rules and procedures set out in the Respondent's New gTLD Applicant Guidebook (**Guidebook**) and the Auction Rules for New gTLDs (**Auction Rules**) (collectively, **New gTLD Program Rules**).
2. gTLDs are one category of top-level domains used in the domain name system (**DNS**) of the Internet, to the right of the final dot, such as ".COM" or ".ORG". Under the Guidebook and Auction Rules, in the event of multiple applicants for the same gTLD, the applicants are placed in a "contention set" for resolution privately or, if this first option fails, through an auction administered by the Respondent.
3. On 27 and 28 July 2016, the Respondent conducted an auction among the seven (7) applicants for the .WEB gTLD. Nu Dotco, LLC (**NDC**) won the auction while the Claimant was the second-highest bidder. Shortly after the .WEB auction, it was revealed that NDC and Verisign, Inc. (**Verisign**) had entered into an agreement (**Domain Acquisition Agreement** or **DAA**) under which Verisign undertook to provide funds for NDC's bid for the .WEB gTLD, while NDC undertook, if its application proved to be successful, to transfer and assign its registry operating rights in respect of .WEB to Verisign upon receipt from the Respondent of its actual or deemed consent to this assignment.¹
4. The Claimant initiated the present Independent Review Process (**IRP**) on 14 November 2018, seeking, among others, binding declarations that the Respondent must disqualify NDC's bid for .WEB and, in exchange for a bid price to be specified by the Panel, proceed with contracting the registry agreement for .WEB with the Claimant.
5. At the outset of these proceedings, on 30 August 2019, the Parties agreed that there should

¹ Domain Acquisition Agreement entered into by NDC and Verisign on 25 August 2015, Ex. C-218, as amended and supplemented by the "Confirmation of Understanding" executed by these same parties on 26 July 2016, Ex. H to Mr. Livesay's witness statement. See below, paras. 39, 84 and 101.

be a bifurcated Phase I in this IRP to address two questions. The first was the Claimant’s claim that the Respondent violated its *Bylaws for Internet Corporation for Assigned Names and Numbers*, as amended on 18 June 2018 (**Bylaws**), in adopting the *amicus curiae* provisions set out in Rule 7 of the *Interim Procedures for Internet Corporation for Assigned Names and Numbers’ Independent Review Process*, adopted by the Respondent’s board of directors (**Board**) on 25 October 2018 (**Interim Procedures**), and that Verisign and NDC should be prohibited from participating in the IRP on that basis. This question has been referred to in these proceedings as the Claimant’s **Rule 7 Claim**. The second question to be addressed in Phase I was the extent to which, in the event the Rule 7 Claim failed, NDC and Verisign should be permitted to participate in the IRP as *amici*.

6. In its Decision on Phase I dated 12 February 2020 (**Decision on Phase I**), which concluded the first phase of the IRP, this IRP Panel (**Panel**) unanimously decided to grant the requests respectively submitted by Verisign and NDC (collectively, the *Amici*) to participate as *amici curiae* in the present IRP, on the terms and subject to the conditions set out in that decision. On the basis of the Claimant’s alternative request for relief in Phase I,² the Panel decided to join to the Claimant’s other claims in Phase II those aspects of Afiliias’ Rule 7 Claim over which the Panel determined that it had jurisdiction³ – to the extent the Claimant were to choose to maintain them.
7. On 4 March 2020, the Panel held a case management conference in relation to Phase II of the IRP. On that occasion, the Claimant informed the Panel that it intended to maintain its Rule 7 Claim in order to illustrate what it described as the “unseemly relationship between the regulator and the monopolist”⁴ (*i.e.*, in this case, respectively, the Respondent and Verisign). For reasons set out later in this Final Decision, the Panel has determined that the outstanding aspects of the Rule 7 Claim that were joined to the Claimant’s other claims in Phase II have become moot by the participation of the *Amici* in this IRP in accordance with the Panel’s Decision on Phase I. Accordingly, the Panel has concluded that no useful

² See Decision on Phase I, para. 183.

³ In its decision on Phase I, the Panel found that it has jurisdiction over any actions or failures to act alleged to violate the Articles or Bylaws: (a) committed by the Board; or (b) committed by Staff members of ICANN, but not over actions or failures to act committed by the IRP Implementation Oversight Team as such. See Decision on Phase I, para. 133.

⁴ Transcript of the preparatory conference of 4 March 2020, p. 11.

purpose would be served by the Rule 7 Claim being addressed beyond the findings and observations contained in the Panel's Decision of Phase I, which the Respondent's Board has no doubt reviewed and can act upon, as deemed appropriate. In this Final Decision, the Panel disposes of the Claimant's other substantive claims in this IRP, as well as its cost claims in connection with the IRP, including in relation to Phase I.

8. After careful consideration of the facts, the applicable law and the submissions made by the Parties and the *Amici*, the Panel finds that the Respondent has violated its *Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers*, as approved by the Board on 9 August 2016, and filed on 3 October 2016 (**Articles**) and its Bylaws by (a) its staff (**Staff**) failing to pronounce on the question of whether the Domain Acquisition Agreement complied with the New gTLD Program Rules following the Claimant's complaints that it violated the Guidebook and Auction Rules, and, while these complaints remained unaddressed, by nevertheless moving to delegate .WEB to NDC in June 2018, upon the .WEB contention set being taken "off hold"; and (b) its Board, having deferred consideration of the Claimant's complaints about the propriety of the DAA while accountability mechanisms in connection with .WEB remained pending, nevertheless (i) failing to prevent the Staff, in June 2018, from moving to delegate .WEB to NDC, and (ii) failing itself to pronounce on these complaints while taking the position in this IRP, an accountability mechanism in which these complaints were squarely raised, that the Panel should not pronounce on them out of respect for, and in order to give priority to the Board's expertise and the discretion afforded to it in the management of the New gTLD Program. In the opinion of the Panel, the Respondent in so doing violated its commitment to make decisions by applying documented policies objectively and fairly. The Panel also finds that in preparing and issuing its questionnaire of 16 September 2016 (**Questionnaire**), and in failing to communicate to the Claimant the decision made by the Board on 3 November 2016, the Respondent has violated its commitment to operate in an open and transparent manner and consistent with procedures to ensure fairness.
9. The Panel is also of the view that it is for the Respondent, that has the requisite knowledge, expertise, and experience, to pronounce in the first instance on the propriety of the DAA under the New gTLD Program Rules, and on the question of whether NDC's application

should be rejected and its bids at the auction disqualified by reason of its alleged violations of the Guidebook and Auction Rules. The Panel therefore denies the Claimant's requests for (a) a binding declaration that the Respondent must disqualify NDC's bid for .WEB for violating the Guidebook and Auction Rules, and (b) an order directing the Respondent to proceed with contracting the Registry Agreement for .WEB with the Claimant, in exchange for a price to be specified by the Panel and paid by the Claimant.

B. The Parties

10. The Claimant in the IRP is Afilias Domains No. 3 Limited (**Afilias** or **Claimant**), a legal entity organised under the laws of the Republic of Ireland with its principal place of business in Dublin, Ireland. Afilias provides technical and management support to registry operators and operates several generic gTLD registries.
11. The Claimant's parent company, Afilias, Inc., was, until 29 December 2020, a United States corporation that was the world's second-largest Internet domain name registry. As noted below in paragraphs 244 to 249, in post-hearing submissions made in December 2020, the Panel was informed that pursuant to a Merger Agreement signed on 19 November 2020 between Afilias, Inc. and Donuts, Inc. (**Donuts**), these two (2) companies have merged as of 29 December 2020. The Claimant has explained, however, that this transaction does not include the transfer of the Claimant's .WEB application, as both the Claimant as an entity and its .WEB application have been carved out of the transaction.
12. The Claimant is represented in the IRP by Mr. Arif Hyder Ali, Mr. Alexandre de Gramont, Ms. Rose Marie Wong, Mr. David Attanasio, Mr. Michael A. Losco and Ms. Tamar Sarjveladze of Dechert LLP, and by Mr. Ethan Litwin of Constantine Cannon LLP.
13. The Respondent is the Internet Corporation for Assigned Names and Numbers (**ICANN** or **Respondent**), a not-for-profit corporation organised under the laws of the State of California, United States. ICANN oversees the technical coordination of the Internet's DNS on behalf of the Internet community. The essential function of the DNS is to convert

domain names that are easily remembered by humans – such as “icann.org” – into numeric IP addresses understood by computers.

14. ICANN’s core mission, as described in its Bylaws, is to ensure the stable and secure operation of the Internet’s unique identifier system. To that end, ICANN contracts with, among others, entities that operate gTLDs. The Bylaws provide that in performing its mission, ICANN will act in a manner that complies with and reflects ICANN’s commitments and respects ICANN’s core values, as described in the Bylaws.
15. ICANN is represented in the IRP by Mr. Jeffrey A. LeVee, Mr. Steven L. Smith, Mr. David L. Wallach, Mr. Eric P. Enson and Ms. Kelly M. Ozurovich, of Jones Day LLP.

C. The IRP Panel

16. On 26 November 2018, the Claimant nominated Professor Catherine Kessedjian as a panelist for the IRP. On 13 December 2018, the International Centre for Dispute Resolution (**ICDR**) appointed Prof. Kessedjian on the IRP Panel and her appointment was reaffirmed by the ICDR on 4 January 2019.
17. On 18 January 2019, the Respondent nominated Mr. Richard Chernick as a panelist for the IRP and he was appointed to that position by the ICDR on 19 February 2019.
18. On 17 July 2019, the Parties nominated Mr. Pierre Bienvenu, Ad. E., to serve as the IRP Panel Chair. Mr. Bienvenu accepted the nomination on 23 July 2019 and he was appointed by the ICDR on 9 August 2019.
19. In September 2019, with the consent of the Parties, Ms. Virginie Blanchette-Séguin was appointed as Administrative Secretary to the IRP Panel.

D. The *Amici*

20. Verisign is a publicly traded company organised under the laws of the State of Delaware. Verisign is a global provider of domain name registry services and Internet infrastructure that operates, among others, the registries for the .COM, .NET and .NAME gTLDs. Verisign is represented in this IRP by Mr. Ronald L. Johnston, Mr. James S. Blackburn,

Ms. Maria Chedid, Mr. Oscar Ramallo and Mr. John Muse-Fisher, of Arnold & Porter Kaye Scholer LLP.

21. NDC is a limited liability company organised under the laws of the State of Delaware. NDC was established as a special purpose vehicle to participate in ICANN's New gTLD Program. NDC was initially represented in this IRP by Mr. Charles Elder and Mr. Steven Marenberg, of Irell & Manella LLP, and from 1 March 2020 onward by Mr. Steven Marenberg, Mr. Josh B. Gordon and Ms. April Hua, of Paul Hastings LLP.

E. Place (Legal Seat) of the IRP

22. The Claimant has proposed that the seat of the IRP be London, England, without prejudice to the location of where hearings are held. In its letter dated 30 August 2019, the Respondent has confirmed its agreement with this proposal.

F. Language of the Proceedings

23. In accordance with Section 4.3(I) of the Bylaws, the language of the proceedings of this IRP is English.

G. Jurisdiction of the Panel

24. The Claimant's Request for IRP is submitted pursuant to Article 4, Section 4.3 of the Bylaws, the International Arbitration Rules of the ICDR (**ICDR Rules**), and the Interim Procedures. Section 4.3 of the Bylaws provides for an independent review process to hear and resolve, among others, claims that actions or failures to act by or within ICANN committed by the Board, individual Directors, Officers or Staff members constituted an action or inaction that violated the Articles or the Bylaws.
25. In its Decision on Phase I, the Panel concluded, in respect of Afilias' Rule 7 Claim, that it has jurisdiction over any actions or failures to act alleged to violate the Articles or Bylaws:
 - (a) committed by the Board; or
 - (b) committed by Staff members;

but not over actions or failures to act allegedly committed by the IRP Implementation Oversight Team (**IOT**), on the ground that the latter does not fall within the enumeration “Board, individual Directors, Officers or Staff members” in the definition of **Covered Actions** at Section 4.3(b)(ii) of the Bylaws.

26. In relation to Phase II issues, the Parties and *Amici* have characterized a number of issues as “jurisdictional”, such as the scope of the dispute described in the Amended Request for IRP, the timeliness of the claims, the applicable standard of review, and the relief that the Panel is empowered to grant. Those issues are addressed in the relevant sections of this Final Decision. However, and subject to the foregoing, the jurisdiction of the Panel to hear the Claimant’s core claims against the Respondent in relation to .WEB is not contested.

H. Applicable Law

27. The rules applicable to the present IRP are, in the main, those set out in the Bylaws and the Interim Procedures.
28. Section 1.2(a) of the Bylaws provides that “[i]n performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law [...]”. The Panel notes that Article III of the Articles is to the same effect as Section 1.2(a) of the Bylaws.
29. At the hearing on Phase I, counsel for the Respondent, in response to a question from the Panel, submitted that in case of ambiguity the Interim Procedures, as well as the Articles and other “quasi-contractual” documents of ICANN, are to be interpreted in accordance with California law, since ICANN is a California not-for-profit corporation. The Claimant did not express disagreement with ICANN’s position in this respect.
30. As noted later in these reasons, the issues of privilege that arose in the document production phase of this IRP were resolved applying California law, as supplemented by US federal law.

I. Burden and Standard of Proof

31. It is a well-known and accepted principle in international arbitration that the party advancing a claim or defence carries the burden of proving its case on that claim or defence.
32. As regards the standard (or degree) of proof to which a party will be held in determining whether it has successfully carried its burden, it is generally accepted in practice in international arbitration that it is normally that of the balance of probabilities, that is, “more likely than not”. That said, it is also generally accepted that allegations of dishonesty or fraud will attract very close scrutiny of the evidence in order to ensure that the standard is met. To quote from a leading textbook, “[t]he more startling the proposition that a party seeks to prove, the more rigorous the arbitral tribunal will be in requiring that proposition to be fully established.”⁵
33. These principles were applied by the Panel in considering the issues in dispute in Phase II of this IRP.

J. Rules of Procedure

34. The ICDR is the IRP Provider responsible for administering IRP proceedings.⁶ The Interim Procedures, according to their preamble and the contextual note at footnote 1 thereof, are intended to supplement the ICDR Rules in effect at the time the relevant request for independent review is submitted. In the event of an inconsistency between the Interim Procedures and the ICDR Rules, the Interim Procedures govern.⁷

II. HISTORY OF THE PROCEEDINGS

A. Phase I

35. The history of these proceedings up to 12 February 2020, the date of the Panel’s Decision on Phase I, is set out at paragraphs 33 to 67 of the Panel’s Phase I decision, which are

⁵ See, generally, Nigel Blackaby, Constantine Partasides QC, Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration*, 6th ed., Oxford, Oxford University Press, 2015, para. 6.87.

⁶ See Bylaws, Ex. C-1, Section 4.3 (m).

⁷ See Interim Procedures, Ex. C-59, Rule 2.

incorporated by reference in this Final Decision.

36. In order to provide context for the present decision, the Panel recalls that on 18 June 2018, Afilias invoked ICANN's Cooperative Engagement Process (**CEP**) after learning that ICANN had removed the .WEB gTLD contention set's "on-hold" status. A CEP is intended to help parties to a potential IRP resolve or narrow the issues that might need to be addressed in an IRP. The Parties participated in the CEP process until 13 November 2018.
37. On 14 November 2018, Afilias filed its request for IRP with the ICDR. On the same day, ICANN informed Afilias that it would only keep the .WEB gTLD contention set "on-hold" until 27 November 2018, so as to allow Afilias time to file a request for emergency interim relief, barring which ICANN would take the .WEB gTLD contention set off of its "on hold" status. Afilias filed a Request for Emergency Panelist and Interim Measures of Protection with the ICDR on 27 November 2018 (**Request for Emergency Interim Relief**), seeking to stay all ICANN actions that would further the delegation of the .WEB gTLD.
38. From November 2018 to March 2019, the Parties focused on the Claimant's Request for Emergency Interim Relief and, pursuant to Requests to Participate as *Amicus* in the IRP filed by the *Amici* on 11 December 2018, on the possible participation of the *Amici* in the proceedings.
39. The Emergency Panelist presided over a focused document production process during which, on 18 December 2018, ICANN produced the Document Acquisition Agreement entered into between Verisign and NDC in connection with .WEB. The Claimant then took the position that the documents produced to it by the Respondent warranted the amendment of its Request for IRP. Accordingly, on 29 January 2019, the Parties agreed to postpone the deadline for the submission of the Respondent's Answer until after the Claimant filed its Amended Request for IRP. In the event, the Claimant filed its Amended Request for IRP with the ICDR on 21 March 2019 (**Amended Request for IRP**), and the Respondent submitted its Answer to the Amended Request for IRP on 31 May 2019 (**Respondent's Answer**).
40. In January 2019, the Parties asked the Emergency Panelist to postpone further activity

pending resolution of the *Amici*'s requests to participate in the IRP. After the appointment of this Panel to determine the IRP, the Parties expressed their understanding that it would be for this Panel to resolve the Emergency Interim Relief Request. In the meantime, the Respondent agreed that the .WEB gTLD contention set would remain on hold until the conclusion of this IRP.⁸

41. As for the *Amici*'s requests to participate in the IRP, they were first the subject of proceedings before a Procedures Officer appointed by the ICDR on 21 December 2018. In its final Declaration, dated 28 February 2019, the Procedures Officer found that "the issues raised [...] are of such importance to the global Internet community and Claimants [sic] that they should not be decided by a "Procedures Officer", and therefore the issues raised are hereby referred to [...] the IRP Panel for determination".⁹ The *Amici*'s requests to participate in the IRP were referred to the Panel and, by agreement of the Parties, were resolved in Phase I of this IRP by the Panel's Decision on Phase I dated 12 February 2020.

B. Phase II

42. On 4 March 2020, the Panel presided over a case management conference to discuss the issues to be decided in Phase II and the Parties' respective proposed procedural timetables for the Phase II proceedings. The Parties differed as to the timing of document production and the briefing schedule for Phase II. The Claimant favoured document production taking place after the filing of Afiliias' Reply, ICANN's Rejoinder and the *Amici*'s Briefs, such production to be followed by the simultaneous filing of Responses from the Parties. The Respondent, for its part, proposed a document production stage at the outset of Phase II, to be followed by a briefing schedule for the filing of the Parties' additional submissions and the *Amici*'s Briefs.
43. In its First Procedural Order for Phase II, dated of 5 March 2020 (**First Procedural Order**), the Panel decided that the document production phase in relation to Phase II would take place at the outset of Phase II, as proposed by the Respondent, so as to give the Parties

⁸ See ICANN's Response to Afiliias' Costs Submission, dated 23 October 2020, at para. 23.

⁹ Declaration of the Procedures Officer dated 28 February 2019, p. 38.

the benefit of the documents produced during this process in their additional submissions in relation to Phase II. With respect to the other elements of the Procedural Timetable, the Panel adopted the Claimant’s proposed briefing sequence, which provided for the filing of the Claimant’s Reply, the Respondent’s Rejoinder, the *Amici*’s Briefs, and an opportunity for the Claimant and the Respondent subsequently to respond simultaneously to the *Amici*’s Briefs. The Panel attached to the First Procedural Order the following procedural timetable for Phase II, reflecting these decisions (**Procedural Timetable**):

No.	Action	Party	Date
1.	Simultaneous requests to produce (via Redfern Schedules)	Afilias and ICANN	6 March 2020
2.	Simultaneous responses/objections (via Redfern Schedules)	Afilias and ICANN	13 March 2020
3.	List of agreed issues to be decided in Phase II and, as the case may be, list(s) of additional issues to be decided in Phase II	Afilias and ICANN	13 March 2020
4.	Simultaneous replies to responses/objections (via Redfern Schedules)	Afilias and ICANN	20 March 2020
5.	Hyperlinked list of constituent elements (as of that date) of the Phase II record	Afilias and ICANN	20 March 2020
6.	Panel ruling on outstanding objections	N/A	27 March 2020
7.	Production of documents	Afilias and ICANN	17 April 2020
8.	Submissions on questions as to which the <i>Amici</i> will be permitted to submit briefings to the Panel, as well as page limits and other modalities	Afilias, ICANN, Verisign and NDC	24 April 2020
9.	Reply (along with all supporting exhibits, witness statements, expert reports and legal authorities)	Afilias	1 May 2020
10.	Rejoinder (along with all supporting exhibits, witness statements, expert reports and legal authorities)	Afilias	29 May 2020
11.	<i>Amici</i> ’s Briefs (along with all supporting exhibits, if any, and legal authorities)	Verisign and NDC	26 June 2020
12.	Simultaneous Responses to the <i>Amici</i> ’s Briefs	Afilias and ICANN	15 July 2020
13.	Parties to identify witnesses called for cross-examination at the hearing	Afilias and ICANN	24 July 2020
14.	Final status and pre-hearing conference	Afilias, ICANN, Verisign and NDC	29 July 2020
15.	Hearing	Afilias, ICANN, Verisign and NDC	3-7 August 2020

No.	Action	Party	Date
16.	Post-hearing submissions	Afilias, ICANN, Verisign and NDC	TBD

44. As reflected in the Procedural Timetable, in its First Procedural Order the Panel also asked the Parties to develop a joint list of issues to be decided in Phase II, and laid out a process for the determination, in consultation with the Parties and as contemplated in the Panel’s Decision on Phase I, of the questions as to which the *Amici* would be permitted to submit briefings to the Panel. The Panel also accepted the Parties’ proposal that the hearing, scheduled on 3-7 August 2020, be held in Chicago, IL.
45. In accordance with the Procedural Timetable, on or about 6 March 2020, the Parties exchanged document production requests in the form of Redfern Schedules. The Claimant addressed twenty-one (21) requests to produce documents to the Respondent, while the Respondent addressed two (2) requests to produce to the Claimant. Responses or objections to those requests were exchanged on or about 13 March 2020. The Claimant objected to both of the Respondent’s requests. The Respondent objected to many, but not all, of the Claimant’s requests, having agreed to search for some categories of documents requested by the Claimant.
46. Also on 6 March 2020, the Claimant sought clarification of the First Procedural Order as regards the question of whether the *Amici* would be permitted, in their briefs, to add new documents to the record as exhibits. The Claimant argued that any documents to be submitted by the *Amici* would inevitably be “cherry picked” and supportive of their submissions. The Claimant thus took the position that if the *Amici* were allowed to refer to documents that are not already in the record, the principles of fundamental fairness and due process required that it be granted an opportunity to request documents from the *Amici*. On 11 March 2020, the Respondent submitted in response that pursuant to the Decision on Phase I, the *Amici* are entitled to submit “briefings and supporting exhibits” and that the provisions of the Interim Procedures relating to the exchange of information do not apply to the *Amici*. On the same date, the *Amici* contended, for their part, that the First Procedural Order clearly states that they may submit exhibits, without specifying that such exhibits are limited to those already in the record. The *Amici* stressed that material evidence may

be in their possession and not in possession of the Parties. They further contended that the Panel had already ruled that they may not propound discovery nor be the recipient of information requests. In its reply dated 12 March 2020, the Claimant reiterated its fairness concerns and stated that the First Procedural Order did not address the question of whether the *Amici*'s exhibits were to be limited to those on record.

47. By email dated 13 March 2020, the Parties informed the Panel that they had attempted – for a second time and still without success – to agree on a joint list of issues to be decided in Phase II. While unable to agree on the joint issues list requested by the Panel, the Parties proposed an agreed procedure for the Panel ultimately to determine the questions on which the *Amici* would be invited to submit briefs. In the event, the Panel accepted the Parties' suggestion in Procedural Order No. 3, and issued a revised procedural timetable reflecting the changes proposed by the Parties (**Revised Procedural Timetable**).
48. In Procedural Order No. 2 dated 27 March 2020 (**Procedural Order No. 2**), the Panel ruled on the outstanding objections to the Parties' respective requests to produce, granting twelve (12) of the Claimant's fourteen (14) outstanding requests and one (1) of the two (2) requests presented by the Respondent. In the same order, the Panel directed each of the Parties to provide to the other a privilege log listing each document over which a privilege is asserted, on the ground that such logs might prove useful to the Parties and the Panel in addressing issues arising from refusals to produce based on privilege.
49. In Procedural Order No. 3, also dated 27 March 2020 (**Procedural Order No. 3**), the Panel ruled on the Claimant's clarification request in regard to the possibility for the *Amici*, as part of their briefs, to add to the evidentiary record of the IRP. It is useful to cite in full the Panel's ruling on that question:

In its Decision on Phase I, the Panel made clear that, under the Interim Procedures, the *Amici* are non-disputing parties whose participation in the IRP is through the submission of "written briefings", possibly supplemented by oral submissions at the merits hearing. The Panel also rejected the notion that, under the Interim Procedures, the *Amici* can enjoy the same participation rights as the disputing parties. It follows that it is for the Parties, who bear the burden of proving their case, to build the evidentiary record of the IRP, and it is based on that record that the *Amici* "may submit to the IRP Panel written briefing(s) on the DISPUTE or on such discrete questions as the IRP Panel may request briefing" (see Rule 7 of the Interim Procedures).

The Panel expects the Parties, in accordance with the Procedural Timetable, to file the entirety of the remainder of their case as part of the second round of submissions contemplated by the timetable, that is to say, with the Claimant's Reply and the Respondent's Rejoinder. As evoked in the Panel's Decision on Phase I (*see* par. 201), if there is evidence in the possession of the *Amici* that the Respondent considers relevant to, and that it wishes to adduce in support of its case, be it witness or documentary evidence, that evidence is required to be filed as part of the Respondent's Rejoinder, and not with the *Amici's* Briefs.

The Panel did not preclude the possibility in its Phase I Decision (and the Procedural Timetable) that the *Amici* might wish to file documents in support of the submissions to be made in their Briefs. By referring to such documents as "exhibits", however, as other arbitral tribunals have in referring to materials to be filed with the submissions of *amicus* participants, the Panel did not mean to suggest that these "exhibits" (which the Panel would expect to be few in number, and to be directed to supporting the *Amici's* submissions, not the Respondent's case) would become part of the record and acquire the same status as the documentary evidence filed by the Parties.

Should a Party be of the view that documents submitted in support of the *Amici's* Briefs are incomplete or somehow misleading, it will be open to that Party to advance the argument in response to the *Amici's* submissions and to seek whatever relief it considers appropriate from the Panel.¹⁰

50. As regards the Claimant's request to be granted an opportunity to request documents from the *Amici*, the Panel referred to its Decision on Phase I, in which it was noted that the provisions of the Interim Procedures relating to Exchange of Information (Rule 8) apply to *Parties*, not to persons, groups or entities that are granted permission to participate in an IRP with the status of an *amicus curiae*.¹¹
51. On 17 April 2020, the Respondent produced to the Claimant its document production pursuant to the Procedural Order No. 2. On 24 April 2020, the Respondent transmitted to the Claimant a privilege log identifying documents withheld from production based on the attorney-client privilege or the attorney work product doctrine.
52. On 29 April 2020, the Claimant filed an application seeking assistance from the Panel regarding what the Claimant described as the Respondent's "grossly deficient document production and insufficiently detailed Privilege Log" (**29 April 2020 Application**). By way of relief, the Claimant requested in this application that the Panel order the Respondent to "(i) supplement and remedy its production by producing those documents that are subject to the Tribunal's production order or ICANN's production agreement; (ii) produce those

¹⁰ Procedural Order No. 3, pp. 2-3.

¹¹ See Decision on Phase I, para. 195.

documents listed on ICANN's Privilege Log that are not privileged; (iii) produce those documents that contain privileged and non-privileged information with appropriate redactions covering only the privileged information; and (iii) (*sic*) for the remaining documents, remedy its Privilege Log so that the Panel and Afiliacorp can properly assess the validity of the privilege that ICANN has invoked."¹² The Claimant also reserved "its right to request the Panel to conduct an in camera review of documents that ICANN has asserted are covered by privilege".¹³

53. As directed by the Panel, the Respondent responded to the 29 April 2020 Application on 6 May 2020, rejecting the Claimant's complaints and asserting that the Respondent had in all respects complied with the Procedural Order No. 2. The Respondent argued that it searched and produced all non-privileged documents responsive to the Claimant's requests to which the Respondent agreed or was directed by the Panel to respond, and that it properly withheld only those documents protected by attorney-client privilege or the work product doctrine. The Respondent added that it served a privilege log providing, in respect of each withheld document, all of the information necessary to establish privilege.
54. On 11 May 2020, the Panel, as suggested by the Claimant, held a telephonic hearing in connection with the 29 April 2020 Application. On that occasion, both Parties had the opportunity to amplify their written submissions orally and to present arguments in reply. Consistent with the Panel's Decision on Phase I, the *Amici* were permitted to attend this procedural hearing as observers, which they did. In the course of its counsel's reply submissions at the hearing, the Claimant articulated a new waiver argument, namely that by arguing that the Board reasonably decided, in November 2016, not to make any determination regarding NDC's conduct until after the conclusion of the IRP, as alleged in the Respondent's Rejoinder, the Respondent had in effect affirmatively put the reasonableness and good faith of that Board's decision at issue in the case.
55. In accordance with the Revised Procedural Timetable (as modified by the Panel's correspondence of 1 May 2020), on 4 May 2020, the Claimant filed its Reply Memorial in

¹² 29 April 2020 Application, p. 11.

¹³ *Ibid*, fn 29.

Support of Amended Request by Afilias Domains No. 3 Limited for Independent Review (**Claimant's Reply**) and, on 1 June 2020, the Respondent filed its Rejoinder Memorial in Response to Amended Request by Afilias Domains No. 3 Limited for Independent Review (**Respondent's Rejoinder**).

56. On 10 June 2020, while the Claimant's 29 April 2020 Application regarding document production remained under advisement, the Claimant filed a supplemental submission to add an additional argument in favour of a broader document production by the Respondent, which echoed the new argument put forward in the course of its counsel's reply at the hearing of 11 May 2020 (**Supplemental Submission**). In that supplemental submission, the Claimant argued that the Respondent had waived potentially applicable privilege with the filing of its Rejoinder Memorial where it allegedly put certain documents for which it claimed privilege "at issue" in this IRP.
57. By emails dated 11 June 2020 (corrected the following day), the Panel established a briefing schedule in relation to the Claimant's Supplemental Submission. In accordance with this schedule, the Respondent set out its position in relation to the Supplemental Submission in a response dated 17 June 2020 and a sur-reply dated 26 June 2020, inviting the Panel to find that the Respondent did not waive privilege and, therefore, that the relief sought by the Supplemental Submission should be denied. As for the Claimant, its position in relation to the Supplemental Submission was amplified in a reply dated 19 June 2020. The relief sought by the Claimant's Supplemental Submission as set out in the Claimant's 19 June 2020 reply is that the Panel order the Respondent to produce all documents that formed the basis of its Board's alleged determination, in November 2016, to defer any decision on the .WEB contention set, as well as all documents reflecting any determination by the Board to continue or terminate such deferral, including all such documents for which the Respondent claimed privilege, on the ground that the Respondent has waived any applicable privilege by putting such documents at issue.
58. The Claimant filed another application on 10 June 2020, this one regarding the status of the evidence originating from the *Amici* which had been filed with the Respondent's Rejoinder with the caveat that "ICANN did so without endorsing those statements or

agreeing with them in full”¹⁴ (**10 June Application**). The Claimant argued that ICANN was not permitted, pursuant to Procedural Order No. 3, to submit materials from the *Amici* unless it considered them relevant and wished to adduce them in support of its case. By way of relief, the Claimant requested that the Respondent be directed to resubmit the evidence filed with its Rejoinder that originated from the *Amici*, with a clear indication of the portions thereof with which the Respondent did not agree or which it did not endorse. Should the Respondent fail to do so, the Claimant invited the Panel to hold that all of the evidence submitted by the Respondent should be taken to have been submitted by and on behalf of the Respondent. On 15 June 2020, the Respondent responded to the 10 June Application, arguing that the submission of evidence on behalf of the *Amici* with the Respondent’s Rejoinder complied with Procedural Order No. 3. The Claimant replied on 17 June 2020, contending that the Panel could not allow Respondent to hide the basis for its actions and non-actions by letting the *Amici* defend it in the abstract and without affirming that it agrees with the *Amici*’s evidence.

59. In Procedural Order No. 4 dated 12 June 2020 (**Procedural Order No. 4**), the Panel denied the Claimant’s 29 April 2020 Application while reserving the question raised in the Supplemental Submission. The Panel decided that the Respondent had no obligation to ask the *Amici* to search for documents responsive to the Claimant’s requests to produce, and consequently rejected the Claimant’s claim that the Respondent ought to have produced responsive documents in the possession of the *Amici*. In that same order, a majority of the Panel concluded, applying California law as supplemented by US federal law, that the description used by the Respondent in its privilege log was sufficient to validly assert privilege and, therefore, that the Claimant had failed to justify its request that the Respondent be required to revise its privilege log. One member of the Panel, however, would have required disclosure of more detailed information from the Respondent in order to support the latter’s claims of privilege. Finally, the Panel rejected the remaining allegations of the Claimant regarding the alleged insufficiency of the Respondent’s production. Specifically, the Panel held that it would violate the attorney-client privilege and work product protection to call upon the Respondent, as requested by the Claimant, to

¹⁴ Respondent’s Rejoinder, fn 6.

redact privileged communications or work product documents so as to reveal “facts or information” contained in those protected documents.

60. On 26 June 2020, NDC and Verisign respectively filed the *Amicus Curiae* Brief of Nu Dotco, LLC (**NDC’s Brief**) and Verisign, Inc.’s Pre-Hearing Brief (Phase II) (**Verisign’s Brief**). In accordance with the Revised Procedural Timetable, the Claimant and the Respondent both responded to the *Amici*’s briefs on 24 July 2020, respectively in Afilias Domains No. 3 Limited’s Response to the *Amicus Curiae* Briefs (**Afilias’ Response to the Amici’s Briefs**) and ICANN’s Response to the Briefs of *Amicus Curiae* (**ICANN’s Response to the Amici’s Briefs**).
61. On 14 July 2020, the Panel issued its fifth procedural order (**Procedural Order No. 5**). In relation to the 10 June Application, the Panel found that the Respondent had allowed its Rejoinder to serve as a vehicle for the filing of what the Respondent itself described as the “*Amici*’s evidence”, the “*Amici*’s expert reports and witness statements”. In the Panel’s view, the Respondent had thus sought to do indirectly what the Panel had decided in Phase I could not be done directly under the Interim Procedures. By way of relief, the Panel directed the Respondent to clearly identify, in a communication to be addressed to the Claimant and the *Amici* and filed with the Panel, those aspects (if any) of the *Amici*’s facts and expert evidence which the Respondent formally refused to endorse, or with which it disagrees, and to provide an explanation for this non-endorsement or disagreement.¹⁵ The Respondent complied with the Panel’s direction by letters dated 17-18 July 2020.
62. The Panel considers it useful to cite the reasons supporting this ruling as they laid the foundations to the Panel’s approach to the issues in dispute in this IRP:

17. The Respondent has filed a Rejoinder seeking to draw a distinction between the Respondent’s evidence, filed without reservation in support of the Respondent’s primary case, and the “*Amici*’s evidence”, which the Respondent states it is filing “on behalf of the *Amici*” “to help ensure that the factual record in this IRP is complete”. However, the Respondent files this *Amici* evidence with the caveat that it is neither endorsing it, nor agreeing with it in full, as set out in the above quoted footnote 6 of the Rejoinder.

¹⁵ Procedural Order No. 5, para. 24.

18. In the Panel's view, the Respondent is thus seeking to do indirectly what the Panel decided in Phase I could not be done directly under the terms of the Interim Procedures. Instead of the *Amici* filing their own evidence with their Briefs, the Respondent has allowed the Rejoinder to serve as a vehicle for the filing of the "*Amici's* evidence", the "*Amici* expert reports and witness statements". This is indeed how the Respondent describes that evidence in its 15 June 2020 correspondence. The fact that the Rejoinder serves as a vehicle for the filing of what is, in effect, the *Amici's* evidence is consistent with the Respondent's proposal, in its submissions of 22 June 2020 relating to the modalities of the merits hearing (discussed below), that "the *Amici* be permitted to [...] introduced and conduct redirect examination of their own witnesses" (Respondent's letter of 22 June 2020, p. 2, para. 3 [emphasis added in PO5]).

19. The Respondent explains, in its 15 June response, that the purpose of the so-called "*Amici* evidence" is to address the Claimant's challenge of the *Amici's* conduct. The Respondent goes on to explain [emphasis added in PO5]:

Given that ICANN has not fully evaluated the competing contentions of Afilias and the *Amici*, for reasons ICANN explains at length in its Rejoinder, ICANN is not in a position to identify the portions of the *Amici* witness statements with which it "agrees or disagrees." But ICANN views it as essential that this evidence be of record, and that the Panel consider it, if the Panel decides to address the competing positions of Afilias and Amici regarding the latter's conduct.

20. The Panel understands the resulting procedural posture to be as follows. The Respondent has adduced evidence in support of its primary case that the ICANN Board, in the exercise of its fiduciary duties, made a decision that is both consistent with ICANN's Articles and Bylaws and within the realm of reasonable business judgment when, in November 2016, it decided not to address the issues surrounding .WEB while an Accountability Mechanism regarding .WEB was pending. That, according to the Respondent, should define the proper scope of the present IRP.

21. However, recognizing that the Claimant's case against the Respondent includes allegations concerning the *Amici's* conduct (specifically, NDC's alleged non-compliance with the Guidebook and Auction Rules), the Respondent files the "*Amici* evidence" on the ground that the record should include not only Afilias' allegations against Verisign and NDC, "but also Verisign's and NDC's responses." The difficulty is that this evidence is propounded not as the Respondent's defense to Afilias' claims against it, but rather (on the ground that the Respondent has not fully evaluated the competing contentions of Afilias and the *Amici*) as the *Amici's* response to Afilias' allegations that NDC violated the Guidebook and Auction Rules.

22. The Panel recalls that this IRP is an ICANN Accountability Mechanism, the parties to which are the Claimant and the Respondent. As such, it is not the proper forum for the resolution of potential disputes between Afilias and two non-parties that are participating in these proceedings as *amici curiae*. While it is open to the Respondent to choose how to respond to the Claimant's allegations concerning NDC's conduct, and to evaluate the consequences of its choice in this IRP, the Panel is of the view that the Respondent may not at the same time as it elects not to provide a direct response, adduce responsive evidence on that issue on behalf of the *Amici* and, in relation to that evidence, reserve its position as to which portions thereof the Respondent endorses or agrees with. In the opinion of the Panel, this leaves the Claimant uncertain as to the case it has to meet, which the Panel considers unfair, and it has the potential to disrupt the proceedings if the Respondent were later to take a position, for example in its post-hearing brief, which the Claimant would not have had the opportunity to address prior to, or at the merits hearing.

23. The Panel has taken due note of the Respondent's evidence and associated contentions concerning its Board's decision of November 2016. Nevertheless, the Guidebook and Auction Rules originate from ICANN. That being so, in this ICANN Accountability Mechanism in which the Respondent's conduct in relation to the application of the Guidebook and Auction Rules is being impugned, the Respondent should be able to say whether or not the position being defended by the *Amici* in relation to these ICANN instruments is one that ICANN is prepared to endorse and, if not, to state the reasons why.

60. In Procedural Order No. 5, the Panel also ruled on the Claimant's Supplemental Submission by rejecting the Claimant's contention that the Respondent's Rejoinder had itself put in issue in the IRP documents over which the Respondent had claimed privilege, and that the Respondent had thus waived attorney-client privilege. Having quoted the leading case on implied waiver of attorney-client privilege under California law,¹⁶ the Panel wrote:

37. In the Panel's opinion, the Supreme Court's reasoning directly applies, and defeats the Claimant's claim of implied waiver. While the Respondent has disclosed the fact that its Board received legal advice before deciding to defer acting upon Afilias' complaints, the Respondent did not disclose the content of counsel's advice. Nor is the Respondent asserting that the Board's decision was consistent with counsel's advice, or that the Board's decision was reasonable because it followed counsel's advice. Disclosure of the *fact* that the Board solicited and received legal advice does not entail waiver of privilege as to the *content* of that advice. If that were so, the Respondent's compliance with the Panel's directions concerning the contents of the privilege log to be filed in support of its claims of privilege would, in of itself, waive the privilege that the privilege log serves to protect.

[emphasis in the original]

61. On 26 July 2020, the *Amici* filed a request for "urgent clarification from the Panel regarding the status of the evidence from *Amici* that ICANN has not endorsed in response to Procedural Order No. 5". The *Amici* stressed that, while ICANN endorsed almost all of the statements of the *Amici*'s expert witnesses, ICANN declined to endorse almost all of the *Amici*'s fact witnesses. In its order dated 27 July 2020 (**Procedural Order No. 6**), the Panel ruled that, notwithstanding ICANN's decision not to endorse them, the witness statements of Messrs. Paul Livesay and Jose I. Rasco III remained part of the record of this IRP, and that the Panel would consider the evidence of these witnesses, as well as the rest of the evidence filed in the IRP.
62. On 29 July 2020, the Panel held a telephonic pre-hearing conference, which was attended

¹⁶ *Southern Cal. Gas Co. v. Public Utilities Com.*, 50 Cal. 3d 31 (1990).

by the Parties and *Amici*, to discuss various points of order in advance of the merits hearing.

63. The evidentiary hearing in relation to the merits of the IRP was held from 3 to 11 August 2020 inclusive. Because of the ongoing COVID-19 pandemic and the associated air travel restrictions, the hearing was conducted remotely using a videoconference platform selected by the Parties. Since the participants were located in multiple time zones, hearing days had to be shortened. To compensate, three (3) additional days to the five (5) days initially scheduled for the hearing were held in reserve. In the end, fewer witnesses than had been anticipated were heard and the hearing was completed in seven (7) days. A transcript of the hearing was prepared by Ms. Balinda Dunlap.
64. The Claimant had filed with its original Request for IRP witness statements from three (3) fact witnesses, Messrs. John L. Kane, Cedarampattu “Ram” Mohan and Jonathan M. Robinson, as well as two (2) expert reports, one by Dr. George Sadowsky, the other by Mr. Jonathan Zittrain. Upon the filing of its Amended Request for IRP, on 21 March 2019, the Claimant withdrew the witness statements of its three (3) fact witnesses “[i]n light of ICANN’s disclosure of the August 2015 Domain Acquisition Agreement between VeriSign and NDC”.¹⁷
65. For its part, the Respondents filed, on its own behalf, witness statements from five (5) fact witnesses, Ms. J. Beckwith Burr, Mr. Todd Strubbe, Ms. Christine A. Willett, Mr. Christopher Disspain and Ms. Samantha S. Eisner, and one (1) expert report by Dr. Dennis W. Carlton. In addition, the Respondent filed, on behalf of the *Amici*, witness statements from three (3) fact witnesses, Mr. Rasco, of NDC, and Messrs. David McAuley and Paul Livesay, of Verisign, and two (2) expert reports, one (1) by the Hon. John Kneuer, the other by Dr. Kevin M. Murphy. In its letter of 18 July 2020, the Respondent withdrew the witness statement of Mr. Strubbe, a Verisign employee whose evidence had been offered in support of the Respondent’s opposition to the Request for Emergency Interim Relief sought by the Claimant at the outset of the proceedings. The Respondent explained that Mr. Strubbe’s evidence related to the question of whether Verisign would be irreparably injured by a delay in the delegation of .WEB, an issue that had become moot

¹⁷ See Amended Request for IRP, fn 14, at p. ii.

by the time of the hearing.

66. The seven (7) fact witnesses whose witness statements remained in evidence, as well as the three (3) expert witnesses appointed by the Parties, were all initially called to appear at the hearing for questioning.¹⁸ In the course of the hearing, the Claimant informed the Panel of its decision not to cross-examine the Respondent's expert witness, which prompted the Respondent to decide not to cross-examine the Claimant's experts.
67. The evidentiary hearing was thus devoted to hearing the Parties' and *Amici's* opening statements, and to the questioning of the remaining seven (7) fact witnesses called by the Respondent, on its behalf or on behalf of the *Amici*, namely Ms. Burr, Ms. Willett, Mr. Disspain, Ms. Eisner, Mr. McAuley, Mr. Rasco and Mr. Livesay.
68. At the end of the hearing, it was decided that the Parties and *Amici* would be permitted to file post-hearing briefs on 8 October 2020. The Panel indicated, referring back to a question that had been discussed at the pre-hearing conference, that it would inform the Parties and *Amici* of a date – to be held in reserve – on which the Panel would make itself available to hear oral closing submissions from the Parties and *Amici* should the Panel feel the need to do so after perusing the post-hearing submissions. The date was later set to 20 November 2020.
69. On 23 August 2020, the Panel forwarded to the Parties and *Amici* a list of questions that the Panel invited them to address in their respective post-hearing submissions.
70. Pursuant to a short extension of time granted by the Panel on 6 October 2020, on 12 October 2020, the Parties filed their post-hearing briefs (respectively, **Claimant's PHB** and **Respondent's PHB**), submissions on costs, and updated lists of Phase II issues, along with a factual chronology agreed to by both of them.
71. Also on 12 October 2020, the *Amici* filed a joint post-hearing brief (***Amici's PHB***). In their cover email, as well as in footnote 2 to their PHB, the *Amici* noted that the Parties had not consulted with them in the preparation of their respective issues lists, nor in the preparation

¹⁸ The Claimant did not request the presence of the *Amici's* expert witnesses at the hearing.

of their joint chronology. The *Amici* therefore objected to the Parties' Phase II issues lists "to the extent that they omit or misrepresent the issues before this Panel", and they objected also to the Parties' joint chronology, which they asserted was incomplete.

72. On 16 October 2020, the Panel noted the *Amici*'s conditional objection to the Parties' respective issues lists. As regards the Parties' joint chronology, the *Amici* were given until 23 October 2020 to file, after consultations with the Parties, an amended version of the joint chronology with marked-up additions showing the items that they consider should be added to the joint chronology for it to be complete.
73. Also on 16 October 2020, the Claimant sought leave to respond to a number of "new non-record documents" cited in the *Amici*'s PHB. Having considered the Respondent's and *Amici*'s comments on this request, on 22 October 2020 the Panel granted the Claimant's request and a response to the impugned non-record documents was filed by the Claimant on 26 October 2020.
74. On 23 October 2020, the Parties filed their respective replies to the cost submissions of the other party (respectively, **Claimant's Reply Submission on Costs** and **Respondent's Response Submission on Costs**). On that date, the Claimant also provided the Panel with a joint chronology which had been agreed by the Parties and the *Amici* pursuant to the Panel's communication dated 16 October 2020 (**Joint Chronology**). The 23 October 2020 Joint Chronology is the chronology referred to in this Final Decision, and it is the one that the Panel has used in its deliberations
75. On 3 November 2020, having had the opportunity carefully to review the Parties' and *Amici*'s comprehensive post-hearing submissions, the Panel informed them of its decision not to avail itself of the possibility to hear additional oral closing submissions. The date reserved for that purpose was therefore released.
76. In a series of letters beginning with counsel for Verisign's letter of 9 December 2020, sent on behalf of both *Amici*, the Panel was informed of an impending, and later consummated merger of the Claimant's parent company, Afilias, Inc., and its competitor Donuts, Inc. This was described by Verisign as "new facts arising subsequent to the merits hearing, as

well as related newly discovered evidence, that contradict critical representations made by Afilias Domains No. 3 Limited (“Afilias”) in the pre-hearing pleadings and at the merits hearing [...]”. The *Amici* requested that the Panel consider these new developments in resolving the Claimant’s claims in this IRP. The submissions of the Parties and *Amici* concerning these post-hearing developments are summarized in the next section of this Final Decision.

77. On 7 April 2021, the Panel, being satisfied that the record of the IRP was complete and that the Parties and *Amici* had no further submissions to make in relation to the issues in dispute, formally declared the arbitral hearing closed in accordance with Article 27 of the ICDR Rules.
78. The Panel concludes this history of the proceedings by expressing its gratitude to Counsel for the Parties and *Amici* for their assistance in the resolution of this dispute and the exemplary professional courtesy each and everyone of them displayed throughout these proceedings.

III. FACTUAL BACKGROUND

79. The essential facts of this case have been conveniently laid out in the Joint Chronology dated 23 October 2020 agreed to by the Parties and *Amici*. In order to provide some background for the Panel’s analysis below, the most salient facts of this case are summarized in this section.
80. The deadline for the submission of applications for new gTLDs under the Respondent’s New gTLD Program was 30 May 2012. As mentioned in the overview, the Claimant is one of seven (7) entities that submitted an application to the Respondent for the right to operate the registry of the .WEB gTLD pursuant to the rules and procedures set out in the Respondent’s Guidebook and the Auction Rules for New gTLDs.
81. Because there were multiple applicants for .WEB, the applicants were placed in a “contention set” for resolution either privately or through an auction of last resort administered by the Respondent.
82. Towards the end of 2014, at a time when the .WEB contention set was still on hold, and

had thus not been resolved, Redacted - Third Party Designated Confidential Information

.¹⁹ Apart from filing applications for new gTLDs that were variants of the company's name, for example “.Verisign”, or internationalized versions of Verisign's existing TLDs, Verisign had not otherwise sought to acquire rights to new gTLDs as part of ICANN's New gTLD Program. Redacted - Third Party Designated Confidential Information

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83. Verisign identified .WEB as one business opportunities in the New gTLD Program. Redacted - Third Party Designated Confidential Information

. In May 2015, Mr. Livesay contacted Mr. Rasco, NDC's CFO and manager, and expressed interest in working with NDC to acquire the rights to .WEB.²¹

84. On 25 August 2015, Verisign and NDC executed the DAA under which Verisign undertook to provide, Redacted - Third Party Designated Confidential Information funds for NDC's bid for the .WEB gTLD while NDC undertook, if it prevailed at the auction and entered into a registry agreement with ICANN, to transfer and assign its .WEB registry agreement to Verisign upon receipt of ICANN's actual or deemed consent to the assignment.

85. On 27 April 2016, ICANN scheduled the .WEB auction of last resort for 27 July 2016.

86. Early in June 2016, it became known among members of the .WEB contention set that NDC did not intend to participate in a private auction in order to privately resolve the contention set. It is common ground that the Respondent, as a rule, favours the private resolution of contention sets. On 7 June 2016, in answer to a request to postpone the

¹⁹ Merits hearing transcript, 11 August 2020, pp. 1125:17-1126:15 (Mr. Livesay).

²⁰ Mr. Livesay's witness statement, 1 June 2020, para. 4.

²¹ Merits hearing transcript, 7 August 2020, p. 806:12-18 (Mr. Rasco).

ICANN auction in order for members of the contention set to “try to work this out cooperatively”, Mr. Rasco stated in an email: “I went back to check with the powers that be and there was no change in the response and will not be seeking an extension.”²² The email in question was addressed to Mr. Jon Nevett, of Ruby Glen, LLC (**Ruby Glen**).

87. On 23 June 2016, Ruby Glen informed ICANN that it believed NDC “failed to properly update its application” to account for “changes to the Board of Directors and potential control of [NDC]”.²³ On 27 June 2016, ICANN asked NDC to “confirm that there have not been changes to [its] application or [to its] organization that need to be reported to ICANN.” On the same day, NDC confirmed that “there have been no changes to [its] organization that would need to be reported to ICANN.”²⁴
88. On 29 June 2016, Ms. Willett, then Vice-President of ICANN’s gTLD Operations, informed Ruby Glen that her team had investigated and that NDC had confirmed that there had been no changes to NDC’s ownership or control. As a result, she advised that “ICANN was continuing to proceed with the Auction as scheduled.”²⁵
89. On 30 June 2016, Ruby Glen formally raised its concern about a possible change in control of NDC with ICANN’s ombudsman (**Ombudsman**). On 12 July 2016, the Ombudsman informed Ms. Willett that he had “not seen any evidence which would satisfy [him] that there ha[d] been a material change to the application. So [his] tentative recommendation [was] that there was nothing which would justify a postponement of the auction based on unfairness to the other applicants.”²⁶ The following day, Ms. Willett informed the .WEB contention set accordingly.
90. On 17 July 2016, two other .WEB applicants, Donuts and Radix FZC (**Radix**), filed an emergency Reconsideration Request, alleging that ICANN had failed to perform a “full

²² Mr. Rasco’s email dated 7 June 2016, Ex. C-35.

²³ Ms. Willett’s witness statement, 31 May 2019, Ex. A.

²⁴ Exchanges between Messrs. Rasco and Jared Erwin, Ex. C-96.

²⁵ Declaration of Ms. Willett in support of ICANN’s opposition to Plaintiff’s *ex parte* application for temporary restraining order, Ex. C-40, paras. 15-16.

²⁶ Ms. Willett’s witness statement, 31 May 2019, Ex. G.

and transparent investigation into the material representations made by NDC” and contesting ICANN’s decision to proceed with the ICANN auction.²⁷ Reconsideration is an ICANN accountability mechanism allowing any person or entity materially affected by an action or inaction of the Board or Staff to request reconsideration of that action or inaction.²⁸ Donuts’ and Radix’s Reconsideration Request was denied on 21 July 2016.²⁹

91. On 22 July 2016, Ruby Glen filed a complaint against ICANN in the US District Court of the Central District of California, and an application for a temporary restraining order seeking to halt the .WEB auction (**Ruby Glen Litigation**). On 26 July 2016, the application for a temporary restraining order was denied.³⁰
92. In the meantime, on 20 July 2016, the blackout period associated with the ICANN auction had begun. The blackout period extends from the deposit deadline, in this case 20 July 2016, until full payment has been received from the prevailing bidder (**Blackout Period**). During the Blackout Period, members of a contention set, including the .WEB contention set, “are prohibited from cooperating or collaborating with respect to, discussing with each other, or disclosing to each other in any manner the substance of their own, or each other’s, or any other competing applicants’ bids or bidding strategies, or discussing or negotiating settlement agreements or post-Auction ownership transfer arrangements, with respect to any Contention Strings in the Auction.”
93. On 22 July 2016, Mr. Kane, a representative of Afilias, wrote a text message to Mr. Rasco asking whether NDC would consider a private auction if ICANN were to delay the scheduled auction.³¹ Mr. Rasco did not respond to this query, as he testified he considered

²⁷ Reconsideration Request by Ruby Glen, LLC and Radix FZC, Ex. R-5, p. 2.

²⁸ See Bylaws, Ex. C-1, Article 4, Section 4.2.

²⁹ Reconsideration Request by Ruby Glen, LLC and Radix FZC, Ex. R-5, pp. 11-12.

³⁰ *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Cal.), Order on *Ex Parte* Application for Temporary Order (26 July 2016), Ex. R-9.

³¹ See the exchange of text messages between Messrs. Kane and Rasco, Attachment E to Arnold & Porter’s letter to Mr. Enson dated 23 August 2016, Ex. R-18, p. 73.

it an attempt to engage in a prohibited discussion during the Blackout Period.³²

94. Redacted - Third Party Designated Confidential Information

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95. On 27 and 28 July 2016, ICANN conducted the auction of last resort among the seven (7) applicants for the .WEB gTLD. As already mentioned, NDC won the auction while the Claimant was the second-highest bidder.

96. On 28 July 2016, Verisign filed a form with the U.S. Security and Exchange Commission stating that “[s]ubsequent 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.”³⁴

97. On 31 July 2016, Mr. Rasco informed Ms. Willett that Redacted - Designated Confidential Information

³⁵ On 1 August 2016, Verisign issued a press release stating that it had “entered into an agreement with Nu Dot Co LLC wherein the Company provided funds for Nu Dot Co’s bid for the .web TLD.”³⁶

98. The following day, 2 August 2016, Donuts invoked the CEP with ICANN in regard to

³² Mr. Rasco’s witness statement, 10 December 2018, para. 17.

³³ Mr. Livesay’s witness statement, 1 June 2020, para. 27, and Ex. H attached thereto.

³⁴ Verisign’s Form 10-Q, Quarterly Report, Ex. C-45, p. 13.

³⁵ Ms. Willett’s email dated 31 July 2016, Ex. C-100, [PDF] pp. 1-2.

³⁶ Verisign statement regarding .WEB auction results, Ex. C-46.

.WEB (**Donuts CEP**).³⁷ The CEP is a non-binding process in which parties are encouraged to participate to attempt to resolve or narrow a dispute.³⁸ While the CEP is voluntary, the Bylaws create an incentive for parties to participate in this process by providing that failure of a Claimant to participate in good faith in a CEP exposes that party, in the event ICANN is the prevailing party in an IRP, to an award condemning it to pay all of ICANN's reasonable fees – including legal fees – and costs incurred by ICANN in the IRP.

99. On 8 August 2016, Ruby Glen filed an Amended Complaint against ICANN in the Ruby Glen Litigation. Also on 8 August 2016, Afiliis sent to Mr. Atallah a letter raising concerns about Verisign's involvement with NDC and in the ICANN auction, and, on the same day, submitted a complaint with the Ombudsman.
100. On 19 August 2016, ICANN informed the .WEB applicants that the .WEB contention set had been placed “on-hold” to reflect the pending accountability mechanism initiated by Donuts.
101. Redacted - Third Party Designated Confidential Information

102. On 9 September 2016, Afiliis sent ICANN a second letter regarding Afiliis' concerns about Verisign's involvement with NDC's application for .WEB, stating that “ICANN's Board and officers are obligated under the Articles, Bylaws and the Guidebook (as well as

³⁷ Cooperative Engagement and Independent Review Processes Status Update, 8 August 2016, Ex. C-108, [PDF] p. 1.

³⁸ Bylaws, Ex. C-1, Article 4, Section 4.3 (e).

³⁹ Arnold & Porter's letter to Mr. Enson dated 23 August 2016, Ex. R-18, [PDF] pp. 1-8.

⁴⁰ See Respondent's Rejoinder, para. 35 and Transcript of the 11 May 2020 Hearing, Ex. R-29, p. 20:9-15.

international law and California law) to disqualify NDC's bid immediately and proceed with contracting of a registry agreement with Afilias, the second highest bidder", and asking ICANN to respond by no later than 16 September 2016.⁴¹

103. On 16 September 2016, Ms. Willett sent Afilias, Ruby Glen, NDC and Verisign a detailed Questionnaire and invited them to provide information and comments on the allegations raised by Afilias and Ruby Glen.⁴² The Respondent avers that the purpose of the Questionnaire "was to assist ICANN in evaluating what action, if any, should be taken in response to the claims asserted by Afilias and Ruby Glen".⁴³ It is common ground that at the time, while ICANN, NDC and Verisign had knowledge of the provisions of the Domain Acquisition Agreement, of which each of them had a copy, Afilias and Ruby Glen did not. Responses to the Questionnaire were provided to ICANN on 7 October 2016 by Afilias⁴⁴ and Verisign⁴⁵, and on 10 October 2016 by NDC.⁴⁶
104. On 19 September 2016, the Ombudsman informed Afilias that he was declining to investigate Afilias' complaint regarding the .WEB auction because Ruby Glen had initiated both a CEP and litigation in respect of the same issue.⁴⁷
105. On 30 September 2016, ICANN acknowledged receipt of Afilias' letters of 8 August 2016 and 9 September 2016, noted that ICANN had placed the .WEB contention set on hold "to reflect a pending ICANN Accountability Mechanism initiated by another member in the contention set", and added that Afilias would "be notified of future changes to the contention set status or updates regarding the status of relevant Accountability Mechanisms." ICANN further stated that it would "continue to take Afilias' comments,

⁴¹ Afilias' Letter to Mr. Atallah dated 9 September 2016, Ex. C-103.

⁴² ICANN's letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50.

⁴³ Respondent's Rejoinder, para. 46.

⁴⁴ Afilias' letter to Ms. Willett dated 7 October 2016, Ex. C-51.

⁴⁵ Arnold & Porter's letter to Ms. Willett dated 7 October 2016, Ex. C-109.

⁴⁶ Mr. Rasco's email to ICANN dated 10 October 2016, Ex. C-110.

⁴⁷ Mr. Herb Waye's email to Mr. Hemphill dated 19 September 2016, Ex. C-101.

and other inputs that we have sought, into consideration as we consider this matter.”⁴⁸

106. On 3 November 2016, the Board of ICANN held a Board workshop during which a briefing was presented by in-house counsel regarding the .WEB contention set (**November 2016 Workshop**).⁴⁹ A memorandum prepared by ICANN’s outside counsel and containing legal advice in anticipation of litigation regarding the .WEB contention set had been sent to “non-conflicted” ICANN Board members on 2 November 2016, in advance of the workshop.⁵⁰ As will be seen in the following section of this Final Decision, the November 2016 Workshop is of particular importance in this case. Suffice it to say for present purposes that, at least according to ICANN, during this workshop the Board “specifically [chose...] not to address the issues surrounding .WEB while an Accountability Mechanism regarding .WEB was pending”.⁵¹ That decision of the ICANN Board was not communicated to Afilias at the time. Indeed, it was first made public and disclosed to Afilias 3 ½ years later, upon the filing of the Respondent’s Rejoinder in this IRP, filed on 1 June 2020.⁵²
107. On 28 November 2016, the US District Court of the Central District of California dismissed Ruby Glen’s claims against ICANN in the Ruby Glen Litigation on the basis that “the covenant not to sue [in Module 6 of the Guidebook] bars Plaintiff’s entire action.”⁵³
108. On 18 January 2017, the Department of Justice (**DOJ**) issued a civil investigative demand to Verisign, ICANN, and others regarding Verisign’s “proposed acquisition of [NDC’s] contractual rights to the .web generic top-level domain.”⁵⁴ The DOJ requested that ICANN take no action on .WEB during the pendency of the investigation. Between February

⁴⁸ ICANN’s letter to Mr. Hemphill dated 30 September 2016, Ex. C-61.

⁴⁹ Joint Fact Chronology, and ICANN’s Privilege Log of 24 April 2020, pp. 29-30.

⁵⁰ Respondent’s Rejoinder, para. 40.

⁵¹ *Ibid*, para. 3.

⁵² There are multiple references to the November 2016 Workshop in the Respondent’s privilege log of 24 April 2020, but not to any decision made in respect of .WEB.

⁵³ *Ruby Glen, LLC v. ICANN*, Case No. 2:16-cv-05505 (C.D. Cal.), 28 November 2016, Ex. C-106.

⁵⁴ DOJ Civil Investigative Demand to Thomas Indelicarto of Verisign dated 18 January 2017, Ex. AC-31.

and June 2017, ICANN made several document productions and provided information to DOJ, Redacted - Third Party Designated Confidential Information

.⁵⁵ On 9 January 2018, a year after the issuance of the DOJ's investigative demand, the DOJ closed its investigation of .WEB without taking any action.

109. On 30 January 2018, the Donuts CEP closed, and ICANN gave Ruby Glen (the entity through which Donuts, Inc. had submitted an application for .WEB) until 14 February 2018 to file an IRP. Ruby Glen did not file an IRP in respect of .WEB.
110. On 15 February 2018, Mr. Rasco requested via email that ICANN move forward with the execution of a .WEB registry agreement with NDC in light of the termination of the DOJ investigation and the absence of any pending accountability mechanisms.⁵⁶
111. On 23 February 2018, counsel for Afiliás submitted a Documentary Information Disclosure Policy (**DIDP**) request to ICANN (**Afiliás' First DIDP Request**) and asked for an update on ICANN's investigation of the .WEB contention set.⁵⁷ ICANN responded to Afiliás' First DIDP Request on 24 March 2018.
112. On 28 February 2018, counsel for NDC sent a formal letter to ICANN requesting that it move forward with the execution of a registry agreement for .WEB with NDC.⁵⁸
113. On 16 April 2018, counsel for Afiliás wrote to the ICANN Board requesting an update on the status of the .WEB contention set, an update on the status of ICANN's investigation, and prior notification of any action by the Board related to .WEB, adding that Afiliás "intend[ed] to initiate a CEP and a subsequent IRP against ICANN, if ICANN proceeds toward delegation of .WEB to NDC."⁵⁹

⁵⁵ Respondent's Rejoinder, para. 49.

⁵⁶ Mr. Rasco's email to ICANN dated 15 February 2018, Ex. C-182.

⁵⁷ Dechert's letter to the Board dated 23 February 2018, Ex. C-78.

⁵⁸ Irell & Manella's letter to Messrs. Jeffrey and Atallah dated 28 February 2018, Ex. R-20.

⁵⁹ Dechert's letter to the Board dated 16 April 2018, Ex. C-113.

114. On 23 April 2018, counsel for Afilias wrote to the ICANN Board to object to the non-disclosure of the documents requested in the First DIDP Request by reason of their confidentiality, and to offer to limit their disclosure to outside counsel.⁶⁰ This request was treated as a new DIDP request (**Second DIDP Request**)⁶¹. On the same date, counsel for Afilias submitted a reconsideration request challenging ICANN’s response to Afilias’ First DIDP Request (**Reconsideration Request 18-7**).⁶²
115. On 28 April 2018, ICANN’s outside counsel wrote to counsel for Afilias, confirming that the .WEB contention set was on-hold but declining to undertake to send Afilias prior notice of a change to its status on the ground that doing so “would constitute preferential treatment and would contradict Article 2, Section 2.3 of the ICANN Bylaws.”⁶³ Afilias responded to that letter on 1 May 2018, reiterating the arguments it had previously made.⁶⁴
116. On 23 May 2018, ICANN responded to Afilias’ Second DIDP Request, and on 5 June 2018, Afilias’ Reconsideration Request 18-7 was denied.
117. On 6 June 2018, ICANN took the .WEB contention set off-hold and notified the .WEB applicants by emailing the contacts identified in the applications.⁶⁵ In the following days, the normal process leading to the execution of a registry agreement was put in motion within ICANN in relation to the .WEB registry.
118. On 12 June 2018, Ms. Willett and other Staff approved the draft Registry Agreement for .WEB and its transmittal to NDC. On 14 June 2018, ICANN sent the draft .WEB Registry Agreement to NDC, which NDC promptly signed and returned to ICANN. On the same day, Ms. Willett and other Staff approved executing the .WEB Registry Agreement on

⁶⁰ Dechert’s letter to the Board dated 23 April 2018, Ex. C-79.

⁶¹ See Determination of the Board Accountability Mechanisms Committee (BAMC) Reconsideration Request 18-7 dated 5 June 2018, Ex. R-32, p. 5.

⁶² Afilias Domain No. 3 Limited Reconsideration Request, Ex. R-31 or VRSN-26.

⁶³ Jones Day’s letter to Mr. Ali dated 28 April 2018, Ex. C-80.

⁶⁴ Dechert’s letter to Mr. LeVee dated 1 May 2018, Ex. C-114.

⁶⁵ Exchange of emails between ICANN Staff dated 6 June 2018, Ex. C-166; and Mr. Erwin’s email to Ms. Willett and Mr. Christopher Bare dated 6 June 2018, Ex. C-167.

ICANN's behalf.⁶⁶

119. On 18 June 2018, prior to ICANN's execution of the .WEB Registry Agreement, Afilias invoked a CEP with ICANN regarding the .WEB gTLD.⁶⁷ Two days later, ICANN placed the .WEB contention set back on hold to reflect Afilias' invocation of a CEP. As a result, the extant .WEB Registry Agreement was voided.⁶⁸
120. On 22 June 2018, Afilias filed a second reconsideration request (**Reconsideration Request 18-8**), seeking reconsideration of ICANN's response to Afilias' 23 April 2018 DIDP Request. On 6 November 2018, the Board, on the recommendation of the Board Accountability Mechanisms Committee, denied that request.⁶⁹
121. A week later, on 13 November 2018, ICANN wrote to counsel for Afilias to confirm that the CEP for this matter was closed as of that date and to advise that ICANN would grant Afilias an extension of time to 27 November 2018 (fourteen (14) days following the close of the CEP) to file an IRP regarding the matters raised in the CEP, if Afilias chooses to do so. As already noted, Afilias filed its Request for IRP on the following day, 14 November 2018.

IV. SUMMARY OF SUBMISSIONS AND RELIEF SOUGHT

122. The submissions made in relation to Phase II are voluminous. The Panel summarizes these submissions below. Where appropriate, the Panel refers in the analysis section of this Final Decision to those parts of the submissions and evidence found by the Panel to be most pertinent to its analysis. In reaching its conclusions, however, the Panel has considered all of the Parties' submissions and evidence.
123. The submissions made and the relief initially sought in relation to the Claimant's Rule 7 Claim are set out in detail in the Panel's Decision on Phase I. The position adopted by the Claimant in relation to its Rule 7 Claim in Phase II is discussed below, in section V.E. of

⁶⁶ Exchange of emails between ICANN Staff dated 14 June 2018, Ex. C-170.

⁶⁷ Dechert's letter to ICANN dated 18 June 2018, Ex. C-52.

⁶⁸ Exchange of emails between ICANN Staff dated 14 June 2018, Ex. C-170.

⁶⁹ ICANN, Approved Board Resolutions, Special Meeting of the ICANN Board, 6 November 2018, Ex. C-7, pp. 1-10.

this Final Decision.

A. Claimant’s Amended Request for IRP

124. In its Amended Request for IRP dated 21 March 2019, the Claimant claims that the Respondent has breached its Articles and Bylaws as a result of the Board’s and Staff’s failure to enforce the rules for, and underlying policies of, ICANN’s New gTLD Program, including the rules, procedures, and policies set out in the Guidebook and Auction Rules.⁷⁰
125. The Claimant avers that NDC ought to have disclosed the Domain Acquisition Agreement to ICANN and modified its .WEB application to reflect that it had entered into the DAA with Verisign, or to account for the implications of the agreement’s terms for its application. The Claimant submits that while it is evident that NDC violated the New gTLD Program Rules, the Respondent has failed to disqualify NDC from the .WEB contention set, or to disqualify NDC’s bids in the .WEB auction.
126. The Claimant contends that the Respondent has breached its obligation, under its Bylaws, to make decisions by applying its documented policies “neutrally, objectively, and fairly,” in addition to breaching its obligations under international law and California law to act in good faith. The Claimant also submits that the Respondent, by these breaches, has failed to respect one of the pillars of the New gTLD Program and one of ICANN’s founding principles: to introduce and promote competition in the Internet namespace in order to break Verisign’s monopoly.⁷¹
127. More specifically, the Claimant contends that NDC violated the Guidebook’s prohibition against the resale, transfer, or assignment of its application, as NDC transferred to Verisign crucial application rights, including the right to reach a settlement or participate in a private auction. The Claimant also asserts that NDC’s bids at the .WEB auction were invalid because they were made on Verisign’s behalf, reflecting what the latter was willing to pay and implying no financial risk for NDC.

⁷⁰ Amended Request for IRP, para. 2.

⁷¹ *Ibid*, para. 5.

128. By way of relief, the Claimant requested the Panel to issue a binding declaration:
- (1) that ICANN has acted inconsistently with its Articles and Bylaws, breached the binding commitments contained in the AGB, and violated international law;
 - (2) that, in compliance with its Articles and Bylaws, ICANN must disqualify NDC's bid for .WEB for violating the AGB and Auction Rules;
 - (3) ordering ICANN to proceed with contracting the Registry Agreement for .WEB with Afilias in accordance with the New gTLD Program Rules;
 - (4) specifying the bid price to be paid by Afilias;
 - (5) that Rule 7 of the Interim Procedures is unenforceable and awarding Afilias all costs associated with the additional work needed to, among other things, address arguments and filings made by Verisign and/or NDC;
 - (6) declaring Afilias the prevailing party in this IRP and awarding it the costs of these proceedings; and
 - (7) granting such other relief as the Panel may consider appropriate in the circumstances.⁷²

B. Respondent's Response

129. In its Response dated 31 May 2019, the Respondent argues that it complied with its Articles, Bylaws, and policies in overseeing the .WEB contention set disputes and resulting accountability mechanisms.

⁷² Amended Request for IRP, para. 89.

130. The Respondent contends that it thoroughly investigated claims made prior to the .WEB auction about NDC’s alleged change of control, and notes that it was not alleged at the time that NDC had an agreement with Verisign regarding .WEB. Accordingly, what the Respondent investigated was an alleged change in ownership, management or control of NDC, which it found had not occurred.
131. With regard to alleged Guidebook violations resulting from the Domain Acquisition Agreement with Verisign, the Respondent notes that due to the pendency of the DOJ investigation and various accountability mechanisms – including this IRP – its Board has not yet had an opportunity to fully evaluate the Guidebook violations alleged by the Claimant, adding that those are hotly contested and would not in any event call for automatic disqualification of NDC.⁷³
132. The Respondent explains that, with the exception of approximately two weeks in June 2018, after Afiliias’ DIPD-related Reconsideration Requests were resolved and before Afiliias initiated its CEP, the .WEB contention set has been on hold from August 2016 through today. The Respondent observes that during the entire period from July 2016 through June 2018, the Claimant took no action that could have placed the .WEB issues before the Board, although it could have.⁷⁴
133. The Respondent adds that the Guidebook breaches alleged by the Claimant “are the subject of good faith dispute by NDC and VeriSign”. The Respondent also avers that while the Claimant’s IRP “is notionally directed at ICANN, it is focused exclusively on the conduct of NDC and VeriSign to which NDC and VeriSign have responses”.⁷⁵ The Respondent argues, speaking of its Board, that deferring consideration of the alleged violations of the Guidebook until this Panel renders its final decision is within the realm of reasonable business judgment.⁷⁶

⁷³ Respondent’s Response, para. 61.

⁷⁴ *Ibid*, para. 62. As noted above, the Claimant’s second Reconsideration Request was lodged on 22 June 2018, and therefore after the Respondent placed the .WEB contention set back on hold following the Claimant’s commencement of a CEP.

⁷⁵ Respondent’s Response, para. 63.

⁷⁶ *Ibid*, para. 66.

134. The Respondent underscores that the Guidebook does not require ICANN to deny an application where an applicant failed to inform ICANN that previously submitted information has become untrue or misleading. Rather, according to ICANN, the Guidebook gives it discretion to determine whether the changed circumstances are material and what consequences, if any, should follow. By disqualifying NDC, this Panel would, in ICANN's submission, usurp the Board's discretion and exceed the Panel's jurisdiction.
135. As for the Claimant's allegation that the Domain Acquisition Agreement between NDC and Verisign is anticompetitive, the Respondent notes that this is denied by Verisign and contradicted by the DOJ's decision not to take action following its investigation into the matter. The Respondent also denies Afilias' assertion that the sole purpose of the New gTLD Program was to create competition for Verisign. The Respondent also contends, relying on the evidence of its expert economist, Dr. Carlton, that there is no evidence that .WEB will be a unique competitive check on .COM, nor that the Claimant would promote .WEB more aggressively than Verisign.
136. As regards the applicable standard of review, the Respondent submits that an IRP panel is asked to evaluate whether an ICANN action or inaction was consistent with ICANN's Articles, Bylaws, and internal policies and procedures. However, with respect to IRPs challenging the ICANN Board's exercise of its fiduciary duties, the Respondent submits that an IRP Panel is not empowered to substitute its judgment for that of ICANN. Rather, its core task is to determine whether ICANN has exceeded the scope of its Mission or otherwise failed to comply with its foundational documents and procedures.⁷⁷
137. The Respondent contends that all of Afilias' claims are time-barred under both the Bylaws in force in 2016 and the current Interim Procedures. The Bylaws in force in 2016 provided that an IRP had to be filed within thirty (30) days of the posting of the Board minutes relating to the challenged ICANN decision or action. The Interim Procedures now provide that an IRP must be filed within 120 days after a claimant becomes aware "of the material effect of the action or inaction" giving rise to the dispute, provided that an IRP may not be filed more than twelve (12) months from the date of such action or inaction.

⁷⁷ Respondent's Response, para. 55.

The Respondent contends that Afiliás' claims regarding alleged deficiencies in ICANN's pre-auction investigation accrued on 12 September 2016, when it posted minutes regarding the Board's denial of Ruby Glen's Reconsideration Request challenging that investigation. The Respondent takes the position that the facts and claims supporting the Claimant's allegations of Guidebook and Auction Rules violations were set forth in Afiliás' letters dated August and September 2016, and were therefore known to the Claimant at that time.⁷⁸

138. As for the Claimant's requested relief, the Respondent contends that it goes far beyond what is permitted by the Bylaws and calls for the Panel to decide issues that are reserved to the discretion of the Board.

C. Claimant's Reply

139. In its Reply dated 4 May 2020 (revised on 6 May 2020), the Claimant rejects ICANN's self-description as a mere not-for-profit corporation, averring that the Respondent serves as the *de facto* international regulator and gatekeeper to the Internet's DNS space, with no government oversight.⁷⁹
140. Regarding the standard of review, the Claimant denies that this case involves the exercise of the Board's fiduciary duties. The Panel is required to conduct an objective, *de novo* examination of the Dispute. Moreover, quite apart from the Board's alleged determination to defer consideration of the Claimant's claims until this Panel has issued its decision, the Claimant notes that this IRP also impugns the flawed analysis of the New gTLD Program Rules by the Staff, ICANN's inadequate investigation of the *Amici's* conduct, its failure to disqualify NDC's application and auction bids, and its decision to proceed with contracting with NDC in respect of .WEB.⁸⁰
141. The Claimant submits that the Respondent's defences are baseless and self-contradictory:

⁷⁸ *Ibid*, paras. 73-76.

⁷⁹ Claimant's Reply, paras. 1-3.

⁸⁰ *Ibid*, para. 8.

on the one hand it argues that it appropriately handled Afiliias' concerns while on the other it asserts that its Board has deferred consideration of these concerns until the Panel's final decision in this IRP.⁸¹ The Claimant reiterates that ICANN violated its Bylaws and Articles by not disqualifying NDC's application and bids for .WEB, and in proceeding to contract with NDC for the .WEB registry agreement.

142. The Claimant contends that the New gTLD Program Rules are mandatory. In its view, it is not within ICANN's discretion to overlook violations of those rules by some applicants, such as NDC, nor to allow non-applicants like Verisign to circumvent them by "enlisting a shell like NDC".⁸² According to the Claimant, the Respondent improperly ignored NDC's clear violation of the prohibition against the resale, transfer or assignment of rights and obligations in connection with its application.
143. In addition, the Claimant contends that the public portions of NDC's application, left unchanged after its agreement with Verisign, deceived the Internet community as to the identity of the true party-in-interest behind NDC's .WEB application.⁸³ All in all, the Domain Acquisition Agreement constituted, according to the Claimant, a change of circumstances that rendered the information in NDC's application misleading, yet the Respondent did nothing to redress that situation even after it was provided with a copy of the Domain Acquisition Agreement.⁸⁴
144. In reply to the Respondent's argument that the Guidebook does not impose, but merely allows ICANN to disqualify applications containing a material misstatement, misrepresentation, or omission, the Claimant counters that the Respondent must exercise any discretion it may have in this regard consistent with its Articles and Bylaws and in accordance with its obligation towards the Internet community to implement the New gTLD Program openly, transparently and fairly, treating all applicants equally. According to the Claimant, the Respondent's position, were it accepted, would wipe away years of

⁸¹ *Ibid*, para. 20.

⁸² *Ibid*, para. 27.

⁸³ Claimant's Reply, para. 40.

⁸⁴ *Ibid*, para. 69.

carefully deliberated policy development work by the ICANN community.⁸⁵

145. The Claimant also submits that NDC's bids in the auction were invalid for failure to comply with the Auction Rules.⁸⁶ In that respect, the Claimant stresses that while the Auction Rules provide that bids must be placed by or on behalf of a Qualified Applicant, in the present case the DAA makes it clear that NDC was making bids Redacted - Third Party Designated Confidential Information

.⁸⁷ Afilias therefore claims that the New gTLD Program Rules required ICANN to declare NDC's bids invalid and award the .WEB gTLD to Afilias, as the next highest bidder.

146. The Claimant avers that ICANN's investigation of its stated concerns was superficial, self-serving, and designed to protect itself, without the transparency, openness, neutrality, objectivity, fairness and good faith required under the Bylaws. In that respect, the Claimant stresses that the Respondent received the Domain Acquisition Agreement on 23 August 2016, and ought to have disqualified NDC's application and bids upon review of its terms.

147. Instead, the Respondent issued its 16 September 2016 Questionnaire to Afilias, Verisign, NDC and Ruby Glen, making no mention of the fact that the Respondent had already sought and received input from Verisign, nor of the fact that at the time, ICANN, Verisign and NDC had knowledge of the contents of the Domain Acquisition Agreement, whereas Afilias had not. According to the Claimant, the Questionnaire was a "pure artifice", designed to elicit answers that would help Verisign's cause if its arrangement with NDC was challenged at a later date and to protect ICANN from the type of criticism and concerns already raised by Afilias.⁸⁸

148. The Claimant notes that there is no indication that the Respondent did anything with the responses it received to the Questionnaire, or what steps were taken to achieve an "informed resolution" of the concerns raised by Afilias. What is known is merely that the

⁸⁵ *Ibid*, para. 85.

⁸⁶ *Ibid*, para. 88.

⁸⁷ *Ibid*, para. 95.

⁸⁸ Claimant's Reply, para. 114.

Board decided not to make a determination on the merits on Afilias' contentions against Verisign and NDC until all accountability mechanisms had been concluded, and that on 6 June 2018, the Respondent decided to remove the .WEB contention set from its on-hold status and to proceed with the delegation of .WEB to NDC. This, the Claimant asserts, suggests that the Respondent had in fact made a determination on the merits of Afilias' contentions.⁸⁹

149. According to the Claimant, ICANN must exercise its discretion insofar as the application of the New gTLD Program Rules is concerned consistently with what the Claimant describes as the Respondent's competition mandate, that is, the mandate to promote competition and to constrain the market power of .COM.⁹⁰ In the Claimant's view, the DOJ's investigation is irrelevant to deciding this IRP as the DOJ's official policy is that no inference should be drawn from a decision to close a merger investigation without taking further action.
150. In response to the Respondent's contention that its claims are time-barred, the Claimant argues that the lack of merit of this defence is underscored by the Respondent's assertion that the Claimant's claims are in one sense premature and in another sense overdue. The Claimant recalls that (1) between August 2016 and the end of 2016, ICANN represented that it would seek the informed resolution of Afilias' concerns, and keep Afilias informed of the outcome; (2) between January 2017 and January 2018, the DOJ was conducting its antitrust investigation, and had asked ICANN to take no action on .WEB; and (3) between January 2018 and June 2018, Afilias repeatedly asked ICANN for information about the status of .WEB, which ICANN failed to provide until the Claimant was notified that the .WEB contention set had been taken off-hold, whereupon Afilias invoked the Cooperative Engagement Process.⁹¹
151. The Claimant disputes that the complaints it made in its 2016 letters are the same as those relied upon in its Amended Request for IRP: the former were based on public information

⁸⁹ *Ibid*, para. 118.

⁹⁰ *Ibid*, paras. 125-128.

⁹¹ Claimant's Reply, paras. 137-139.

only, and requested an investigation; the latter were prompted by the realization that in spite of its requests that NDC's application and bids be disqualified, ICANN had now signaled that it was proceeding to contract with NDC.

152. The Claimant contends that the Respondent misstates the relief that an IRP Panel may order. According to the Claimant, the Panel has the power to issue "affirmative declaratory relief" requiring the Respondent to disqualify NDC's application and bids and to offer the Claimant the rights to .WEB.⁹²

D. Respondent's Rejoinder

153. In its Rejoinder Memorial dated 1 June 2020, the Respondent states that a feature that sets this IRP apart is that ICANN has not yet fully address the ultimate dispute underlying the Claimant's claims.⁹³ In that respect, the Respondent stresses that, since the inception of the New gTLD Program, it placed applications and contention sets "on hold" when related accountability mechanisms were initiated.⁹⁴ In its view, the Respondent followed its processes by specifically choosing, in November 2016, not to address the issues surrounding .WEB while an accountability mechanism regarding that gTLD was pending.⁹⁵ When it received the Domain Acquisition Agreement in August of 2016, ICANN did not disqualify NDC's application because the .WEB contention set was on hold at that time due to a pending accountability mechanism by the parent company of another .WEB applicant.⁹⁶ The Respondent argues that it was reasonable for the Board to make this choice because the results of the accountability mechanism, and the subsequent DOJ investigation, could have had an impact on any eventual analysis ICANN might be called upon to make.⁹⁷

154. The Respondent explains that, in the November 2016 Workshop, Board members and

⁹² *Ibid*, paras. 147-155.

⁹³ Respondent's Rejoinder, para. 1.

⁹⁴ *Ibid*, paras. 2 and 89.

⁹⁵ *Ibid*, paras. 3 and 89.

⁹⁶ *Ibid*, para. 4.

⁹⁷ *Ibid*, paras. 41 and 91.

ICANN's in-house counsel discussed the issue of .WEB and chose to not take any action at that time regarding .WEB because an accountability mechanism was pending regarding .WEB. The Respondent states that it did not seem prudent for the Board to interfere with or pre-empt the issues that were the subject of the accountability mechanism. The Respondent underscores that the Claimant does not explain how the Board's determination not to make a decision regarding .WEB during the pendency of an accountability mechanism or other legal proceedings on the same issue represents an inconsistent application of documented policies.⁹⁸

155. Responding to the Claimant's suggestion that ICANN was beholden to Verisign, the Respondent avers that it has an arms-length relationship with Verisign which is no different from ICANN's relationship with other registry operators, including Afilias.⁹⁹
156. Regarding the applicable standard of review, the Respondent argues that the Panel must apply a *de novo* standard in making findings of fact and reviewing the actions or inactions of individual directors, officers or Staff members, but has to review actions or inactions of the Board only to determine whether they were within the realm of reasonable business judgment. In other words, in the Respondent's view, it is not for the Panel to opine on whether the Board could have acted differently than it did.¹⁰⁰
157. The Respondent maintains that the Claimant's claims regarding actions or inactions of ICANN in August through October 2016 are time-barred under Rule 4 of the Interim Procedures.¹⁰¹ The Respondent stresses that the Claimant's IRP was filed more than two (2) years after it sent letters complaining about the auction and NDC's relationship with Verisign.¹⁰² According to the Respondent, the Claimant was aware, in 2016, of the actions and inactions that it seeks to challenge, along with the material effect of those

⁹⁸ Respondent's Rejoinder, paras. 40-41 and 92.

⁹⁹ *Ibid*, paras. 51-53.

¹⁰⁰ *Ibid*, paras. 54-62.

¹⁰¹ *Ibid*, paras. 9 and 63-64.

¹⁰² *Ibid*, para. 65.

actions, even if it did not have a copy of the Domain Acquisition Agreement.¹⁰³ In any event, the Respondent contends that the Claimant ignores the final clause of Rule 4, which states that a statement of dispute may not be filed more than twelve (12) months from the date of the challenged action or inaction.¹⁰⁴ Responding to the equitable estoppel argument advanced by the Claimant, the Respondent argues that there is nothing in its 2016 letters to suggest that it encouraged the Claimant to delay the filing of an IRP, and that the Claimant has not alleged that it relied on those letters in deciding not to file an IRP.¹⁰⁵ The Respondent also notes that the Claimant was represented by experienced counsel throughout the period at issue.¹⁰⁶

158. Responding to the Claimant's contentions pertaining to its post-auction investigation, the Respondent notes that the Claimant asserted no claim in that regard in its Amended Request for IRP, which focussed on pre-auction rumors.¹⁰⁷ In addition, the Respondent avers that its post-auction investigation was prompt, thorough, fair, and fully consistent with its Bylaws and Articles.¹⁰⁸
159. The Respondent also observes that the Guidebook and Auction Rules violations alleged by the Claimant do not require the automatic disqualification of NDC and instead that ICANN is vested with significant discretion to determine what the penalty or remedy should be, if any.¹⁰⁹
160. The Respondent contends that it has, as yet, taken no position on whether NDC violated the Guidebook.¹¹⁰ The Respondent adds that determining whether NDC violated the Guidebook "is not a simple analysis that is answered on the face of the Guidebook" which,

¹⁰³ *Ibid*, paras. 66-70.

¹⁰⁴ Respondent's Rejoinder, paras. 64-65.

¹⁰⁵ *Ibid*, paras. 72-75.

¹⁰⁶ *Ibid*, paras. 76-78.

¹⁰⁷ *Ibid*, paras. 104-105.

¹⁰⁸ *Ibid*, paras. 8 and 107-113.

¹⁰⁹ *Ibid*, paras. 80-88.

¹¹⁰ *Ibid*, para. 81.

according to the Respondent, includes no provision that squarely addresses an arrangement like the Domain Acquisition Agreement. The Respondent submits that a “true determination of whether there was a breach of the Guidebook requires an in-depth analysis and interpretation of the Guidebook provisions at issue, their drafting history to the extent it exists, how ICANN has handled similar situations, and the terms of the DAA”. The Respondent argues that “[t]his analysis must be done by those with the requisite knowledge, expertise, and experience, namely ICANN.”¹¹¹

161. The Respondent notes, referring to the evidence of the *Amici*, that there have been a number of arrangements that appear to be similar to the DAA in the secondary market for new gTLDs.¹¹² Because it has the ultimate responsibility for the New gTLD Program, the Board has reserved the right to individually consider any application to determine whether approval would be in the best interest of the Internet community.¹¹³
162. Turning to the Claimant’s arguments regarding competition, the Respondent denies that it has exercised its discretion to benefit Verisign, repeating that it has not “fully evaluated” the Domain Acquisition Agreement – and NDC’s related conduct – because the .WEB contention set has been on hold due to the invocation of ICANN’s accountability mechanisms and the DOJ investigation. Accordingly, the Claimant’s assertion that the Respondent has violated its so-called “competition promotion mandate” is not ripe for consideration.¹¹⁴
163. The Respondent adds that it is not required or equipped to make judgment about which applicant for a particular gTLD would more efficiently promote competition. Rather, ICANN complies with its core value regarding competition by coordinating and implementing policies that facilitate market-driven competition, and by deferring to the appropriate government regulator, such as the DOJ, the investigation of potential competition issues. The Respondent notes, pointing to the evidence of Drs. Carlton and

¹¹¹ *Ibid*, para. 82.

¹¹² Respondent’s Rejoinder, para. 83.

¹¹³ *Ibid*, para. 87.

¹¹⁴ *Ibid*, para. 95.

Murphy, that there is no evidence that Verisign's operation of .WEB would restrain competition.¹¹⁵

164. Finally, the Respondent argues that the Claimant seeks relief which is beyond the Panel's jurisdiction and not available in these proceedings. While the Panel is empowered to declare whether the Respondent complied with its Articles and Bylaws, it cannot disqualify NDC's application, or bid, and offer Claimant the rights to .WEB.¹¹⁶

E. The *Amici's* Briefs

1. NDC's Brief

165. In its *amicus* brief dated 26 June 2020, NDC alleges that ICANN has approved many post-delegation assignments of registry agreements for new gTLDs pursuant to pre-delegation financing and other similar agreements.¹¹⁷ NDC notes that Afilias itself has participated extensively in the secondary market for new gTLDs.¹¹⁸
166. NDC argues that, having won the auction, it has the right and ICANN has the obligation under the Guidebook to execute the .WEB registry agreement, subject to compliance with the appropriate conditions. Although additional steps remain before the delegation of .WEB, NDC characterizes those as routine and administrative.¹¹⁹
167. Turning to the Panel's jurisdiction, NDC stresses that the Panel's remedial powers are significantly circumscribed. Section 4.3(o) of the Bylaws provides a closed list that only authorizes the Panel to take the actions enumerated therein. NDC contends that while the Panel is authorized to determine whether ICANN violated its Bylaws, it cannot decide the Claimant's claims on the merits or grant the affirmative relief sought by Afilias.¹²⁰

¹¹⁵ *Ibid*, paras. 94-103.

¹¹⁶ *Ibid*, paras. 114-124.

¹¹⁷ NDC's Brief, paras. 32-37.

¹¹⁸ *Ibid*, paras. 38-39.

¹¹⁹ *Ibid*, paras. 55-56.

¹²⁰ *Ibid*, paras. 64-69.

168. NDC further argues that Section 4.3(o) does not permit the Panel to second-guess the Board's reasonable business judgment. If the Panel finds that there has been a violation of the Bylaws, the proper remedy is to issue a declaration to that effect. It would then be up to the Board to exercise its business judgment and decide what action to take in light of such declaration.¹²¹
169. According to NDC, the Panel's limited remedial authority is consistent with the terms of the Guidebook providing that ICANN retains the sole decision-making authority with respect to the Claimant's objections and NDC's .WEB application. NDC submits that only ICANN possesses the required expertise and resources to craft DNS policy and to weight the competing interests and policies that would factor into a decision on .WEB.¹²²
170. NDC argues that if ICANN were to find that NDC violated the Guidebook or other applicable rules, ICANN's discretion to make determinations regarding gTLD applications would offer it a wide range of possible reliefs, not limited to the relief that the Claimant has asked the Panel to grant.¹²³
171. Responding to the Claimant's argument that IRP decisions are intended to be final and enforceable, NDC contends that the binding nature of a dispute resolution procedure and the enforceability of a decision arising out of such procedure cannot expand the scope of the adjudicator's circumscribed remedial jurisdiction.¹²⁴ In that regard, the Cross-Community Working Group for Accountability (CCWG) did not, contrary to the Claimant's contention, recommend that IRP panels should be authorized to dictate a remedy in cases in which ICANN would be found to have violated its Articles or Bylaws. Rather, the CCWG stated that an IRP would result in a declaration that an action/failure to act complied or did not comply with ICANN's obligations.¹²⁵

¹²¹ *Ibid*, paras. 70-74.

¹²² NDC's Brief, paras. 75-79.

¹²³ *Ibid*, para. 80.

¹²⁴ *Ibid*, paras. 81-84.

¹²⁵ *Ibid*, paras. 85-89.

172. Finally, NDC denies making any material misrepresentations to ICANN, as there had been no change to its management, control or ownership since the filing of its .WEB application.¹²⁶ NDC also contends that it did not violate any ICANN rules by agreeing with Verisign to a post-auction transfer of .WEB. In arranging for such a post-auction transfer, NDC asserts that it acted consistently with what the industry understood was permissible.¹²⁷ In that respect, NDC argues that Afiliias' own participation in the secondary market – on both sides of transfers – belies its protestations in this case.¹²⁸ In addition, NDC submits that Afiliias itself violated the Guidebook by contacting NDC during the Blackout Period.¹²⁹
173. For these reasons, NDC requests that the Panel deny in its entirety the relief requested by the Claimant.¹³⁰

2. Verisign's Brief

174. In its *amicus* brief also dated 26 June 2020, Verisign declares that it joins in the sections of NDC's brief setting forth the background of this IRP and the scope of the Panel's authority, including as to the issues properly presented to the Panel for decision. In the submission of Verisign, the only question properly before the Panel is whether ICANN violated its Bylaws when it decided to defer a decision on the Claimant's objections, and the Panel should decline to determine the merits or lack thereof of these objections, or to award .WEB to the Claimant. According to Verisign, the Domain Acquisition Agreement complies with the Guidebook, is consistent with industry practices under the New gTLD Program, and there is no basis for refusing to delegate .WEB based on ICANN's mandate to promote competition.¹³¹
175. The Domain Acquisition Agreement, according to its terms, does not constitute a resale,

¹²⁶ *Ibid*, paras. 96-99.

¹²⁷ *Ibid*, paras. 100-107.

¹²⁸ *Ibid*, paras. 108-113.

¹²⁹ *Ibid*, paras. 114-119.

¹³⁰ *Ibid*, para. 120.

¹³¹ Verisign's Brief, pp. 1-2.

assignment, or transfer of rights or obligations with respect to NDC's .WEB application, nor does it require Verisign's consent for NDC to take any action necessary to comply with the Guidebook or with NDC's obligations under the application. Verisign argues that the only sale, assignment or transfer contemplated in the Domain Acquisition Agreement is the possible future and conditional assignment of the registry agreement for .WEB. Verisign contends that Section 10 of Module 6 of the Guidebook is intended to limit the acquisition of rights over the gTLD *by applicants*, providing that applicants would only acquire rights with respect to the subject gTLD upon execution of a post-delegation registry agreement with ICANN. Verisign contends that Section 10 does not prohibit future transfers of rights. Verisign further argues that restrictions on the assignment or transfer of a contract are to be narrowly construed consistent with the purpose of the contract.¹³² Verisign argues that the Domain Acquisition Agreement provides only for a possible future assignment of the registry agreement of .WEB upon ICANN's prior consent.¹³³

176. Verisign avers that the Domain Acquisition Agreement is consistent with industry practices under the Guidebook, including assignments of gTLDs approved by ICANN. According to Verisign, there exists a robust secondary marketplace with respect to the New gTLD Program in which Afilias itself has participated. Verisign argues that the Domain Acquisition Agreement contemplates nothing more than what has already often occurred under the Program.¹³⁴ Verisign further claims that it would be fundamentally unfair – and a violation of the equal treatment required under the Bylaws – if ICANN or the Panel were to adopt a new interpretation of the anti-assignment provision of the Guidebook.¹³⁵
177. In addition, Verisign argues that the drafting history of the Guidebook contradicts the Claimant's claims. According to Verisign, ICANN purposely declined to include proposed limits on post-delegation assignments of registry agreements, choosing instead to rely on ICANN's right, upon a post-delegation request for assignment of a registry agreement, to

¹³² *Ibid*, paras. 2-4, 6 and 11-20.

¹³³ *Ibid*, paras. 4 and 21-34.

¹³⁴ Verisign's Brief, paras. 5, 9-10 and 35-45.

¹³⁵ *Ibid*, para. 46.

approve such assignment.¹³⁶

178. Verisign contends that, in an attempt to contrive support for its contention that NDC sold the application to Verisign, the Claimant takes out of context select obligations of NDC under the Domain Acquisition Agreement to protect Verisign’s loan of funds to NDC for the auction.¹³⁷ Redacted - Third Party Designated Confidential Information

¹³⁸ In addition, Verisign underscores that there was no obligation for NDC to disclose Verisign’s support in the resolution of the contention set. As Verisign puts it, “confidentiality in such matters is common”.¹³⁹

179. Verisign argues that the Guidebook requires an amendment to the application only when previously submitted information becomes untrue or inaccurate, which was not the case here since the Domain Acquisition Agreement did not make Verisign the owner of NDC’s application.¹⁴⁰ Furthermore, Verisign asserts that the mission statement in a new gTLD application is irrelevant to its evaluation.¹⁴¹

180. Verisign also argues that there is no basis for refusing to delegate .WEB based on ICANN’s mandate to promote competition.¹⁴² According to Verisign, ICANN has no regulatory authority – including over matters of competition – and was not intended to supplant existing legal structures by establishing a new system of Internet governance.¹⁴³ In Verisign’s submission, ICANN has acted upon its commitment to enable competition by helping to create the conditions for a competitive DNS and by referring competition

¹³⁶ *Ibid*, paras. 49-51.

¹³⁷ *Ibid*, para. 52.

¹³⁸ *Ibid*, para. 57.

¹³⁹ *Ibid*, para. 62.

¹⁴⁰ *Ibid*, paras. 65-76.

¹⁴¹ *Ibid*, paras. 77-86.

¹⁴² *Ibid*, paras. 88-93.

¹⁴³ Verisign’s Brief, paras. 94-101.

issues to the relevant authorities.¹⁴⁴

181. Verisign claims that there is no threat or injury to competition resulting from its potential operation of the .WEB registry, and that the Claimant has submitted no economic evidence to support the contrary view.¹⁴⁵ Verisign further stresses that it does not have a dominant market position and that it is not a “monopoly”, as it has less than 50% of the relevant market.¹⁴⁶ In the view of the expert economists retained by Verisign and the Respondent, there is no evidence that .WEB will be a particularly significant competitive check on .COM.¹⁴⁷
182. Verisign concludes by reiterating that this Panel should only determine whether ICANN properly exercised its reasonable business judgment when it deferred making a decision on Afiliás’ claims regarding the .WEB auction. To the extent that the Panel considers the substance of the Claimant’s claims, Verisign submits that they are meritless and should be rejected.¹⁴⁸

F. Parties’ Responses to *Amici*’s Briefs

1. Afiliás’ Response to *Amici*’s Briefs

183. The Claimant begins its 24 July 2020 Response to the *Amici*’s Briefs by addressing what it describes as the omissions and misrepresentations of key facts in the *Amici*’s submissions.¹⁴⁹ The Claimant insists on the fact that Verisign failed to apply for .WEB by the set deadline¹⁵⁰ and provides no explanation for that failure. It observes that had Verisign applied for .WEB in 2012, its status as an applicant would have been known and the public

¹⁴⁴ *Ibid*, paras. 102-107.

¹⁴⁵ *Ibid*, paras. 108-112.

¹⁴⁶ *Ibid*, paras. 112-119.

¹⁴⁷ *Ibid*, paras. 125-134.

¹⁴⁸ *Ibid*, para. 140.

¹⁴⁹ Claimant’s Response to *Amici*’s Briefs, paras. 5-66.

¹⁵⁰ While not material to the issues in dispute, there is some confusion in the Claimant’s submissions as to what the deadline was. In the Claimant’s Response, the deadline is said to be 13 June 2012 (para. 9); in the Claimant’s PHB, it is said to be 20 April 2012 (para. 10); while in the Joint Chronology, it is stated that it was 30 May 2012.

portions of its application would have been available for the public and governments to comment upon.¹⁵¹

184. Turning to the circumstances of the execution of the Domain Acquisition Agreement, the Claimant notes that as a small company with limited funding, NDC had no chance of obtaining .WEB for itself and was thus the perfect vehicle to allow Verisign to fly “under the radar” of the other .WEB applicants and to blindsides them with a high bid that none could have seen coming.¹⁵² The Claimant asks, if the *Amici* believed that their arrangement complied with the New gTLD Program Rules, why go through such lengths to conceal the Domain Acquisition Agreement not only to their competitors, but also to ICANN.¹⁵³ The Claimant notes in this regard Verisign’s inquiry to ICANN, shortly after the execution of the DAA, about ICANN’s practice when approached to approve the assignment of a new registry agreement. On that occasion, Verisign mentioned neither the DAA, nor .WEB.¹⁵⁴ The Claimant vehemently denies that the other transactions identified by the *Amici* as industry practice are analogous to the Domain Acquisition Agreement.¹⁵⁵
185. According to the Claimant, the *Amici*’s pre-auction conduct, including the execution of the Confirmation of Understandings of 26 July 2016, also exemplifies their concerted attempts to conceal the DAA and Verisign’s interest in .WEB. In regard to the post-auction period, the Claimant argues that the *Amici* misrepresent the Claimant’s letters of 8 August and 9 September 2016 as asserting the same claims as those made in this IRP, and adds that they have failed to explain how and why ICANN’s outside counsel came to contact Verisign’s outside counsel, by phone, to request information about the DAA.
186. With respect to the *Amici*’s reliance on ICANN’s purported “decision not to decide” of November 2016, the Claimant denies the existence of the “well-known practice” upon which the Board’s decision was allegedly based; states that this alleged practice is

¹⁵¹ Claimant’s Response to *Amici*’s Briefs, paras. 8-16.

¹⁵² *Ibid*, para. 20.

¹⁵³ *Ibid*, para. 22.

¹⁵⁴ *Ibid*, paras. 24-29.

¹⁵⁵ *Ibid*, para. 23.

inconsistent with ICANN’s conduct at the time; that not taking action on a contention set while an accountability mechanism is pending is not among ICANN’s documented policies;¹⁵⁶ that ICANN never informed Afiliias of such decision until well into this IRP;¹⁵⁷ and that such decision is not even documented.¹⁵⁸

187. The Claimant also notes that there is no indication that the Staff had undertaken any analysis of the compatibility of the DAA with the New gTLD Program Rules when the Staff moved toward contracting with NDC in June 2018, as soon as the Board rejected Afiliias’ request to reconsider the denial of its most recent document disclosure request.¹⁵⁹ Nor is it known what assessment of that question had been made by the Board. In this regard, the Claimant claims there is a contradiction between the Respondent’s statement in this IRP that it has not yet considered the Claimant’s complaints, and the Respondent’s submission to the Emergency Arbitrator that ICANN had evaluated these complaints.¹⁶⁰

188. According to the Claimant, the *Amici* misrepresent the nature of the Domain Acquisition Agreement. The Claimant notes that Redacted - Third Party Designated Confidential Information, and were therefore not “executory” in nature.¹⁶¹ The Claimant also rejects any analogy between the Domain Acquisition Agreement and a financing agreement.¹⁶² In the Claimant’s submission, it is self-evident that the DAA was an attempt to circumvent the New gTLD Program Rules, and this should have been patently clear to the Staff and Board upon its review. The Domain Acquisition Agreement makes plain that NDC resold, assigned or transferred to Verisign several rights and obligations in its application for .WEB, including: Redacted - Third Party Designated Confidential Information

¹⁵⁶ *Ibid*, paras. 54-55.

¹⁵⁷ Claimant’s Response to *Amici*’s Briefs, para. 56.

¹⁵⁸ *Ibid*, paras. 49-58.

¹⁵⁹ *Ibid*, para. 62.

¹⁶⁰ *Ibid*, para. 65.

¹⁶¹ *Ibid*, paras. 67-71.

¹⁶² *Ibid*, paras. 72-73.

189. The Claimant avers that NDC violated the Guidebook by failing to promptly inform ICANN of the terms of the Domain Acquisition Agreement since those terms made the information previously submitted in NDC's .WEB application untrue, inaccurate, false or misleading. The Claimant stresses that the Guidebook does not exempt the section of the application that details the applicant's business plan from the obligation to notify changes to ICANN. In any event, NDC also failed to update its responses regarding the technical aspects of NDC's planned operation of the .WEB registry. The Claimant argues as well that NDC intentionally failed to disclose the Domain Acquisition Agreement prior to the auction, when Mr. Rasco was specifically asked whether there were any changed circumstances needing to be reported to ICANN.¹⁶⁴
190. The Claimant reiterates its arguments about NDC having violated the Guidebook by submitting invalid bids – made on behalf of a third party – at the .WEB auction. In the Claimant's submission, the *Amici's* examples of market practice are inapposite for a variety of reasons, and none of them reflects the level of control that the Domain Acquisition Agreement gave Verisign.¹⁶⁵
191. Responding to the *Amici's* arguments pertaining to the discretion enjoyed by ICANN in the administration of the New gTLD Program, the Claimant contends that such discretion is circumscribed by the Articles and Bylaws, as well as principles of international law, including the principle of good faith.¹⁶⁶ The Claimant underscores that the Bylaws require ICANN to operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. The Claimant argues that due process and procedural fairness require, among other procedural protections, that decisions be based on evidence and on appropriate inquiry into the facts. According to the Claimant,

¹⁶³ *Ibid*, paras. 74-98.

¹⁶⁴ Claimant's Response to *Amici's* Briefs, paras. 99-114.

¹⁶⁵ *Ibid*, paras. 121-136.

¹⁶⁶ *Ibid*, paras. 140-144.

ICANN repeatedly failed to comply with those principles in regards to Afilias' claims. The Claimant notes again that even in this IRP the Respondent has taken diametrically opposed positions as to whether or not it has evaluated Afilias' concerns.¹⁶⁷

192. The Claimant also argues that ICANN is required by its Bylaws to afford impartial and non-discriminatory treatment, an obligation that is consistent with the principles of impartiality and non-discrimination under international law. The Claimant submits that, upon receipt of the Domain Acquisition Agreement, and without conducting any investigation on the matter, ICANN accepted the *Amici*'s positions on their agreement at face value, and incorporated them into a questionnaire that was designed to elicit answers to advance the *Amici*'s arguments, and that was based on information that ICANN and the *Amici* had in their possession – but which they knew was unavailable to Afilias.¹⁶⁸
193. The Claimant avers that the Respondent also failed to act openly and transparently as required by the Articles, Bylaws and international law. The Claimant contends that, far from acting transparently, ICANN allowed NDC to enable Verisign to secretly participate in the .WEB auction in disregard of the New gTLD Program Rules, failed to investigate NDC's conduct and instead proceeded to delegate .WEB to NDC in an implicit acceptance of its conduct at the auction, all the while keeping Afilias in the dark about the status of its investigation regarding the .WEB gTLD for nearly two years.¹⁶⁹ The Claimant further claims that the Respondent failed to respect its legitimate expectations despite its commitment to make decisions by applying documented policies consistently, neutrally, objectively and fairly. According to the Claimant, had the Respondent followed the New gTLD Program Rules, it would necessarily have disqualified NDC from the application and bidding process.¹⁷⁰
194. As regards the applicable standard of review, the Claimant denies that the Board's conduct in November 2016 constitutes a decision protected by the business judgment rule. The

¹⁶⁷ *Ibid*, paras. 145-147.

¹⁶⁸ Claimant's Response to *Amici*'s Briefs, paras. 148-149.

¹⁶⁹ *Ibid*, paras. 151-158.

¹⁷⁰ *Ibid*, paras. 159-161.

Claimant also stresses that neither the *Amici* nor the Respondent assert that the business judgment rule applies to the decision taken by ICANN in June 2018 to proceed with delegating .WEB to NDC. The Claimant takes the position that its claims regarding (1) the Respondent's failure to disqualify NDC, (2) its failure to offer Afilias the rights to .WEB and (3) the delegation process for .WEB after a superficial investigation of the Claimant's complaints, do not concern the Board's exercise of its fiduciary duties. The Claimant contends finally that, even assuming *arguendo* that the business judgment rule has any application, the secrecy regarding the Board's November 2016 conduct makes it impossible for this Panel to evaluate the reasonableness of that conduct.¹⁷¹

195. Responding to the *Amici*'s claims regarding its own conduct, the Claimant denies having violated the Blackout Period. It contends that the provisions relating to Blackout Period are designed to prevent bid rigging and do not prohibit any and all contact among the members of the contention set.¹⁷²
196. The Claimant states that the *Amici* misrepresent the scope and effect of ICANN's competition mandate. The Claimant argues that ICANN must act to promote competition pursuant to its Bylaws, and that it failed to do so when it permitted Verisign to acquire .WEB in a program designed to challenge .COM's dominance. The Claimant stresses that Dr. Carlton – the economist retained by the Respondent – expressed views on the competitive benefits of introducing new gTLDs in 2009 that differ from those expressed in his report prepared for the purpose of this IRP.¹⁷³ According to the Claimant, any decision furthering Verisign's acquisition of .WEB is inconsistent with ICANN's competition mandate. In the Claimant's view, .WEB cannot be considered as "just another gTLD", since it has been uniquely identified by members of the Internet community as the next best competitor for .COM. The Claimant contends that the high price paid by Verisign for .WEB was at least partly driven by the benefits it would derive from keeping that

¹⁷¹ *Ibid*, paras. 165-178.

¹⁷² *Ibid*, paras. 179-184.

¹⁷³ Claimant's Response to *Amici*'s Briefs, paras. 164 and 185-198.

competitive asset out of the hands of its competitors.¹⁷⁴ The Claimant reiterates its submission that the DOJ's decision to close its investigation is irrelevant to the Panel's analysis.¹⁷⁵

197. Turning to the Panel's remedial authority, the Claimant argues that the *Amici* are wrong in asserting that the Panel's authority is limited to issuing a declaration as to whether ICANN acted in conformity with its Articles and Bylaws when its Board deferred making any decision on .WEB in November 2016. The Claimant urges that meaningful and effective accountability requires review and redress of ICANN's conduct. In that regard, the Claimant invokes the international law principle that any breach of an engagement involves an obligation to make reparation.¹⁷⁶ Finally, the Claimant contends that the Panel must determine the scope of its authority based on the text, context, object and purposes of the IRP, and not only on Section 4.3(o) of the Bylaws, which is not exhaustive and should be read, *inter alia*, with reference to Section 4.3(a).¹⁷⁷

2. ICANN's Response to the *Amici*'s Briefs

198. In its brief Response dated 24 July 2020 to the *Amici*'s Briefs, the Respondent notes that the position advocated by the *Amici* in their respective briefs is generally consistent with its own position as regards the following three (3) issues: (1) the Panel's jurisdiction and remedial authority, (2) the nature and implications of the Bylaws' provisions in relation to competition, and (3) whether Verisign's potential operation of .WEB would be anticompetitive.¹⁷⁸
199. The Respondent reiterates that it does not take a position on what it describes as the Claimant's and NDC's "allegations against each other" regarding their respective pre-auction, and auction conduct, or whether NDC violated the Guidebook and Auction

¹⁷⁴ *Ibid*, paras. 199-209.

¹⁷⁵ *Ibid*, paras. 210-213.

¹⁷⁶ *Ibid*, paras. 218-220.

¹⁷⁷ *Ibid*, paras. 223-236.

¹⁷⁸ Respondent's Response to *Amici*'s Briefs, paras. 2-6.

Rules by the execution of the DAA, adding that it will consider those issues after this IRP concludes.¹⁷⁹

G. Post-Hearing Submissions

200. The Parties and *Amici* have filed comprehensive post-hearing submissions in which they have reiterated their respective positions on all issues in dispute. In the summary below, the Panel focuses on those aspects of the post-hearing submissions that comment on the hearing evidence, or put forward new points.

1. Claimant's Post-Hearing Brief

201. In its Post-Hearing Brief dated 12 October 2020, the Claimant argues that the two fundamental questions before the Panel are whether the Respondent was required to (i) determine that NDC is ineligible to enter into a registry agreement for .WEB for having violated the New gTLD Program Rules and, if so, (ii) offer the .WEB gTLD to the Claimant. The Claimant submits that the hearing evidence leaves no doubt that these questions must be answered in the affirmative.

202. The evidence revealed that the Respondent's failure to act upon the Claimant's complaints was a result of the unjustified position that these were motivated by "sour grapes" for having lost the auction. According to the Claimant, this attitude permeated every aspect of the Respondent's consideration of the Claimant's concerns, including its decision, in the course of 2018, to approve a gTLD registry contract for NDC.¹⁸⁰

203. The Claimant notes that Ms. Willett acknowledged that the decision of an applicant to participate in an Auction of Last Resort is one of the applicant's rights under a gTLD application. Redacted - Third Party Designated Confidential Information .181

204. The Claimant argues that the evidence of Mr. Livesay confirms the competitive significance of .WEB, in that Verisign's CEO was directly involved in the 2014 initiative

¹⁷⁹ *Ibid*, para. 7.

¹⁸⁰ Claimant's PHB, paras. 1-2.

¹⁸¹ Claimant's PHB, para. 16.

to seek to participate in the gTLD market. Mr. Livesay also confirmed, as did Mr. Rasco, that Redacted - Third Party Designated Confidential Information

According to the Claimant, the evidence of these witnesses demonstrates that they harboured serious doubts as to whether they were acting in compliance with the Program Rules; otherwise, why conceal the DAA's terms from ICANN's scrutiny, and keep Verisign's involvement in NDC's application hidden from the Internet community? In sum, the Claimant submits that the *Amici's* conduct evidence an attempt to "cheat the system".¹⁸²

205. In the pre-auction period, the Claimant focuses on Mr. Rasco's representation to the Ombudsman that there had been no changes to the NDC application, a statement that cannot be reconciled with the terms of the DAA, according to the Claimant. Also plainly incorrect, in the submission of the Claimant, is Mr. Rasco's assurance to Ms. Willett, as evidenced in the latter's email communication to the Ombudsman, that the decision not to resolve the contention set privately "was in fact his".
206. The Claimant notes that from the moment Verisign's involvement in NDC's application for .WEB was made public, the Respondent treated Verisign as though it was the *de facto* applicant for .WEB, for example, by directly contacting Verisign about questions concerning NDC's application and working with Verisign on the delegation process for .WEB. In regard to Verisign's detailed submission of 23 August 2016, which included a copy of the DAA, the Claimant notes that only the Claimant's outside counsel and Mr. Scott Hemphill have been able to review it and that the Internet community remains unaware of the Agreement's details. The Claimant finds surprising that Ms. Willett, in spite of her leadership position within ICANN in respect of the Program, would have never reviewed – indeed seen – the DAA, or Verisign's 23 August 2016 letter.¹⁸³
207. The Claimant also notes Ms. Willett's inability to address questions concerning the Questionnaire that was sent to some contention set members under cover of her letter

¹⁸² *Ibid*, paras. 21-23.

¹⁸³ *Ibid*, paras. 46-56.

dated 16 September 2016, including the fact that some questions were misleading for anyone, such as the Claimant, who had no knowledge of the terms of the DAA. The Claimant also notes that the Respondent presented no evidence explaining what it did with the responses to the Questionnaire, other than Mr. Disspain confirming that the responses were never considered by the Board.

208. Turning to the “load-bearing beam of ICANN’s defense in this case”, the November 2016 Board decision to defer consideration of Afilias’ complains, the Claimant submits that the evidence belies that any such decision was in fact made. Rather, according to the Claimant, both Ms. Burr and Mr. Disspain testified that ICANN simply adhered to its practice to put the process on hold once an accountability mechanism has been initiated, a practice that the Claimant says has not been proven in fact to exist. The Claimant quotes the evidence of Ms. Willett, who testified that work and communications within ICANN would continue while an accountability mechanism was pending, simply that the contention set would not move to the next phase; and points to the fact that the Staff were engaging with NDC and Verisign in December 2017 and January 2018 on the subject of the assignment of .WEB even though Ruby Glen had not yet resolved its CEP, or ICANN considered Afilias’ concerns. The Claimant also sees a contradiction between the Respondent’s claim that it has not yet taken a position on the merits of Afilias’ complaints, and the evidence of Ms. Willett that ICANN would not delegate a gTLD until a pending matter was resolved.¹⁸⁴
209. The Claimant reviews in its PHB the evidence concerning the genesis of Rule 7 of the Interim Procedures, as it reveals the degree to which, in its submission, the Respondent was willing to go to make things easier for itself and for Verisign to defend against future efforts by the Claimant to challenge ICANN’s conduct. The Claimant notes that Ms. Eisner and Mr. McAuley did speak over the phone on 15 October 2018, and that shortly thereafter, Ms. Eisner reversed her positions and expanded the categories of *amicus* participation to cover the circumstances in which the *Amici* found themselves at the time.¹⁸⁵

¹⁸⁴ Claimant’s PHB, paras. 61-76.

¹⁸⁵ *Ibid*, paras. 77-91.

210. Insofar as the DAA is concerned, the Claimant notes that the evidence confirms that NDC and Verisign performed exactly as the language of the DAA provides.¹⁸⁶
211. The Claimant argues that ICANN violated its Articles and Bylaws through its disparate treatment of Afilias and Verisign. For instance, the Claimant notes that ICANN: failed to provide timely answers to Afilias' letters while Verisign was able to reach ICANN easily to discuss .WEB, even though it was a non-applicant; informally invited Verisign's counsel to comment on Afilias' concerns; discussed the .WEB registry agreement with NDC, all the while stating that ICANN was precluded from acting on Afilias' complaints due to the pendency of an accountability mechanism; and also advocated for the *Amici* and against Afilias throughout this IRP. According to the Claimant, further evidence of disparate treatment can be found in the Staff's decision to make Rule 4 retroactive so as to catch the Claimant's CEP.¹⁸⁷
212. According to the Claimant, the Staff's decision to take the .WEB contention set off hold and to conclude a registry agreement with NDC also violated the Bylaws and ICANN's obligation to enforce its policies fairly. The Claimant argues that the Board delegated the authority to enforce the New gTLD Program Rules to Staff who authorized the .WEB registry agreement to be sent to NDC and would have countersigned it if the Claimant had not initiated a CEP. The Board did not act to stop the process even though it was aware that the execution of the .WEB registry agreement was imminent.¹⁸⁸
213. In addition, the Claimant contends that ICANN failed to enable and promote competition in the DNS contrary to its Bylaws. The Claimant submits that the only decision ICANN could have taken regarding .WEB to promote competition would have been to reject NDC's application and delegate .WEB to Afilias. In its view, ICANN cannot satisfy its competition mandate by relying on regulators or the DOJ's decision to close its .WEB investigation.¹⁸⁹

¹⁸⁶ *Ibid*, para. 103.

¹⁸⁷ Claimant's PHB, paras. 126-138.

¹⁸⁸ *Ibid*, paras. 139-143.

¹⁸⁹ *Ibid*, paras. 144-154.

214. In relation to its Rule 7 Claim, the Claimant maintains that the Staff improperly coordinated with Verisign the drafting of that rule. In response to a question raised by the Panel, the Claimant explained that its Rule 7 Claim remains relevant at the present stage of the IRP because the Respondent's breach of its Articles and Bylaws in regard to the development of Rule 7 justifies an award of costs in the Claimant's favour.¹⁹⁰
215. As regards the Respondent's argument based on the business judgment rule, the Claimant points to the evidence of Ms. Burr concerning the nature of Board workshops to advance the position that a workshop is not a forum where the Respondent's Board can take any action at all, still less one that is protected by the business judgment rule. The Claimant also asserts that the evidence of the Respondent's witnesses supports its position that no affirmative decision regarding .WEB had been taken during the November 2016 workshop. Finally, the Claimant reiterates that there is no evidence of an ICANN policy or practice to defer decisions while accountability mechanisms are pending.¹⁹¹
216. Turning to the limitations issue, the Claimant avers that the Respondent's position that the Claimant's claims are time-barred is inherently inconsistent with its assertion that ICANN has not yet addressed the fundamental issues underlying those claims. According to the Claimant, its claims are based on conduct of the Staff and Board that culminated in irreversible violations of Afilias' rights when the Staff proceeded with the delegation of .WEB to NDC on 6 June 2018. Consequently, the Claimant argues that its claims are not time-barred pursuant to Rule 4 of the Interim Procedures.
217. Responding to the Respondent's argument that the claims brought in the Amended Request for IRP are time-barred because Afilias raised the same issues in its letters of August and September 2016, the Claimant contends that in the face of ICANN's representations that it was considering the matter, it would have been unreasonable for Afilias to file contentious dispute resolution proceedings in 2016. The Claimant adds that those letters described how *NDC* had violated the New gTLD Program Rules – not how *ICANN* had violated its

¹⁹⁰ *Ibid*, para. 157.

¹⁹¹ Claimant's PHB, paras. 159-170.

Articles and Bylaws.¹⁹²

218. The Claimant further contends that, because of the circumstances in which Rule 4 of the Interim Procedures was adopted, it cannot be applied to its claims. The Claimant avers that four (4) days after the Claimant commenced its CEP – understanding that its claims had never been subject to any time limitation – ICANN launched a public comment process concerning the addition of timing requirements to the rules governing IRPs. In spite of the fact that the public comment period on proposed Rule 4 remained open, ICANN included Rule 4 in the draft Interim Procedures that were presented to the Board for approval, and adopted by the Board on 25 October 2018. The Respondent further provided that the Interim Procedures would apply as from 1 May 2018, and no carve out was made for pending CEPs or IRPs. According to the Claimant, the decision to make Rule 4 retroactive can only have been made in an attempt to preclude Afilias from arguing that its CEP had been filed prior to the adoption of the new rules. The Claimant avers that ICANN’s enactment and invocation of Rule 4 is an abuse of right and is contrary to the international law principle of good faith.¹⁹³
219. In response to the argument that Afilias should have submitted a reconsideration request to the Board, the Claimant argues that, prior to June 2018, there was no action or inaction by the Staff or Board to be reconsidered.¹⁹⁴
220. The Claimant contends that the Board waived its right to individually consider NDC’s application by failing to do so at a time where such review would have been meaningful. The Claimant underscores that the Board failed to do so in November 2016, and again in early June 2018 when it was informed that the Staff was going to conclude a registry agreement for .WEB with NDC. According to the Claimant, there is no evidence to suggest that the Board ever intended to consider whether NDC had violated the New gTLD Program Rules, and it is now for this Panel to decide the Claimant’s claims.¹⁹⁵

¹⁹² *Ibid*, paras. 177-183.

¹⁹³ Claimant’s PHB, paras. 184-192.

¹⁹⁴ *Ibid*, paras. 193-195.

¹⁹⁵ *Ibid*, paras. 196-202.

221. Moving to the issue of the Panel’s jurisdiction, the Claimant emphasizes that this is the first IRP under both ICANN’s revised Bylaws and the Interim Procedures. The Claimant stresses that the IRP is a “final, binding arbitration process” and that the Panel is “charged with hearing and resolving the Dispute”. According to the Claimant, this is particularly important in light of the litigation waiver that ICANN required all new gTLD applicants to accept and to avoid an accountability gap that would leave claimants without a means of redress against ICANN’s conduct. The Claimant submits that the Panel’s jurisdiction extends to granting the remedies that Afilias has requested. In the Claimant’s view, the inherent jurisdiction of an arbitral tribunal sets the baseline for the Panel’s jurisdiction and any deviation must be justified by the text of the Bylaws. In that respect, the Claimant also invokes the international arbitration principle that a tribunal has an obligation to exercise the full extent of its jurisdiction.¹⁹⁶
222. The Claimant notes that the CCWG intended to enhance ICANN’s accountability with an expansive IRP mechanism to ensure that ICANN remains accountable to the Internet community. In Afilias’ view, the CCWG’s report “provides binding interpretations for the provisions of ICANN’s Bylaws that set forth the jurisdiction and powers of an IRP panel – none of which are inconsistent with the CCWG Report.”¹⁹⁷
223. The Claimant alleges that in the Ruby Glen Litigation before the Ninth Circuit, ICANN represented that the litigation waiver would neither affect the rights of New gTLD Program applicants nor be exculpatory, with the implication that the IRP could do anything that the courts could. In Afilias’ view, ICANN’s position before the Ninth Circuit contradicts ICANN’s position in this IRP when it asserts that the Panel cannot order mandatory or non-interim affirmative relief.¹⁹⁸
224. In relation to the relief it is requesting from the Panel, the Claimant avers that the CCWG Report states that claimants have a right to “seek redress” against ICANN through an IRP. According to the Claimant, unless the Panel directs ICANN to remedy the alleged

¹⁹⁶ *Ibid*, paras. 203-210.

¹⁹⁷ Claimant’s PHB, paras. 211-220.

¹⁹⁸ *Ibid*, paras. 221-228.

violations, there is a serious risk that this dispute will go unresolved. For that reason, the Claimant requests that the Panel issue a decision that is legally binding on the Parties and that fully resolves the Dispute. By way of injunctive relief, the Claimant asks the Panel to: reject NDC's application for the .WEB gTLD; disqualify NDC's bids at the ICANN auction; deem NDC ineligible to execute a registry agreement for the .WEB gTLD; offer the registry rights to the .WEB gTLD to Afilias, as the next highest bidder in the ICANN auction; set the bid price to be paid by Afilias for the .WEB gTLD at USD 71.9 million; pay the Claimant's fees and costs.¹⁹⁹

2. Respondent's Post-Hearing Brief

225. In its Post-Hearing Brief dated 12 October 2020, the Respondent argues that the Claimant has effectively abandoned its competition claim, which was rooted in the notion that ICANN's founding purpose was to promote competition and that this competition mandate and ICANN's Core Values regarding competition required it to disqualify NDC and block Verisign's potential operation of .WEB. The Respondent contends that without this competition claim, the Claimant's case boils down to whether the Respondent was required to disqualify NDC for a series of alleged violations of the Guidebook and Auction Rules.²⁰⁰ As to those, the Respondent reiterates that it has not decided whether the DAA violates the Guidebook or Auction Rules, or the appropriate remedy for any violation that may be found. Relying on the evidence of Mr. Disspain, the Respondent contends that the propriety of the DAA is a matter for the ICANN Board.
226. According to the Respondent, the practice of placing contention sets on hold while accountability mechanisms are pending is well known. Accordingly, the Board's decision to defer making a decision on .WEB in November 2016 should have come as no surprise to the Claimant and is entitled to deference from this Panel. As for the transmission of a registry agreement for .WEB to NDC in June 2018, the Respondent claims that it did not reflect a decision that the DAA was compliant with the Guidebook and Auction Rules, but

¹⁹⁹ *Ibid.*, paras. 229-246. The Parties' submissions on costs are summarized below, in the section of this Final Decision dealing with the Claimant's cost claim.

²⁰⁰ Respondent's PHB, paras. 1-6.

was merely a ministerial act triggered by the removal of the set's on hold status.²⁰¹

227. The Respondent recalls that the Panel's jurisdiction is circumscribed by the Bylaws in relation to the types of disputes that may be addressed, the claims that can be raised, the remedies available, the time within which a Dispute may be brought, and the standard of review.²⁰² The Respondent contends that the Panel can only address alleged violations that are asserted in the Amended Request. In relation to those, the Panel's remedial authority is limited to issuing a declaration as to whether a Covered Action constituted an action or inaction that violated the Articles or Bylaws. According to the Respondent, the relief requested by the Claimant clearly exceeds the Panel's limited remedial authority, which does not include the authority to disqualify NDC's bid, proceed to contracting with Afiliás, specify the price to be paid by Afiliás, or invalidate Rule 7. The Respondent argues that the Panel is authorized to shift costs only on a finding that the losing party's claim or defence is frivolous or abusive. The Respondent submits that the CCWG's Supplemental Proposal dated 23 February 2016 does not expand the Panel's remedial authority. If there is any inconsistency, the Bylaws clearly control.²⁰³
228. The Respondent argues that there is no "gap" created by the litigation waiver and avers that it takes the same position in this IRP as it did in the Ruby Glen Litigation, where it sought to enforce the litigation waiver. The Respondent submits that the Claimant's position in this regard is based on the false premise that remedies available in IRPs must be co-extensive with remedies available in litigation.²⁰⁴
229. The Respondent also contends that the Panel is required to apply the prescribed standard of review. The first sentence of Section 4.3(i) of the Bylaws establishes a general *de novo* standard, and Subsection (iii) then creates a carve-out, providing that actions of the Board in the exercise of its fiduciary duty are entitled to deference provided that they are within the realm of "reasonable judgment". The Respondent argues that all actions by the Board

²⁰¹ Respondent's PHB, paras. 10-12.

²⁰² *Ibid*, para. 14.

²⁰³ *Ibid*, paras. 15-45.

²⁰⁴ *Ibid*, paras. 46-48.

on behalf of ICANN are subject to a fiduciary duty to act in good faith in the interests of ICANN.²⁰⁵

230. Turning to time limitation, the Respondent notes that the Panel has jurisdiction only over claims brought within the time limits established by Rule 4 of the Interim Procedures, and contends that the limitations and repose periods set out in Rule 4 are jurisdictional in nature.²⁰⁶ According to the Respondent, the Claimant's claim that ICANN had an unqualified obligation to disqualify NDC is barred by the repose period and the time limitation, which are dispositive.²⁰⁷ The Respondent contends that the Claimant's claim that the Staff violated the Articles and Bylaws in their investigation of pre-auction rumors or post-auction complaints is also time-barred and therefore outside the jurisdiction of the Panel.²⁰⁸ The Respondent denies that it is equitably estopped from relying on its time limitation defence, and avers that the repose and limitations periods apply retroactively because of the express terms of the Interim Procedures. According to the Respondent, if the Claimant wished to challenge Rule 4, it could have brought such a claim in this IRP, as it did with Rule 7.²⁰⁹
231. Regarding the merits of the Claimant's claims, the Respondent notes the Claimant's decision not to cross-examine Mr. Kneuer, Dr. Carlton, or Dr. Murphy, indicating the abandonment of its competition claim, and reiterates that ICANN does not have the mandate, authority, expertise or resources to act as a competition regulator of the DNS.²¹⁰ According to the Respondent, the unrebutted economic evidence establishes that .WEB will not be competitively unique such that Verisign's operation of .WEB would be anticompetitive.²¹¹

²⁰⁵ Respondent's PHB, paras. 49-57.

²⁰⁶ *Ibid*, paras. 58-61.

²⁰⁷ *Ibid*, paras. 62-69.

²⁰⁸ *Ibid*, paras. 70-72.

²⁰⁹ *Ibid*, paras. 73-85.

²¹⁰ *Ibid*, paras. 86-101.

²¹¹ *Ibid*, paras. 102-129.

232. The Respondent further contends that it was not required to disqualify NDC based on alleged violations of the Guidebook and Auction Rules. According to the Respondent, “it is not a foregone conclusion that NDC is or is not in breach”.²¹² The Respondent argues that the Guidebook and Auction Rules grant it significant discretion to determine whether a breach of their terms has occurred and the appropriate remedy, and that ICANN has not yet made that determination.²¹³ The Respondent maintains that it, and not the Panel, is in the best position to make a determination as to the propriety of the DAA, and its consistency with the Guidebook or Auction Rules.²¹⁴ According to the Respondent, its commitment to transparency and accountability is not relevant to the Claimant’s contention regarding NDC’s alleged violations.²¹⁵
233. The Respondent reiterates that the Board complied with ICANN’s obligations by deciding not to take any action regarding the .WEB contention set while accountability mechanisms were pending, and that the Panel should defer to this reasonable business judgment.²¹⁶ The Respondent adds that its obligations to act transparently did not require the Board to inform Afiliats of its 3 November 2016 decision. In that respect, the Respondent argues that the Claimant has not put forward a single piece of evidence suggesting that it would have acted differently had it known that the Board decided in November 2016 to take no action while the contention set remained on hold.²¹⁷
234. The Respondent takes the position that the Claimant has not properly challenged ICANN’s transmittal of a form registry agreement to NDC in June 2018 and, in any event, that in doing so it acted in accordance with Guidebook procedures and the Articles and Bylaws.²¹⁸
235. According to the Respondent, the Claimant’s claims that ICANN’s pre- and post- auction

²¹² Respondent’s PHB, para. 138.

²¹³ *Ibid*, paras. 136-150.

²¹⁴ *Ibid*, paras. 151-156.

²¹⁵ *Ibid*, paras. 157-158.

²¹⁶ *Ibid*, para. 159.

²¹⁷ *Ibid*, paras. 182-189.

²¹⁸ *Ibid*, paras. 190-197.

investigations violated the Articles and Bylaws have no merit and in any event are time-barred.²¹⁹

236. As regards the Rule 7 Claim, the Respondent submits that to the extent it is maintained, it must be rejected both as lacking merit and because there is no valid basis for an order shifting costs on the ground of Rule 7's alleged wrongful adoption.²²⁰

3. *Amici's* Post-Hearing Brief

237. In their joint Post-Hearing Brief dated 12 October 2020, the *Amici* submit that adverse inferences against the Claimant should be made with respect to every issue in the IRP based on "Afilias purposefully, voluntarily and knowingly withholding" evidence from the Panel. According to the *Amici*, the Claimant's executives whose witness statements were withdrawn had substantial direct personal knowledge and special industry expertise material to virtually every contested issue in the IRP.²²¹
238. The *Amici* argue that the Panel's jurisdiction is limited to declaring whether the Respondent violated its Bylaws, and does not extend to making findings of fact in relation to third-party claims or awarding relief contravening third party rights.²²² As a result, the *Amici* submit that the Panel lacks authority to find that the Domain Acquisition Agreement violates the Guidebook or that the *Amici* engaged in misconduct.²²³ According to the *Amici*, the Panel should limit its review to ICANN's decision making process and only make non-binding recommendations that relate to that process, as opposed to the decision ICANN should make.²²⁴
239. The *Amici* contend that a decision granting the Claimant's requested relief, or making findings on the Domain Acquisition Agreement or their conduct, would violate their due

²¹⁹ *Ibid*, paras. 198-217.

²²⁰ Respondent's PHB, paras. 218-231.

²²¹ *Ibid*, paras. 6 and 13-21.

²²² *Ibid*, paras. 22-49.

²²³ *Ibid*, paras. 62-67.

²²⁴ *Ibid*, paras. 68-81.

process rights because of their limited participation in the IRP.²²⁵

240. According to the *Amici*, the Domain Acquisition Agreement complies with the Guidebook. The *Amici* also allege that transactions comparable to the Domain Acquisition Agreement have regularly occurred as part of the gTLD Program, with ICANN's knowledge and approval and consistent with the Guidebook.²²⁶ They further urge that Section 10 of the Guidebook prohibits only the sale and transfer of an entire application, and does not prohibit agreements between an applicant and a third party to request ICANN to approve a future assignment of a registry agreement.²²⁷ The *Amici* aver that ICANN has approved many assignments of registry agreements under such circumstances.²²⁸
241. The *Amici* state that they did not seek to evade scrutiny by maintaining the Domain Acquisition Agreement confidential during the auction, and argue that the Guidebook did not require disclosure of that agreement prior to the auction. They note that the DAA was always intended to be, and will be subject to the same scrutiny as the numerous other post-delegation assignments of new gTLDs. In addition, the *Amici* deny that the confidentiality of the Domain Acquisition Agreement provided them with any undue advantage.²²⁹
242. The *Amici* argue that there is no evidence of anticompetitive intent or effect, and submit that Afilias has abandoned its competition claims. In addition, the *Amici* urge that ICANN is not an economic regulator, that competition is not a review criterion under the New gTLD Program, and that ICANN's competition mandate was fulfilled by the DOJ investigation.²³⁰
243. Finally, the *Amici* note that the Claimant never rebutted the evidence of its own violation of the Guidebook when a representative of the Claimant contacted NDC during

²²⁵ *Ibid*, paras. 82-86.

²²⁶ *Ibid*, paras. 8 and 87-123.

²²⁷ *Amici's* PHB, paras. 100-109.

²²⁸ *Ibid*, paras. 124-153.

²²⁹ *Ibid*, paras. 153-180.

²³⁰ *Ibid*, paras. 181-205.

the Blackout Period.²³¹

H. Submissions Regarding the Donuts Transaction

244. As noted in the History of the Proceedings' section of this Final Decision, the *Amici* have requested that the Panel take into consideration their submissions concerning the 29 December 2020 merger between Afilias, Inc. and Donuts, Inc. Those submissions, and that of the Parties, are summarized below.
245. In counsel's letter of 9 December 2020, the *Amici* described the contemplated transaction, based on publicly disclosed information, as a sale to Donuts of Afilias, Inc.'s entire existing registry business, with only the .WEB application itself being retained within an Afilias, Inc. shell. This, the *Amici* averred, is information that the Claimant ought to have disclosed to the Panel as it is inconsistent with the Claimant's claims and requested relief in this IRP. Moreover, the *Amici* contended that by withdrawing the witness statements of its party representatives in this IRP, the Claimant sought to prevent the Respondent and the *Amici* from eliciting this information.
246. In its response of 16 December 2020 to the *Amici*'s letter, the Claimant submitted that Afilias, Inc.'s arrangement with Donuts has no bearing on the issues in dispute in the IRP. The Claimant explained that the contemplated transaction concerned the registry business of Afilias, Inc., not its registrar business²³², and that the Claimant as an entity, as well as its .WEB application, had been carved out of the transaction. The Claimant added that after the transaction it will remain part of a group of companies that will control a significant registrar business. Accordingly, the Claimant averred that its new structure will not impact its ability to launch .WEB. Finally, the Claimant noted that it has informed the Respondent of a possible sale of its registry business back in September 2020.

²³¹ *Ibid*, paras. 206-214.

²³² Registry operators are parties to Registry Agreements with ICANN that set forth their rights, duties and obligations as operators. Companies known as "registrars" sell domain name registrations to entities and individuals within existing gTLDs. See Respondent's Rejoinder, 31 May 2019, paras. 17 and 23. As explained in the preamble of the Guidebook, Ex. C-3, "[e]ach of the gTLDs has a designated 'registry operator' and, in most cases, a Registry Agreement between the operator (or sponsor) and ICANN. The registry operator is responsible for the technical operation of the TLD, including all of the names registered in the TLD. The gTLDs are served by 900 registrars, who interact with registrants to perform domain name registration and other related services." (p. 2 of the PDF).

247. Also on 16 December 2020, the Respondent confirmed that it was aware that Afilias, Inc. and Donuts had entered into an agreement by which the latter would acquire the former's TLD registry business, excluding the Claimant's .WEB application. The Respondent submitted that these developments reinforced the importance for the Panel not to exceed its "limited jurisdiction to determine only whether a Covered Action by ICANN violated the Articles of Bylaws and to issue a declaration to that effect."
248. On 21 December 2020, with leave of the Panel, the *Amici* replied to the Parties' letters of 16 December 2020. According to the *Amici*, the Claimant's response only reinforced the "the inappropriateness and inadvisability of the Panel deciding allegations concerning the transactions at issue." That is because, according to the *Amici*, it is a fundamental principle and tenet of the Respondent's Bylaws and IRP procedures that matters involving multiple parties and interests such as the matters at issue in this case are to be addressed in the first instance by the Respondent. The *Amici* also reiterated their claim that the Claimant has not been transparent about its plans and that of Afilias, Inc. as they affected the Claimant's ability to execute on its proposed deployment of .WEB.
249. On 30 December 2020, the day after the closing of the Donuts transaction, Afilias responded to the *Amici*'s letter of 21 December 2020, stating that it "was yet another attempt to divert the Panel's attention from the relevant issue to be arbitrated in this IRP." The Claimant rejected the notion that the Donuts transaction, much like the other transactions the *Amici* had pointed to in their written submissions, bear any resemblance to the Domain Acquisition Agreement, and it listed what it considers are key differences between the two (2) situations.

V. ANALYSIS

A. Introduction

250. As the Panel observed in its Procedural Order No. 5, this IRP is an ICANN accountability mechanism, the Parties to which are the Claimant and the Respondent. As such, it is not the forum for the resolution of potential disputes between the Claimant and the *Amici*, two (2) non-parties that are participating in this IRP as *amici curiae*, or of divergence and

potential disputes between the *Amici* and the Respondent by reason of the latter's actions or inactions in addressing the question of whether the DAA complies with the New gTLD Program Rules.

251. The Claimant's core claims against the Respondent in this IRP arise from the Respondent's failure to reject NDC's application for .WEB, disqualify its bids at the auction, and deem NDC ineligible to enter into a registry agreement with the Respondent in relation to .WEB because of NDC's alleged breaches of the Guidebook and Auction Rules.²³³ The Respondent's impugned conduct engages its Staff's actions or inactions in relation to allegations of non-compliance with the Guidebook and Auction Rules on the part of NDC, communicated in correspondence to the Respondent in August and September 2016, and the Staff's decision to move to delegate .WEB to NDC in June 2018 by proceeding to execute a registry agreement in respect of .WEB with that company; as well as the Board's decision not to pronounce upon these allegations, first in November 2016, and again in June 2018 when, to the knowledge of the Board, the .WEB contention set was taken off hold and the Staff put in motion the process to delegate the .WEB gTLD to NDC.
252. As already noted, the Claimant's core claims serve to support the Claimant's requests that the Panel disqualify NDC's bid for .WEB and, in exchange for a bid price to be specified by the Panel and paid by the Claimant, order the Respondent to proceed with contracting the Registry Agreement for .WEB with the Claimant.
253. The Claimant's core claims have been articulated with increasing particulars as these proceedings progressed. This, in the opinion of the Panel, is understandable in light of the manner in which the Respondent's defences have themselves evolved, most particularly the defence based on the Board's 3 November 2016 decision to defer consideration of the issues raised in connection with .WEB. This reason alone justifies rejection of the Respondent's contention that the Claimant failed to sufficiently plead a violation of the Respondent's Articles and Bylaws in connection with ICANN's post-auction investigation of Afiliás' allegations that NDC violated the Guidebook and Auction Rules. In any event,

²³³ See Afiliás' PHB, para. 247. See also Claimant's Reply, para. 16, where the Claimant describes its "principal claim".

the Panel considers that the Claimant's core claims are comprised within the broad allegations of breach made in the Amended Request for IRP.²³⁴

254. The Respondent's main defences are, first, that the Claimant's claims regarding the Respondent's actions or inactions in 2016 are time-barred. While reserving its position about the propriety of the DAA under the New gTLD Program Rules, the Respondent also denies that it was obligated to disqualify NDC, whether it be by reason of its alleged competition mandate or as a necessary consequence of a violation of the Guidebook or Auction Rules. The Respondent also contends that it complied with its Articles and Bylaws when it decided not to take any action regarding the .WEB contention set while accountability mechanisms in relation to .WEB were pending, and that the Panel should defer to the Board's reasonable business judgment in coming to that decision. As noted, the Respondent rejects as unauthorized under the Bylaws, the Claimant's requests that the Respondent be ordered to proceed with contracting the Registry Agreement for .WEB with the Claimant, at a bid price to be specified by the Panel.
255. The Panel begins its analysis by considering the Respondent's time limitations defence. The Panel then addresses the standard by which the Respondent's actions or inactions should be reviewed. Thereafter, the Panel turns to examining the Respondent's conduct against the backdrop of the entire chronology of events, and considers whether it was open to the Respondent, both its Staff and its Board, not to pronounce upon the DAA's alleged non-compliance with the Guidebook and Auction Rules following the Claimant's complaints, an inaction that endures to this day. The Panel then considers, in turn, the Claimant's Rule 7 Claim, and the scope of the Panel's remedial authority in light of its findings that the Respondent, as set out in these reasons, violated its Articles and Bylaws. The Panel concludes its analysis by designating the prevailing party, as required by Section 4.3(r) of the Bylaws, and determining the Claimant's cost claim.

²³⁴ See, e.g., Amended Request for IRP, para. 2.

B. The Respondent's Time Limitations Defence

1. Applicable Time Limitations Rule

256. Three (3) successive limitations regimes have been referred to as potentially relevant to determining the timeliness of the Claimant's claims in this IRP.
257. Prior to 1 October 2016, at a time when only Board actions could be the subject of an IRP, the Bylaws required that a request for independent review be filed within thirty (30) days of the posting of the Board's minutes relating to the challenged Board decision.²³⁵
258. New ICANN Bylaws came into force as of 1 October 2016. However, these did not contain any provision setting a time limitation for the filing of an IRP. Since the supplementary rules for IRPs in force at the time did not contain a time limitation provision either, it is common ground that, during the period from 1 October 2016 to 25 October 2018, IRPs were subject neither to a limitation period nor to a repose period.
259. The Respondent's time limitations defence is based on Rule 4 of the Interim Procedures which, inclusive of the footnote that forms part of the Rule, reads as follows:

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.

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.

²³⁵ See Bylaws (as amended on 11 February 2016), Ex. C-23, Article IV, Section 3.3.

260. This Rule 4 came into being as part the new Interim Procedures adopted by the Board on 25 October 2018. As set out in some detail in the Panel’s Decision on Phase I, this was the culmination of a development process within ICANN’s IOT that began on 19 July 2016, with the circulation to IOT members of a first draft of proposed Updated Supplementary Procedures, and concluded on 22 October 2018, when draft Interim Supplementary Procedures were sent to the Board for adoption.²³⁶
261. While the Interim Procedures were adopted on 25 October 2018, the first paragraph of their preamble provides that “[t]hese procedures apply to all independent review process proceedings filed after 1 May 2018.” Rule 2 of the Interim Procedures confirms the retroactive application of the Interim Procedures in two (2) ways: first, by providing that they apply to IRPs submitted to the ICDR after the Interim Procedures “go onto effect”; and second, by providing that IRPs commenced prior to the Interim Procedures’ “adoption” (on 25 October 2018) shall be governed by the procedures “in effect at the time such IRPs were commenced”. For IRPs commenced after 1 May 2018, this would point to the Interim Procedures.
262. Ms. Eisner acknowledged in her evidence that Rule 4 was the subject of considerable debate within the IOT. She also confirmed that by October 2018, “ICANN org”²³⁷ was anxious to get a set of procedures in place. Indeed, Ms. Eisner had noted during the IOT meeting held of 11 October 2018 that “we at ICANN org are getting nervous about being on the precipice of having an IRP filed”.²³⁸ It is recalled that on 10 October 2018, the day prior to this meeting, the Claimant had, in the context of its pending CEP, provided the Respondent’s in-house counsel with a draft of the Claimant’s Request for an IRP in connection with .WEB.²³⁹
263. Underlying the footnote to Rule 4 is the fact that the Interim Procedures were conceived as a provisional instrument, designed to apply until the Respondent, in accordance with the

²³⁶ See Decision on Phase I, paras. 139-171.

²³⁷ “ICANN org” is an expression used to refer to ICANN’s Staff and organization, as opposed to ICANN’s Board or its supporting organizations and committees. See Merits hearing transcript, 4 August 2020, p. 391:6-15 (Ms. Burr).

²³⁸ Merits hearing transcript, 5 August 2020, pp. 495 and 498; see also pp. 479-480 (Ms. Eisner).

²³⁹ See Decision on Phase I, para. 151, and Merits hearing transcript, 5 August 2020, p. 494 (Ms. Eisner).

applicable governance processes, will come to develop and adopt final supplementary procedures for IRPs. Specifically in relation to the introduction of a “Time for Filing” provision in the Interim Procedures, Ms. Eisner explained that the IOT:

[...] agreed at some point and finalized language on a footnote that would confirm that if there was a future change in a deadline for time for filing, that ICANN would work to make sure no one was prejudiced by that. [...]

The footnote that was included in the Rule 4 was about the change between the -- we are putting the interim rules into effect. And then if in the future a discussion where people were suggesting that there should be basically no statute of limitations on the ability to challenge an act of ICANN, if that were to be the predominant view, and what the Board put into effect that there would be some sort of stopgap measure put in so that anyone who was not able to file under the interim rules and the timing set out there but could have filed if the other rules, the broader rules had been in effect, that we would put in a stopgap to make sure that no one was prejudiced by that differentiation because we had agreed on a different timing for the final set.²⁴⁰

264. In its Post-Hearing Brief dated 12 October 2020, the Respondent advised that as of that date, final Supplementary Procedures had not been completed or adopted.²⁴¹
265. Having identified and placed in context the rule on which the Respondent relies in support of its time limitations defence, the Panel turns to consider the merits of that defence.

2. Merits of the Respondent’s Time Limitations Defence

266. It is the Respondent’s contention that the Claimant’s claim that ICANN had an unqualified obligation to disqualify NDC upon receiving the DAA in August 2016 is barred by the repose period of Rule 4 because the Claimant challenges actions or inactions that occurred in 2016, more than two (2) years before the Claimant filed its IRP in November 2018. The Respondent adds that the limitations period of Rule 4 also bars the Claimant’s claims because the Claimant was aware of the material effect of the alleged actions or inactions of ICANN by August and September 2016, as evidenced by its letters of 8 August 2016 and 9 September 2016, demanding that ICANN disqualify NDC.
267. The Claimant’s position is that its claims against the Respondent for violating its Articles

²⁴⁰ Merits hearing transcript, 5 August 2020, pp. 496-498 (Ms. Eisner).

²⁴¹ Respondent’s PHB, fn 103, p. 38.

and Bylaws, as opposed to its claims that NDC had violated the New gTLD Program Rules, accrued no earlier than on 6 June 2018, when the Respondent proceeded with the delegation process for .WEB with NDC,²⁴² and that even if the time limitations and repose periods were applicable to its claims against the Respondent, which the Claimant contends they are not, they would have been tolled by its CEP that lasted from 18 June 2018 to 13 November 2018.

268. The Panel has carefully reviewed the Claimant's August and September 2016 correspondence relied upon by the Respondent, and cannot accept the latter's contention that the claims asserted by Afilias in its 2016 letters to ICANN are the same as the claims asserted by the Claimant in this IRP. Whereas the Claimant's 2016 letters sought to demonstrate NDC's alleged violations of the New gTLD Program Rules, the Claimant's IRP, using these violations as a predicate, impugns the conduct of the Respondent itself in response to NDC's conduct. Stated otherwise, the Claimant's claims in this IRP concern not NDC's conduct, but rather the Respondent's actions or inactions in response to NDC's conduct.²⁴³
269. As amplified later in these reasons, when the Panel considers the Respondent's handling of the Claimant's complaints, the Panel does not accept, as urged by the Respondent, that the Claimant can be faulted for having waited for some form of determination by the Respondent before alleging in an IRP that the Respondent's actions or inaction violated its Articles and Bylaws. The Panel recalls that, in its responses to the Claimant's letters of 8 August 2016 and 9 September 2016, the Staff indicated, on 16 September 2016, that ICANN would pursue "informed resolution" of the questions raised by the Claimant and Ruby Glen,²⁴⁴ and, in ICANN's letter of 30 September 2016, that it would "continue to take Afilias' comments, and other inputs that [it] ha[d] sought, into consideration as [it] consider[ed] this matter."²⁴⁵

²⁴² *Ibid*, para. 179.

²⁴³ Claimant's PHB, para. 182.

²⁴⁴ ICANN's letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50.

²⁴⁵ ICANN's letter to Mr. Hemphill dated 30 September 2016 and attached Questionnaire, Ex. C-61.

270. The first of these letters attached a detailed Questionnaire designed to assist ICANN in evaluating the concerns raised by Afilias and Ruby Glen, and the second represented in no uncertain terms that the Respondent's consideration of this matter was continuing. In such circumstances, there is force to the Claimant's contention that commencing contentious dispute resolution proceedings at that time would have interfered with the "informed resolution" that ICANN had represented it would undertake, and would likely have attracted an objection of prematurity.
271. The Panel also recalls, a fact that is not in dispute, that the Respondent did not communicate to the Claimant any view or determination in respect of the many questions raised in the Questionnaire attached to the Respondent's letter of 16 September 2016. As for the Board's decision in November 2016 to defer consideration of the complaints raised in relation to NDC's conduct, it is common ground that it was never communicated to the Claimant or otherwise made public, and that it was disclosed for the first time upon the filing of the Respondent's Rejoinder in this case, on 1 June 2020.
272. From November 2016 to the beginning of the year 2018, as seen already, the .WEB contention set was on hold by reason of the pendency of an accountability mechanism and the DOJ investigation. The situation evolved with the DOJ's decision to close its investigation on 9 January 2018, the closure of Donuts' CEP on 30 January 2018, and the expiration on 14 February 2018 of the 14-day period given to Ruby Glen to file an IRP. Shortly thereafter, the Claimant, on 23 February 2018, formally requested an update on ICANN's investigation of the .WEB contention set and requested documents by way of its First DIDP Request.²⁴⁶ The Claimant also requested that the Respondent take no action in regard to .WEB pending conclusion of this DIDP Request.
273. The Claimant was notified on 6 June 2018 that the Respondent had removed the .WEB contention set from its on-hold status.²⁴⁷ While the Claimant was still ignorant of any determination by the Respondent in respect of the concerns raised in August and

²⁴⁶ Dechert's letter to the Board dated 23 February 2018, Ex. C-78.

²⁴⁷ ICANN Global Support's email to Mr. Kane dated 7 June 2018, Ex. C-62, p. 1. Mr. Kane was in Australia at the time, which is why the date on the Afilias' copy is 7 June 2018, although ICANN sent it on 6 June 2018.

September 2016, which were the subject of the Respondent’s Questionnaire of 16 September 2016, a necessary implication of the Respondent’s decision was that these concerns did not stand – or no longer stood – in the way of the delegation of .WEB to NDC. In the Panel’s opinion, this is when the Claimant’s complaints about NDC’s conduct crystallized into a claim against the Respondent. To quote from Rule 4, but recalling that in June 2018 it had not yet been adopted, this is when the Claimant “[became] aware of the material effect of the action or inaction giving rise to the DISPUTE”.

274. The Claimant commenced its CEP on 18 June 2018, eleven days after the removal of the .WEB contention set from its on-hold status. As already explained, potential IRP claimants are “strongly encouraged” to engage in this non-binding process for the purpose of attempting to narrow the Dispute, and an additional incentive to do so resides in their exposure to a cost-shifting decision if they fail to partake in a CEP and ICANN prevails in the IRP.²⁴⁸
275. The rules applicable to a CEP are described in an ICANN document dated 11 April 2013 (**CEP Rules**).²⁴⁹ The CEP Rules provide that, if the parties have failed to agree a resolution of all issues in dispute upon conclusion of the CEP, the potential IRP claimant’s time to file a request for independent review shall be extended for each day of the CEP but in no event, absent agreement, for more than fourteen (14) days.
276. The Claimant’s CEP was terminated by the Respondent on 13 November 2018. Consistent with the CEP Rules, the Respondent informed the Claimant that “ICANN will grant Afiliis an extension of time to 27 November 2018 (14 days following the close of CEP) to file an IRP”, adding that “this extension will not alter any deadlines that may have expired before the initiation of the CEP”.²⁵⁰ The Claimant commenced its IRP the next day, on 14 November 2018.
277. The Respondent has not challenged the application of the CEP Rules to the Claimant’s

²⁴⁸ Bylaws, Ex. C-1, Article 4, Section 4.3(e)(i)-(ii).

²⁴⁹ Cooperative Engagement Process Rules, 11 April 2013, Ex. C-121.

²⁵⁰ Exchange of emails between ICANN and Dechert, Ex. C-54.

CEP and the time for the filing of its IRP. In response to the Claimant's argument that the retroactive time limitations period set out in Rule 4 was tolled from 18 June 2018 to 13 November 2018, while its CEP was pending, the Respondent argued that the tolling was irrelevant because the limitations period had already long expired based on its submission that the Claimant's claims had accrued in August/September 2016, a submission that this Panel has rejected.

278. In sum, the Panel finds that the Claimant's core claims against the Respondent, as summarized above in paragraph 251 of this Final Decision, only accrued on 8 June 2018. Since the Claimant's CEP had the effect of tolling the time available to the Claimant to file an IRP until 27 November 2018, fourteen (14) days after closure of the CEP, the Claimant's IRP was timely and the Respondent's time limitations defence insofar as the Claimant's core claims are concerned must be rejected.

279. The Claimant has accused the Respondent of having enacted Rule 4 and given it retroactive effect in order to retroactively time bar its claims in this IRP. In support of this contention, the Claimant advances the following factual allegations:

- The Respondent only launched the solicitation of public comments concerning the addition of timing requirements to the draft procedures governing IRPs on 22 June 2018, shortly after Afiliás filed its CEP;
- In spite of the fact that the public comment period on proposed Rule 4 remained open, Rule 4 was included in the proposed Interim Procedures presented to the Board for approval on 25 October 2018;
- Having received a draft of the Claimant's IRP in the context of its CEP on 10 October 2018, the Respondent decided to give retroactive effect to the Interim Procedures to 1 May 2018, six (6) weeks prior to the initiation of the Claimant's CEP, with no carve-out for pending CEPs (of which there were several) or IRPs

(of which there was none); and

- Having terminated the Claimant’s CEP on 13 November 2018, and received its IRP on 14 November 2018, the Respondent was able to rely on the retroactive application of the Interim Procedures to support its Rule 4 time limitations defence.

280. In light of the Panel’s finding as to the accrual date of the Claimant’s core claims, it is not necessary further to consider these allegations. However, the Panel does wish to record its view that, from a due process perspective, the retroactive application of a time limitations provision is inherently problematic. A retroactive law changes the legal consequences of acts committed or the legal status of facts and relationships prior to the enactment of the law.²⁵¹ The potential for unfairness is apparent and thus, in many legal systems, there are restrictions on, and presumptions against, giving legal rules a retroactive effect.

281. Between 1 October 2016 and 25 October 2018, there was no time limitation for the filing of an IRP in respect of the Respondent’s actions or failures to act. Yet an IRP timely filed under the Bylaws, say on 18 June 2018, would, if Rule 4 of the Interim Procedures were given effect to, retroactively be barred and the claims advanced therein defeated with no consideration of their merits because of the retroactive application of the Interim Procedures adopted on 25 October 2018. The fact that only a single case, the Claimant’s IRP, was in fact affected by the retroactive application of the Interim Procedures only heightens the due process concern. The Panel recalls that under Section 4.3(n)(i) of the Bylaws, the rules of procedure for the IRP to be developed by the IOT “should apply fairly to all parties”.

C. Standard of Review

282. The standard of review applicable to an IRP under the Bylaws is provided in Section 4.3(i) of the Bylaws and Rule 11 of the Interim Procedures, which are in substance identical.

²⁵¹ David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888*, p. 41. See also Black’s Law Online Dictionary, 2nd ed., s.v. “retroactive statute”: <https://thelawdictionary.org/retroactive-statute/> (consulted on 7 February 2021): “a law that imposes a new obligation on past things or a law that starts from a date in the past.”

Section 4.3(i) of the Bylaws reads in relevant parts as follows:

(i) Each IRP Panel shall conduct an objective, *de novo* examination of the Dispute.

(i) 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 the Articles of Incorporation or Bylaws.

(ii) All Disputes shall be decided in compliance with the Articles of Incorporation and Bylaws, as understood in the context of the norms of applicable law and prior relevant IRP decisions.

(iii) 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.

283. It is common ground that, except for claims potentially falling under sub-paragraph (iii) of Section 4.3(i), the Panel must conduct an objective, *de novo* examination of claims that actions or failures to act on the part of the Respondent violate its Articles or Bylaws, and make appropriate findings of fact in light of the evidence. The Parties therefore agree that this is the standard applicable to the Panel's review of actions or failures to act on the part of the Respondent's Staff.

284. There is profound divergence between the Parties as to the import of sub-paragraph (iii) of Section 4.3(i), relating to Claims arising out of the Board's exercise of its fiduciary duties. The Respondent argues that the effect of this rule is to incorporate the "business judgment rule" into the independent review of ICANN's Board action, a doctrine which the Respondent avers is recognized in California²⁵² and, according to the California Supreme Court, which "exists in one form or another in every American jurisdiction".²⁵³ More specifically, the Parties diverge both as to the scope of the carve-out made in Section 4.3 (i)(iii), and the question of whether the Board actions and inactions that are impugned by the Claimant involve the Board's exercise of its fiduciary duties.

285. These questions are addressed when the Panel comes to consider the merits of the Claimant's claims. For present purposes, it is noted that the Parties agree that, to the extent

²⁵² Respondent's PHB, para. 50.

²⁵³ *Landen v. La Jolla Shores Clubdominium Homeowners Ass'n*, 21 Cal. 4th 249, 257 (1999) (quoting *Frances T. v. Vill. Green Owners Ass'n*, 42 Cal. 3d 490, 507 n.14 (1986), RLA-13).

the Panel finds that the business judgment rule as it may have been incorporated in Section 4.3(i)(iii) of the Bylaws has any application in the present case, it refers to a “judicial policy of deference to the business judgment of corporate directors in the exercise of their broad discretion in making corporate decisions.”²⁵⁴

D. Merits of the Claimant’s Core Claims

286. While the Panel has found that the Claimant’s core claims against the Respondent crystallized on 8 June 2018, the Panel’s view is that a proper analysis of the Claimant’s claims requires an examination of the Respondent’s conduct – that of its Board, individual Directors, Officers and Staff – against the backdrop of the entire chronology of events leading to the Respondent’s decision of 8 June 2018. Before embarking on this examination, however, the Panel considers it useful to recall the key standards against which the Respondent has determined that its conduct should be assessed.

1. Relevant Provisions of the Articles and Bylaws

287. Article 2, paragraph III of the Respondent’s Articles reads, in part, as follows:

The Corporation shall operate in a manner consistent with these Articles and 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.[...]

288. Under its Bylaws, the Respondent has committed to “act in a manner that complies with and reflects ICANN’s Commitments and respects ICANN’s Core Values”.²⁵⁵

289. The Respondent’s Commitments that are relied upon by the Claimant or appear germane to its claims, are expressed as follows in the Bylaws:

In performing its Mission, ICANN must operate in a manner consistent with these Bylaws for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and international conventions and applicable local law, through open and transparent processes that enable competition and

²⁵⁴ *Lee v. Interinsurance Exch.*, 50 Cal. App. 4th 694, 711 (1996) (quoting *Barnes v. State Farm Mut. Auto Ins. Co.*, 16 Cal. App. 4th 365, 378 (1993)).

²⁵⁵ Bylaws, Ex. C-1, Section 1.2.

open entry in Internet-related markets. Specifically, ICANN commits to do the following (each, a "**Commitment**," and collectively, the "**Commitments**"):

[...]

(v) 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); and

(vi) Remain accountable to the Internet community through mechanisms defined in these Bylaws that enhance ICANN's effectiveness.²⁵⁶

290. As for ICANN's Core Values, which are to "guide the decisions and actions" of the Respondent, they include:

(iv) Introducing and promoting competition in the registration of domain names where practicable and beneficial to the public interest as identified through the bottom-up, multistakeholder policy development process;

(v) Operating with efficiency and excellence, in a fiscally responsible and accountable manner and, where practicable and not inconsistent with ICANN's other obligations under these Bylaws, at a speed that is responsive to the needs of the global Internet community;²⁵⁷

291. The Bylaws further provide that ICANN's Commitments and Core Values "are intended to apply in the broadest possible range of circumstances".²⁵⁸

292. Finally, under Article 3 of the Bylaws, entitled Transparency, the Respondent has committed that it and its constituent bodies:

[...] shall operate to the maximum extent possible in an open and transparent manner and consistent with procedures designed to ensure fairness, [...]²⁵⁹

293. Bearing the standards set out in those commitments and core values in mind, the Panel turns to consider the Respondent's conduct, beginning with the Claimant's complaints about the Panel's pre-auction investigation.

2. Pre-Auction Investigation

294. The Claimant has criticized the Respondent's pre-auction investigation of the allegation

²⁵⁶ Bylaws, Ex. C-1, Section 1.2(a)(v)(vi).

²⁵⁷ *Ibid*, Section 1.2 (b) (v) and (vi).

²⁵⁸ *Ibid*, Section 1.2 (b) (c).

²⁵⁹ *Ibid*, Section 3.1.

by Ruby Glen that NDC had failed properly to update its application following an alleged change of ownership or control of NDC. This allegation was prompted by Mr. Rasco's email of 7 June 2016 to Mr. Nevett, where he stated that the "powers that be" had indicated there was no change in position and that NDC would not be seeking an extension of the auction date. The Claimant strenuously argues that Mr. Rasco's representations, first to an employee of ICANN's New gTLD Operations section, Mr. Jared Erwin,²⁶⁰ and then to the Ombudsman,²⁶¹ were both misleading (in the first case) and erroneous (in the second).

295. As regards the Respondent's pre-auction investigation – on which, in the opinion of the Panel, very little turns insofar as the Respondent's core claims are concerned – the Panel accepts the evidence of Ms. Willett that prior to the auction, the Respondent was unaware of Verisign's involvement in NDC's application. Having considered the witness and documentary evidence on this question, which is preponderant, the Panel finds that the allegation presented to the Respondent was one of change of control within NDC, that it was promptly investigated by Ms. Willett's team and the Respondent's Ombudsman, and that in light of the representations made by Mr. Rasco, it was reasonable for the Respondent to conclude, as Ruby Glen and the other applicants in the contention set were advised in Ms. Willett's letter of 13 July 2016, that the Respondent "found no basis to initiate the application change request process or postpone the auction."²⁶² The Panel therefore rejects the Claimant's contention that the Respondent violated its Bylaws by the manner in which it investigated and resolved the pre-auction allegations of change of control within NDC.

3. Post-auction Actions or Inactions

(i) Overview

296. The evidence leads the Panel to a different conclusion insofar as the post-auction actions and inactions of the Respondent are concerned. What the evidence establishes is that upon it being revealed that Verisign had entered into an agreement with NDC and provided funds

²⁶⁰ Exchanges between Messrs. Erwin and Rasco, Ms. Willett's witness statement, 31 May 2019, Ex. B.

²⁶¹ Exchanges between Messrs. LaHatte and Rasco, Mr. Rasco's witness statement, 30 May 2020, Ex. N, [PDF] p. 2.

²⁶² Ms. Willett's letter to members of the .WEB/.WEBS contention set dated 13 July 2016, Ex. C-44.

in support of NDC's successful bid for .WEB, questions were immediately raised by two (2) members of the .WEB contention set as to the propriety of NDC's conduct as a gTLD applicant in light of the New gTLD Program Rules. As explained later in these reasons, the Panel accepts that these questions, including the fundamental question of whether or not the DAA violates the Guidebook and the Auction Rules, are better left, in the first instance, to the consideration of the Respondent's Staff and Board. However, it needs to be emphasized that this deference is necessarily predicated on the assumption that the Respondent will take ownership of these issues when they are raised and, subject to the ultimate independent review of an IRP Panel, will take a position as to whether the conduct complained of complies with the Guidebook and Auction Rules. After all, these instruments originate from the Respondent, and it is the Respondent that is entrusted with responsibility for the implementation of the gTLD Program in accordance with the New gTLD Program Rules, not only for the benefit of direct participants in the Program but also for the benefit of the wider Internet community.

297. The evidence in the present case shows that the Respondent, to this day, while acknowledging that the questions raised as to the propriety of NDC's and Verisign's conduct are legitimate, serious, and deserving of its careful attention, has nevertheless failed to address them. Moreover, the Respondent has adopted contradictory positions, including in these proceedings, that at least in appearance undermine the impartiality of its processes.
298. In the paragraphs below, the Panel sets out its reasons for making those findings and reaching this conclusion.

(ii) The Claimant's 8 August and 9 September 2016 Letters

299. In the first of these two (2) letters, Mr. Hemphill, at the time, Afilias' Vice President and General Counsel, makes clear that while he has not been able to review a copy of the agreement(s) between NDC and Verisign, what has been made public about the arrangements between the two (2) companies raises sufficient concerns for Afilias to "request that ICANN promptly undertake an investigation" and "take appropriate action against NDC and its .WEB application for violations of the Guidebook, as we had

requested". Mr. Hemphill concludes his letter by urging the Respondent to stay any further action in relation to .WEB and, in particular, not to act upon any request for NDC or Verisign to enter into a registry agreement for .WEB with the Respondent.²⁶³

300. The Claimant's 9 September 2016 letter, noting that the Respondent had not responded to its earlier letter of 8 August, reiterated the request that the Respondent take no steps in relation to .WEB until ICANN, its Ombudsman, or its Board had reviewed NDC's conduct and determined whether or not to disqualify NDC's bid and reject its application. The letter then proceeds to explain, in detail, the reasons why, in the opinion of Afilias, the Respondent was obliged to disqualify NDC's application and proceed to contract for .WEB with Afilias. Specifically, Afilias articulated, by reference to the New gTLD Program Rules, the Articles and the Bylaws, why it considered that NDC had violated the Guidebook and Auction Rules and why ICANN was under a duty to contract with the next highest bidder in the auction. The Claimant concluded its letter by requesting a response by no later than 16 September 2016.²⁶⁴
301. The Claimant is not the only member of the contention set that raised questions, after the auction, about the propriety of Verisign's involvement in, and support for, the application of NDC. Contemporaneously with the Claimant's letters just reviewed, on 8 August 2016 Ruby Glen filed an Amended Complaint in the proceedings it had commenced in the US District Court prior to the auction. In its Amended Complaint, Ruby Glen questioned the legality of the auction for .WEB and sought an order enjoining the execution of a registry agreement pending resolution of its claims.
302. Before coming to the Questionnaire that the Respondent sent out on 16 September 2016, in part in response to Afilias' two (2) letters, the Panel recalls that in the meantime the Respondent had initiated a dialogue directly with Verisign, when outside counsel for the Respondent communicated by telephone with Verisign's outside counsel. The exact request that was made of Verisign's counsel remains unknown. However, it is undisputed that it was prompted by the Claimant's and Ruby Glen's complaints about the propriety of

²⁶³ Afilias' letter to Mr. Atallah dated 8 August 2016, Ex. C-49, pp. 1 and 3-4.

²⁶⁴ Afilias' letter to Mr. Atallah dated 9 September 2016, Ex. C-103.

NDC's arrangements with Verisign. Why the Respondent chose to request assistance at that point directly from Verisign, a non-applicant, rather than from NDC, is a question that was largely left unaddressed apart from outside counsel for the Respondent explaining, during the hearing held in connection with Afilias' Application of 29 April 2020, that counsel knew Verisign's lead counsel from prior cases, and therefore decided to contact him.²⁶⁵

303. On 23 August 2016, in response to this request, Verisign's and NDC's counsel, unbeknownst to the Claimant and likely to the other members of the contention set (except NDC), filed a submission with the Respondent on behalf of NDC and Verisign in the form of an eight (8) page letter and five (5) attachments, one of which was the DAA. The letter states that it is being submitted in response to the request by ICANN's counsel for information regarding the agreement between NDC and Verisign relating to .WEB. Redacted - Third Party Designated Confidential Information

²⁶⁶ The *Amici's* counsel's letter was marked as "Highly Confidential – Attorneys' Eyes Only", while the attached DAA, as already mentioned, was marked as "Confidential Business Information – Do Not Disclose". The letter of 23 August 2016 sent on behalf of the *Amici* was not posted on ICANN's website or disclosed to the Claimant because of its sender's request that it be kept confidential.²⁶⁷

(iii) The 16 September 2016 Questionnaire

304. Turning to the Respondent's Questionnaire of 16 September 2016, the evidence reveals that it resulted from a collaborative effort by and between Ms. Willett, who prepared a first

²⁶⁵ Transcript of the 11 May 2020 Hearing, Ex. R-29, p. 20:12-15 (Mr. Enson: "The lawyers ... -- ICANN and Verisign had been adverse to one another on a number of occasions. The lawyers know each other well and there is nothing extraordinary or sinister about me picking up the phone to call Mr. Johnston about an issue like this.") See also the response from counsel for the Claimant: Merits hearing transcript, 3 August 2020, p. 53:1-10 (Claimant's Opening).

²⁶⁶ Arnold & Porter's letter to Mr. Enson dated 23 August 2016, Ex. C-102.

²⁶⁷ See Merits hearing transcript, 6 August 2020, pp. 690-691 (Ms. Willett).

draft of the questions, and Respondent's counsel. At that time, Ms. Willett held the position of Vice-President, gTLD Operations, Global Division of ICANN, reporting directly to Mr. Atallah.²⁶⁸ The Questionnaire was sent out to Afilias, Ruby Glen, NDC, and Verisign, under cover of a letter of even date signed by Ms. Willett.²⁶⁹ Ms. Willett was asked why the Questionnaire was not sent to all members of the contention set, but the question was objected to on the ground of privilege.

305. The Panel has already noted that Ms. Willett's cover letter refers in introduction to questions having been raised in various fora about whether NDC should have participated in the 27-28 July 2016 auction, and whether NDC's application should have been rejected. The letter goes on to note:

To help facilitate informed resolution of these questions, ICANN would find it useful to have additional information.

Accordingly, ICANN invites Ruby Glen, NDC, Afilias, and Verisign, Inc. (Verisign) to provide information and comment on the topics listed in the attached. Please endeavor to respond to all of the topics/questions for which you have information to do so. To allow ICANN promptly to evaluate these matters, please provide response [...] no later than 7 October 2016.²⁷⁰

306. Ms. Willett was asked what she meant when she stated that the Respondent was seeking information to facilitate "informed resolution". It was put to her that this "sounds like an investigation at the end of which ICANN would resolve the questions that had been raised". In response, Ms. Willett denied that she was undertaking an investigation, and stated that the responses eventually received to the Questionnaire were simply passed on to counsel.²⁷¹

307. The Questionnaire is six (6) pages long and lists twenty (20) "topics" on which the entities to which it was addressed are invited to comment. The introductory paragraph echoes Ms. Willett's cover letter in stating that "all responses to these questions will be taken into

²⁶⁸ Merits hearing transcript, 5 August 2020, p. 545 (Ms. Willett). Ms. Willett left the employ of the Respondent in December 2019.

²⁶⁹ ICANN's letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50.

²⁷⁰ *Ibid*, p. 1 [emphasis added].

²⁷¹ Merits hearing transcript, 6 August 2020, pp. 696-697 (Ms. Willett): "[...] I was not undertaking an investigation. ICANN counsel handled and administered the CEP process. So the responses which I received to these letters I passed along to counsel."

consideration in ICANN’s evaluation of the issues raised [...]”.²⁷²

308. As already noted, while the Respondent, NDC and Verisign had knowledge of the terms of the DAA at that time, Afilias and Ruby Glen did not. It seems to the Panel evident that this asymmetry of information put Afilias and Ruby Glen at a significant disadvantage in addressing the topics listed in the Questionnaire in the context of “ICANN’s evaluation of the issues raised”. By way of example, the first topic asked for evidence regarding whether ownership or control of NDC changed after NDC applied for .WEB. The Respondent, NDC and Verisign were able to comment on the alleged change of ownership or control resulting from the contractual arrangements between the *Amici* by reference to the actual terms of the DAA. However, Afilias and Ruby Glen were not.
309. Other topics in the Questionnaire would attract very different answers depending on whether the responding party had knowledge of the terms of the DAA. By way of examples:

4. In his 8 August 2016, letter, Scott Hemphill stated: “A change in control can be effected by contract as well as by changes in equity ownership.” Do you think that an applicant’s making a contractual promise to conduct particular activities in which it is engaged in a particular manner constitutes a “change in control” of the applicant? Do you think that compliance with such a contractual promise constitutes such a change in control? Please give reasons.

5. Do you think that AGB Section 1.2.7 requires an applicant to disclose to ICANN all contractual commitments it makes to conduct its affairs in particular ways? If not, in what circumstances (if any) would disclosure be required? [...]

7. Do you think that changes to an applicant’s financial condition that do not negatively reflect on an applicant’s qualifications to operate the gTLD should be deemed material? If so, why? Do you think that an applicant’s obtaining a funding commitment from a third party to fund bidding at auction negatively affects that applicant’s qualifications to operate the gTLD? Please explain why, describing your view of the relevance of (a) the funding commitment the applicant received and (b) the consideration the applicant gave to obtain that commitment (e.g., a promise to repay; a promise to use a particular backend provider; an option to receive some ownership interest in the applicant in the future; some promise about how the gTLD will be operated).[...]

9. Do you think that requiring applicants to disclose funding commitments (whether through loans, contributions from affiliated companies, or otherwise) they obtain for auction bids would help or harm the auction process? Would a requirement that applicants disclose their funding arrangements create problems for applicants (for example, making funding commitments harder to obtain)? To what extent, if any, do you think scrutinizing such arrangements (beyond determining whether they negatively reflect on an applicant’s

²⁷² ICANN’s letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50, p. 2 [emphasis added].

qualifications) would be within ICANN's proper mission? Would required disclosure of applicants' funding sources pose any threat to robust competition?

310. Another noteworthy feature of the Questionnaire is that while it contains many references to Mr. Hemphill's letters, it does not refer to the letter of 23 August 2016 from counsel for the *Amici*, nor in terms to the DAA. This was because one and the other had been marked confidential when submitted to the Respondent. Ms. Willett was asked about ICANN's practice when presented with a request to keep correspondence confidential:

[...] our practice was that we respected those requests for confidentiality and we did not post those -- such correspondences, with one exception.

At some point if some other party asked for something to be published or it became desirable and relevant to something else, I recall, again, it's been years, so I don't recall a specific example, but as a general practice, I recall that ICANN might ask the sender if it would be possible to publish a letter, but we respected their requests for confidential correspondence.²⁷³

311. The Panel is of the view that the Respondent could have, and ought to have requested Verisign and NDC for authorization to disclose the DAA to the other addresses of its Questionnaire, be it on an "external counsel's eyes only" basis. There is no evidence that this possibility was explored. It seems to the Panel that in the context of an information gathering exercise such as that in which the Respondent chose to engage with its Questionnaire, it would have been, to quote Ms. Willett's evidence, both "desirable" and "relevant" to do so. The Panel also believes that ICANN's evaluation of the issues would have been better informed had Afiliias and Ruby Glen been given an opportunity to know, and address directly, the arguments advanced on behalf of the *Amici* in response to the concerns they had raised. At the very least, the Respondent could have disclosed that the Questionnaire had been prepared with knowledge of the terms of the DAA, which would have given interested parties an opportunity to seek to obtain a copy of the agreement, either voluntarily by requesting it from the *Amici*, or through compulsion by available legal means.
312. The foregoing leads the Panel to find that the preparation and issuance of the Respondent's Questionnaire in the circumstances just reviewed violated the Respondent's commitment,

²⁷³ Merits hearing transcript, 6 August 2020, pp. 690-691 (Ms. Willett).

under the Bylaws, to operate in an open and transparent manner and consistent with procedures designed to ensure fairness.

313. As noted, Afilias, NDC and Verisign forwarded responses to the Questionnaire, but Ruby Glen did not. Ms. Willett testified that she passed on the responses she received to ICANN's legal team, without undertaking her own analysis. She was not sure what counsel did with them.²⁷⁴ As for any external follow-up, it is common ground that no feedback whatsoever was given to the Claimant of the Respondent's evaluation of these responses.

(iv) The Respondent's Letter of 30 September 2016

314. In the meantime, on 30 September 2016, Mr. Atallah, on behalf of the Respondent, acknowledged receipt of Afilias' 8 August and 9 September 2016 letters and, as found by the Panel when considering the Respondent's time limitations defence, represented in explicit terms that the Respondent's consideration of this matter was continuing. It bears noting that in 2016, Mr. Atallah was President of the Respondent's Global Domains Division, reporting to the CEO, and was the person responsible for overseeing the administration of the New gTLD Program.²⁷⁵

(v) Findings as to the Seriousness of the Issues Raised by the Claimant, and the Respondent's Representation that It Would Evaluate Them

315. In the Panel's opinion, the implication of the Respondent's decision to prepare and send out its 16 September 2016 Questionnaire, and of Mr. Atallah's letter of 30 September 2016 in response to the Claimant's letters of 8 August and 9 September 2016, was that the questions raised by the Claimant and Ruby Glen in connection with NDC's conduct and the latter's arrangements with Verisign were serious and deserving of the Respondent's consideration. This was admitted by the Respondent in its pleadings in this IRP, where the

²⁷⁴ Merits hearing transcript, 6 August 2020, pp. 719-720 (Ms. Willett).

²⁷⁵ Merits hearing transcript, 7 August 2020, pp. 917-918 (Mr. Disspain).

Respondent averred:

[...] ...determining that NDC violated the Guidebook is not a simple analysis that is answered on the face of the Guidebook. There is no Guidebook provision that squarely addresses an arrangement like the DAA. A true determination of whether there was a breach of the Guidebook requires an in-depth analysis and interpretation of the Guidebook provisions at issue, their drafting history to the extent it exists, how ICANN has handled similar situations, and the terms of the DAA. This analysis must be done by those with the requisite knowledge, expertise, and experience, namely ICANN.²⁷⁶

316. In making its finding as to the seriousness of the questions raised by the Claimant, the Panel is mindful of Ms. Willett’s evidence when asked, in cross-examination, whether she considered that the concerns that Afilias had raised were serious. Her answer was that she “considered them to be sour grapes”, and she admitted that she may have shared that view with others within ICANN.²⁷⁷ However, Ms. Willett having testified that she never even read the DAA when these events were unfolding, nor had she read the 23 August 2016 letter sent to the Respondent on behalf of the *Amici*, the Panel must conclude that her stated view was more in the nature of a personal impression than a considered opinion. Moreover, in all appearance her impression was not shared by those who invested time in assisting her preparing the Questionnaire, or by Mr. Atallah who subsequently confirmed that ICANN was continuing to consider the questions raised by the Claimant. In any event, and as just seen, it is not the position formally adopted by the Respondent in this IRP.
317. The questions raised by the Claimant that are, in the opinion of the Panel, serious and deserving of the Respondent’s consideration, include the following, which the Panel merely cites as examples:
- Whether, in entering into the DAA, NDC violated the Guidebook and, more particularly, the section providing that an “Applicant may not resell, assign, or transfer any of applicant’s rights or obligations in connection with the application”.
 - Whether the execution of the DAA by NDC constituted a “change in circumstances

²⁷⁶ Respondent’s Rejoinder, para. 82.

²⁷⁷ Merits hearing transcript, 6 August 2020, p. 746 (Ms. Willett).

that [rendered] any information provided in the application false and misleading”.

- Whether by entering into the DAA after the deadline for the submission of applications for new gTLDs, and by agreeing with NDC provisions designed to keep the DAA strictly confidential, Verisign impermissibly circumvented the “roadmap” provided for applicants under the New gTLD Program Rules, and in particular the public notice, comment and evaluation process contemplated by these Rules.

318. The Panel expresses no view on the answers that should be given to those questions and the other questions arising from the execution of the DAA by NDC and Verisign, other than to reiterate, as acknowledged by the Respondent, that they are deserving of careful consideration.

319. The Panel has no hesitation in finding, based on the above, that that the Respondent represented by its conduct that the questions raised by the Claimant and “others in the contention set” were worthy of the Respondent’s consideration, and that the Respondent would consider, evaluate, and seek informed resolution of the issues arising therefrom. By reason of this conduct on the part of the Respondent, the Panel cannot accept the Respondent’s contention that there was nothing for the Respondent to consider, decide or pronounce upon in the absence of a formal accountability mechanism having been commenced by the Claimant. The fact of the matter is that the Respondent *represented* that it would consider the matter, and made that representation at a time when Ms. Willett confirmed the Claimant had no pending accountability mechanism.²⁷⁸ Moreover, since the Respondent is responsible for the implementation of the New gTLD Program in accordance with the New gTLD Program Rules, it would seem to the Panel that the Respondent itself had an interest in ensuring that these questions, once raised, were addressed and resolved. This would be required not only to preserve and promote the integrity of the New gTLD

²⁷⁸ Merits hearing transcript, 6 August 2020, p. 745 (Ms. Willett).

Program, but also to disseminate the Respondent’s position on those questions within the Internet community and allow market participants to act accordingly.

(vi) The November 2016 Board Workshop

320. The Panel comes to the November 2016 Workshop session at which “the Board chose not to take any action at that time regarding .WEB because an Accountability Mechanism was pending regarding .WEB.”²⁷⁹
321. The existence of this November 2016 Workshop was revealed for the first time in the Respondent’s Rejoinder, filed on 1 June 2020. For example, no mention of it is made in the chronology of events contained in the Respondent’s Response,²⁸⁰ where it was merely pleaded, with no reference to the workshop session, that the Board had not yet had an opportunity to fully address the issues being pursued by Afiliis in this IRP and that “[d]eferring such consideration until this Panel renders its final decision is well within the realm of reasonable business judgment.”²⁸¹
322. The Panel had the benefit of hearing the evidence of two (2) witnesses who were in attendance at the November 2016 Workshop: Mr. Disspain, a long-standing member of ICANN’s Board, and Ms. Burr, who attended the workshop as an observer shortly before being herself appointed to the Board. Both of these witnesses are intimately familiar with the Respondent and its processes, and both testified openly and credibly.
323. This is how Mr. Disspain described the November 2016 Workshop session in his witness statement:

10. In November 2016, the Board received a briefing from ICANN counsel on the status of, and issues being raised regarding, .WEB. The communications during that session, in which ICANN’s counsel, John Jeffrey (ICANN’s General Counsel) and Amy Stathos (ICANN’s Deputy General Counsel), were integrally involved, are privileged and, thus, I will not disclose details of those discussions so as to avoid waiving the privilege. I recall that, prior to this session, the Board received Board briefing materials directly from ICANN’s counsel that set forth relevant information about the disputes regarding .WEB, the parties’ legal and factual contentions and a set of options the Board could consider.

²⁷⁹ Respondent’s Rejoinder, paras. 40-41.

²⁸⁰ Respondent’s Response, paras. 40-54.

²⁸¹ Respondent’s Response, para. 66.

During the session, Board members discussed these topics and asked questions of, and received information and advice from, ICANN’s counsel.

11. At the November 2016 session, the Board chose not to take any action at that time regarding the claims arising from the .WEB auction, including the claim that, by virtue of the agreement between Verisign and NDC, NDC had committed violations of the Applicant Guidebook which merited the disqualification of its application for .WEB and the rejection of its winning bid. Given the Accountability Mechanisms that had already been initiated over .WEB, and given the prospect of further Accountability Mechanisms and legal proceedings, the Board decided to await the results of such proceedings before considering and determining what action, if any, to take at that time. [...]

324. In the course of his cross-examination, Mr. Disspain had the opportunity to add the following to the evidence set out in his witness statement:

- The workshop session of 3 November 2016 was separate and distinct from the actual Board meeting, which took place on 5 November 2016.²⁸²
- The session was attended by a significant number of Board members, in his estimation more than 50%.²⁸³ Also in attendance were ICANN’s CEO, its in-house lawyers, and likely Mr. Atallah.²⁸⁴
- The letters that Afiliis had sent Mr. Atallah were known to those in attendance and “would have been part of the briefing”;²⁸⁵ the Questionnaire prepared by ICANN in response to these letters was also known.²⁸⁶ However, the DAA, the 23 August 2016 letter sent on behalf of the *Amici*, and the Questionnaire were not part of the briefing materials.²⁸⁷

²⁸² Merits hearing transcript, 7 August 2020, pp. 918-919 (Mr. Disspain).

²⁸³ *Ibid*, p. 923 (Mr. Disspain).

²⁸⁴ Merits hearing transcript, 7 August 2020, p. 924 (Mr. Disspain).

²⁸⁵ Merits hearing transcript, 7 August 2020, p. 917 (Mr. Disspain).

²⁸⁶ Merits hearing transcript, 7 August 2020, p. 928 (Mr. Disspain).

²⁸⁷ Merits hearing transcript, 7 August 2020, pp. 930-931 (Mr. Disspain).

- There was a full and open discussion, that likely lasted more than fifteen (15) minutes.
- Rather than “proactively decide” or “agree” its course of action, the Board “made a choice” to follow its longstanding practice of not doing anything when there is a pending outstanding accountability mechanism.²⁸⁸
- The Board made this choice without the need for a vote, straw poll or show of hands.²⁸⁹

325. Ms. Burr explained that Board workshops are informal working sessions. A quorum is not required, attendance is not taken, nor are minutes prepared or resolutions passed.²⁹⁰

326. It is common ground that the choice, or decision, made by the Board at its November 2016 Workshop session was not communicated to Afilias or otherwise made public. In response to a question from the Panel, Mr. Disspain indicated that the question of whether the Board’s 3 November 2016 decision would or would not be communicated to the members of the .WEB contention set was not discussed at the workshop session.²⁹¹ Indeed, Mr. Disspain only became aware through his involvement in this IRP that the November 2016 Board decision to defer consideration of the issues raised in relation to .WEB was only communicated to the Claimant – and made public – when it was revealed in the Respondent’s Rejoinder.

327. Mr. Disspain was invited by the Panel to confirm that after the November 2016 Board workshop, he knew that the question of whether NDC’s bid was compliant with the New gTLD Program Rules had been raised by Afilias and was a “pending question, one on which the Board had not pronounced and had decided not to address.” [emphasis added]

²⁸⁸ Merits hearing transcript, 7 August 2020, pp. 938-939 (Mr. Disspain).

²⁸⁹ Merits hearing transcript, 7 August 2020, p. 935 (Mr. Disspain).

²⁹⁰ Merits hearing transcript, 4 August 2020, pp. 282-286 (Ms. Burr).

²⁹¹ Merits hearing transcript, 7 August 2020, p. 975 (Mr. Disspain).

Mr. Disspain provided this confirmation. The Panel can safely assume that what was true for Mr. Disspain was equally true for his fellow Board members who were in attendance at the workshop.

328. The Respondent urges that it was not a violation of the Respondent’s Bylaws for the Board, on 3 November 2016, to defer consideration of the complaints that had been raised in relation to NDC’s application and auction bids for .WEB. It is common ground that there were Accountability Mechanisms in relation to .WEB pending at the time, and it seems to the Panel reasonable for the Board to have decided to await the outcome of these proceedings before considering and determining what action, if any, it should take. The Panel notes that it reaches that conclusion without needing to rely on the provisions of Section 4.3(i)(iii) of the Bylaws, and determining whether or not that decision involved the Board’s exercise of its fiduciary duties.
329. The Panel does find, however, that it was a violation of the commitment to operate “in an open and transparent manner and consistent with procedures to ensure fairness”²⁹² for the Respondent to have failed to communicate the Board’s decision to the Claimant. As noted already, the Respondent had clearly represented in its letters of 16 and 30 September 2016 that it would evaluate the issues raised in connection with NDC’s application and auction bids for .WEB. Since the Board’s decision to defer consideration of these issues contradicted the Respondent’s representations, it was incumbent upon the Respondent to communicate that decision to the Claimant.

(vii) The Respondent’s Decision to Proceed with Delegation of .WEB to NDC in June 2018

330. Mr. Disspain confirmed that by early 2018, the situation as described in paragraph 327 above “remained unchanged.”²⁹³ That is, the question of whether NDC’s bid, post-DAA, was compliant with the New gTLD Program Rules had been raised and remained a pending question on which the Board had yet to pronounce. The extent to which the Respondent’s

²⁹² See Bylaws Ex. C-1, Art. 3.

²⁹³ Merits hearing transcript, 7 August 2020, pp. 976-977 (Mr. Disspain).

Staff had, by early 2018, progressed in their consideration of the questions that had been raised by the Claimant, if at all, is unknown. However, the evidence establishes that no determination of these questions was communicated to the Claimant, and that neither those questions nor any Staff position in relation thereto were brought back to the Board for its consideration. Ms. Willett explained in the course of her cross-examination that the on-hold status of an application or contention set does not mean “that all work ceases”, or that the Respondent is prevented from continuing to gather information.²⁹⁴ Hence, the fact that the contention set was on hold throughout the period from November 2016 to June 2018 would not justify the lack of progress in evaluating the issues that had been raised in connection with .WEB.

331. This brings the Panel to considering the Respondent’s decision to put the .WEB contention set “off hold” on 6 June 2018, the day after Afiliat’s Reconsideration Request 18-7 was denied.²⁹⁵ As seen, this immediately set back in motion the Respondent’s internal process leading to the execution of a registry agreement. On 12 June 2018, Ms. Willett and other ICANN staff approved a draft registry agreement for .WEB; the registry agreement was forwarded for execution to NDC on 14 June 2018; the agreement was promptly signed and returned to ICANN and, on the same day, ICANN’s Staff approved executing the .WEB Registry Agreement with NDC on behalf of ICANN.
332. In the opinion of the Panel, the Respondent’s decision to move to delegation without having pronounced on the questions raised in relation to .WEB was inconsistent with the representations made in Ms. Willett’s letter of 16 September 2016, the text in the introduction to the attached Questionnaire,²⁹⁶ and Mr. Atallah’s letter of 30 September 2016.²⁹⁷ The Panel also finds this conduct to be inconsistent with the Board’s decision of 3 November 2016 which, while it deferred consideration of the .WEB issues, nevertheless acknowledged that they were deserving of consideration, a position reiterated

²⁹⁴ Merits hearing transcript, 6 August 2020, pp. 697-698 (Ms. Willett).

²⁹⁵ See above, para. 117.

²⁹⁶ ICANN’s letter to Mr. Kane dated 16 September 2016 and attached Questionnaire, Ex. C-50.

²⁹⁷ ICANN’s letter to Mr. Hemphill dated 30 September 2016, Ex. C-61.

by the Respondent in this IRP.

333. Mr. Disspain testified about the Respondent's decision to put the contention set off hold in June 2018. While he had made the point in his witness statement that this was a decision made by ICANN's Staff,²⁹⁸ he confirmed at the hearing that the Board was aware, ahead of time, that the .WEB contention set would be put off hold. He added, however, that he and his fellow Board members fully expected the Claimant to make good on its promise to initiate an IRP, which would result in the contention set being put back on hold.²⁹⁹
334. Mr. Disspain was asked by the Panel what would the Board have done had the Claimant, contrary to his and his colleagues' expectation, *not* initiated an IRP. Might that not have resulted in a registry agreement for .WEB being signed by the Staff on behalf of the Respondent without the Board having the opportunity to address the questions it had chosen to defer in November 2016? Mr. Disspain, understandably, did not want to speculate as to what the Board would have done.³⁰⁰ However, when shown internal correspondence evidencing that signature of the registry agreement for .WEB on behalf of ICANN had in fact been approved by ICANN's Staff after receipt of the executed copy of the agreement by NDC, he did confirm that Board approval is not required for the execution of a registry agreement by ICANN.³⁰¹ Thus, clearly, a registry agreement with NDC for .WEB could have been executed by ICANN's Staff and come into force without the Board having pronounced on the propriety of the DAA under the Guidebook and Auction Rules.
335. In the course of her examination, Ms. Willett was asked the following hypothetical question:

[PANEL MEMBER]: [...] If [...] an applicant had failed to respect the guidebook, but there had been no accountability mechanism to complain about that noncompliance, would you, by reason of the absence of an accountability mechanism, have sent a draft Registry Agreement for execution?

²⁹⁸ Mr. Disspain's witness statement, 1 June 2020, para. 13.

²⁹⁹ Merits hearing transcript, 7 August 2020, pp. 978-980 (Mr. Disspain).

³⁰⁰ *Ibid.*, pp. 981-982 (Mr. Disspain).

³⁰¹ *Ibid.*, pp. 1002-1004 (Mr. Disspain).

THE WITNESS: No, I don't believe we would have. If we determined that an applicant had violated the terms of the guidebook, I don't believe that my team and I would have given our approvals to proceed with contracting.³⁰²

336. In the Panel's view, Ms. Willett's evidence in answer to this question reflects the kind of ownership of compliance issues with the New gTLD Program Rules that the Respondent did not display in its dealing with the concerns raised in connection with NDC's arrangements with Verisign.
337. The Panel observes that the Respondent's Staff's failure to take a position on the question of whether the DAA complies with the New gTLD Program Rules before moving to delegation stands in contrast with the resolution that was brought to the pre-auction allegation of change of control within NDC, which had also been raised, initially, in correspondence. Ms. Willett confirmed in her evidence that the Respondent's pre-auction investigation was prompted by Ruby Glen's email of 23 June 2016.³⁰³ Once the investigation was completed, Ms. Willett informed Ruby Glen of ICANN's decision³⁰⁴ and advised Ruby Glen that if dissatisfied with the decision, it could invoke ICANN's accountability mechanisms.³⁰⁵ No such decision was made by ICANN's Staff in relation to the issues raised by the Claimant that could have formed the basis for a formal accountability mechanism, in the context of which positions would have been adopted, battle lines would have been drawn, and an adversarial process such as an IRP would have resulted in a reasoned decision binding on the parties.
338. What the Panel has described as a failure on the part of the Respondent to take ownership of the issues arising from the concerns raised by the Claimant and Ruby Glen finds expression in the Respondent's submission in this IRP that the dispute arising out of NDC's arrangement with Verisign is in reality a dispute between the Claimant and the *Amici*. For example, the Respondent writes in its Response:

³⁰² Merits hearing transcript, 6 August 2020, pp. 749-750 (Ms. Eisner).

³⁰³ Merits hearing transcript, 6 August 2020, p. 617 (Ms. Willett).

³⁰⁴ See Ms. Willett's letter to members of the .WEB/.WEBS contention set dated 13 July 2016, Ex. C-44.

³⁰⁵ Merits hearing transcript, 6 August 2020, pp. 621-622 (Ms. Willett).

[...] the Guidebook breaches that Afiliás alleges are the subject of good faith dispute by NDC and Verisign, both of which are seeking to participate in this IRP pursuant to their *amicus* applications. [...] While Afiliás' Amended IRP Request is notionally directed at ICANN, it is focused exclusively on the conduct of NDC and Verisign, to which NDC and Verisign have responses. [...]³⁰⁶

339. Another example can be found in the Respondent's post-hearing brief where it is stated:

The testimony at the hearing established that there is a good-faith and fundamental dispute between *Amici* and *Afiliás* about whether the DAA violated the Guidebook or Auction Rules, meaning that reasonable minds could differ on whether NDC is in breach of either and, if so, whether this qualification is the appropriate remedy. Accordingly, Afiliás' additional argument that ICANN can only exercise its discretion reasonably by disqualifying NDC must be rejected.³⁰⁷

340. It may be fair to say, as averred in the Respondent's Response, that "ICANN has been caught in the middle of this dispute between powerful and well-funded businesses".³⁰⁸ However, in the Panel's view, it is not open to the Respondent to add, as it does in the same sentence of its Response, "[and ICANN] has not taken sides", as if the Respondent had no responsibility in bringing about a resolution of the dispute by itself taking a position as to the propriety of NDC's arrangements with Verisign.

341. In the opinion of the Panel, there is an inherent contradiction between proceeding with the delegation of .WEB to NDC, as the Respondent was prepared to do in June 2018, and recognizing that issues raised in connection with NDC's arrangements with Verisign are serious, deserving of the Respondent's consideration, and remain to be addressed by the Respondent and its Board, as was determined by the Board in November 2016. A necessary implication of the Respondent's decision to proceed with the delegation of .WEB to NDC in June 2018 was some implicit finding that NDC was not in breach of the New gTLD Program Rules and, by way of consequence, the implicit rejection of the Claimant's allegations of non-compliance with the Guidebook and Auction Rules. This is difficult to reconcile with the submission that "ICANN has taken no position on

³⁰⁶ See Respondent's Response, para. 63.

³⁰⁷ Respondent's PHB, para. 90 [emphasis added].

³⁰⁸ Respondent's Response, para. 4.

whether NDC violated the Guidebook”.³⁰⁹

342. The same can be said of the Respondent taking the position, shortly after Afiliias filed its IRP, that it would only keep the .WEB contention set on hold until 27 November 2018, so as to allow the Claimant to file a request for interim relief, barring which the Respondent would take the contention set off hold.³¹⁰ It seems to the Panel that the Respondent was once again adopting a position that could have resulted in .WEB being delegated to NDC without the Board having determined whether NDC’s arrangements with Verisign complied within the New gTLD Program Rules.
343. The Panel also finds it contradictory for the Respondent to assert in pleadings before this Panel that the Respondent has not yet considered the Claimant’s complaints, having represented to the Emergency Panelist earlier in these proceedings that ICANN “ha[d] evaluated these complaints” and that the “time ha[d] therefore come for the auction results to be finalized and for .WEB to be delegated so that it can be made available to consumers”.³¹¹
344. In sum, the Panel finds that it was inconsistent with the representations made to the Claimant by ICANN’s Staff, and the rationale of the Board’s decision, in November 2016, to defer consideration of the issues raised in relation to NDC’s application for .WEB, for the Respondent’s Staff, to the knowledge of the Respondent’s Board, to proceed to delegation without addressing the fundamental question of the propriety of the DAA under the New gTLD Program Rules. The Panel finds that in so doing, the Respondent has violated its commitment to make decisions by applying documented policies objectively and fairly.
345. As a direct result of the foregoing, the Panel has before it a party – the Claimant – attacking a decision – the Respondent’s failure to disqualify NDC’s application and auction bids – that the Respondent insists it has not yet taken. Moreover, the Panel finds itself in the

³⁰⁹ Respondent’s Rejoinder, para. 81.

³¹⁰ See Decision on Phase I, para. 40.

³¹¹ ICANN’s Opposition to Afiliias Domains No. 3 LTD.’s Request for Emergency Panelist and Interim Measures of Protection, para. 3.

unenviable position of being presented with allegations of non-compliance with the New gTLD Program Rules in circumstances where the Respondent, the entity with primary responsibility for this Program, has made no first instance determination of these allegations, whether through actions of its Staff or Board, and declines to take a position as to the propriety of the DAA under the Guidebook and Auction Rules in this IRP. The Panel addresses these peculiar circumstances further in the section of this Final Decision addressing the proper relief to be granted.

(viii) Other Related Claims

346. In addition to what the Panel has described as the Claimant’s core claims, the Claimant has advanced a number of related claims, including that the Respondent violated its Articles and Bylaws through its disparate treatment of Afilias and Verisign, and by failing to enable and promote competition in the DNS.
347. As regards the allegation of disparate treatment, it rests for the most part on facts already considered by the Panel in analysing the Claimant’s core claims, such as turning to Verisign rather than NDC to obtain information about NDC’s arrangements with Verisign, allowing for asymmetry of information to exist between the recipients of the 16 September 2016 Questionnaire, delaying providing a response to Afilias’ letters of 8 August and 9 September 2016, submitting Rule 4 for adoption in spite of it being the subject of an ongoing public comment process, and making that rule retroactive so as to encompass the Claimant’s claims within its reach. Accordingly, the Panel does not consider it necessary, based on the allegation of disparate treatment, to add to its findings in relation to the Claimant’s core claims.
348. Turning to the claim that the Respondent failed to enable and promote competition in the DNS, it was summarized in the Claimant’s PHB as the contention that “to the extent ICANN has discretion regarding the enforcement of the New gTLD Program Rules, ICANN may not exercise its discretion in a manner that would be inconsistent with its competition mandate (or with its other Articles and Bylaws).”³¹² As seen, the Respondent

³¹² Claimant’s PHB, para. 145.

has not as yet exercised whatever discretion it may have in enforcing the New gTLD Program Rules in relation to .WEB, and therefore this claim, as just summarized, appears to the Panel to be premature.

349. For reasons expressed elsewhere in this Final Decision, the Panel is of the opinion that it is for the Respondent to decide, in the first instance, whether NDC violated the Guidebook and Auction Rules and, assuming the Respondent determines that it did, what consequences should follow. Likewise, the Respondent is invested with the authority to approve an eventual transfer of a possible registry agreement for .WEB from NDC to Verisign, which it may or may not be called upon to exercise depending on whether NDC's application is rejected and its bids disqualified. That said, and even though it is not strictly necessary to decide the question, the Panel accepts the submission that ICANN does not have the power, authority, or expertise to act as a competition regulator by challenging or policing anticompetitive transactions or conduct. Compelling evidence to that effect was presented by Ms. Burr and Mr. Kneuer, supported by Mr. Disspain, and it is consistent with a public statement once endorsed by the Claimant, in which it was asserted:

While ICANN's mission includes the promotion of competition, this role is best fulfilled through the measured expansion of the name space and the facilitation of innovative approaches to the delivery of domain name registry services. *Neither ICANN nor the GNSO have the authority or expertise to act as anti-trust regulators.* Fortunately, many governments around the world do have this expertise and authority, and do not hesitate to exercise it in appropriate circumstances.³¹³

350. As noted in the History of the Proceedings section of this Final Decision,³¹⁴ the Parties came to the understanding that it would be for this Panel to determine the Claimant's Request for Emergency Interim Relief upon the Respondent agreeing that the .WEB gTLD contention set would remain on hold until the conclusion of this IRP. For the reasons set out in the section of this Final Decision analysing the Claimant's cost claim,³¹⁵ the Panel is of the view that the Claimant's Request for Emergency Interim Relief was well founded, and that it should be granted with effect until such time as the Respondent has considered

³¹³ Registry Operators' Submission Re: Objections to the Proposed Versign Settlement, Ex. R-21, p. 8 [emphasis added].

³¹⁴ See above, para. 40.

³¹⁵ See below, paras. 402-407.

the present Final Decision.

351. As regards the Donuts transaction of 29 December 2020, the Panel does not consider it relevant to the issues determined in this Final Decision. It will be for the Respondent to consider, in the first instance, whether this transaction is of relevance to the Claimant's request that following a possible disqualification of NDC's bid for .WEB, the Respondent must, in accordance with the New gTLD Program Rules, contract the Registry Agreement for .WEB with the Claimant.

E. The Rule 7 Claim

352. The Panel recalls that the Rule 7 Claim was first raised as a defence to the *Amici's* requests, based on Rule 7 of the Interim Procedures, to participate in this IRP as *amici curiae*. In its Decision on Phase I, the Panel granted the *Amici's* requests – subject to modalities set out in that decision – and, to the extent the Claimant wished to maintain its Rule 7 Claim, joined those aspects of the claim over which the Panel found it has jurisdiction to the claims to be decided in Phase II. The *Amici* have since participated in this IRP to the full extent permitted by the Decision on Phase I, as described in earlier sections of this Final Decision.
353. The Panel included in its list of questions to be addressed in post-hearing briefs a request to the Claimant to clarify what remained to be decided in connection with its Rule 7 Claim given the Decision on Phase I and the conduct of the IRP in accordance with that ruling. The Claimant's response is that the Rule 7 Claim remains relevant to justify an award of costs in its favour.
354. As explained in the sections of this Final Decision dealing, respectively, with the designation of the prevailing party and the Claimant's cost claim, there is, in the opinion of the Panel, no basis on which the Claimant could be awarded costs in relation to Phase I or in relation to the outstanding aspects of the Rule 7 Claim. This being so, it is the Panel's opinion that no useful purpose would be served by the Rule 7 Claim being addressed beyond the findings and observations contained in the Panel's Decision on Phase I, which the Respondent's Board has no doubt reviewed and can act upon, as appropriate. The Panel wishes to make clear that in making this Final Decision, the Panel expresses no view on

the merit of those outstanding aspects of the Rule 7 Claim over which the Panel found that it has jurisdiction, beyond that expressed in paragraph 408 of these reasons.

F. Determining the Proper Relief

355. The remedial authority of IRP Panels is set out in Section 4.3(o) of the Bylaws, which reads as follows:

(o) Subject to the requirements of this Section 4.3, each IRP Panel shall have the authority to:

(i) Summarily dismiss Disputes that are brought without standing, lack substance, or are frivolous or vexatious;

(ii) Request additional written submissions from the Claimant or from other parties;

(iii) Declare whether a Covered Action constituted an action or inaction that violated the Articles of Incorporation or Bylaws, declare whether ICANN failed to enforce ICANN's contractual rights with respect to the IANA Naming Function Contract or resolve PTI service complaints by direct customers of the IANA naming functions, as applicable;

(iv) Recommend that ICANN stay any action or decision, or take necessary interim action, until such time as the opinion of the IRP Panel is considered;

(v) Consolidate Disputes if the facts and circumstances are sufficiently similar, and take such other actions as are necessary for the efficient resolution of Disputes;

(vi) Determine the timing for each IRP proceeding; and

(vii) Determine the shifting of IRP costs and expenses consistent with Section 4.3(r).

[emphasis in the original]

356. Of relevance to situating the remedial authority of IRP Panels in their proper context are the provisions of Section 4.3(x), which it is useful to cite in full:

(x) The IRP is intended as a final, binding arbitration process.

(i) IRP Panel decisions are binding final decisions to the extent allowed by law unless timely and properly appealed to the en banc Standing Panel. En banc Standing Panel decisions are binding final decisions to the extent allowed by law.

(ii) IRP Panel decisions and decisions of an en banc Standing Panel upon an appeal are intended to be enforceable in any court with jurisdiction over ICANN without a *de novo* review of the decision of the IRP Panel or en banc Standing Panel, as applicable, with respect to factual findings or conclusions of law.

(iii) ICANN intends, agrees, and consents to be bound by all IRP Panel decisions of Disputes of Covered Actions as a final, binding arbitration.

(A) Where feasible, the Board shall consider its response to IRP Panel decisions at the Board's next meeting, and shall affirm or reject compliance with the decision on the public record based on an expressed rationale. The decision of the IRP Panel, or en banc Standing Panel, shall be final regardless of such Board action, to the fullest extent allowed by law.

(B) If an IRP Panel decision in a Community IRP is in favor of the EC, the Board shall comply within 30 days of such IRP Panel decision.

(C) If the Board rejects an IRP Panel decision without undertaking an appeal to the en banc Standing Panel or rejects an en banc Standing Panel decision upon appeal, the Claimant or the EC may seek enforcement in a court of competent jurisdiction. In the case of the EC, the EC Administration may convene as soon as possible following such rejection and consider whether to authorize commencement of such an action.

(iv) By submitting a Claim to the IRP Panel, a Claimant thereby agrees that the IRP decision is intended to be a final, binding arbitration decision with respect to such Claimant. Any Claimant that does not consent to the IRP being a final, binding arbitration may initiate a non-binding IRP if ICANN agrees; provided that such a non-binding IRP decision is not intended to be and shall not be enforceable.

[italics in the original]

357. The Panel also notes the provisions of Section 4.3(t) which, among others, require each IRP Panel decision to “specifically designate the prevailing party as to each part of a Claim”.
358. In the opinion of the Panel, the Claimant is entitled to a declaration that the Respondent violated its Articles and Bylaws to the extent found by the Panel in the previous sections of this Final Decision, and to being designated the prevailing party in respect of the liability portion of its core claims.
359. As foreshadowed earlier in these reasons, the Panel is firmly of the view that it is for the Respondent, that has the requisite knowledge, expertise, and experience, to pronounce in the first instance on the propriety of the DAA under the New gTLD Program Rules, and on the question of whether NDC’s application should be rejected and its bids at the auction disqualified by reason of its alleged violations of the Guidebook and Auction Rules.
360. The Panel also accepts the Respondent’s submission that it would be improper for the Panel to dictate what should be the consequence of NDC’s violation of the New gTLD Program

Rules, assuming a violation is found. The Panel is mindful of the Claimant’s contention that whatever discretion the Respondent may have is necessarily constrained by the Respondent’s obligation to enforce the New gTLD Program Rules objectively and fairly. Nevertheless, the Respondent does enjoy some discretion in addressing violations of the Guidebook and Auction Rules and it is best that the Respondent first exercises its discretion before it is subject to review by an IRP Panel.

361. In the opinion of the Panel, the foregoing conclusions are consistent with the authority of IRP Panels under Section 4.3 (o) (iii) of the Bylaws, which grants the Panel authority to “declare” whether a Covered Action constituted an action or inaction that violated the Articles or Bylaws.

G. Designating the Prevailing Party

362. Section 4.3(t) of the Bylaws requires the Panel to designate the prevailing party “as to each part of a Claim”.³¹⁶ This designation has relevance, among others, to the Panel’s exercise of its authority under Section 4.3(r) of the Bylaws to shift costs by providing for the “losing party” to pay the administrative costs and/or fees of the “prevailing party” in the event the Panel identifies the losing party’s Claim or defence as frivolous or abusive.³¹⁷
363. The Panel has already determined that the Claimant is entitled to be designated as the prevailing party in relation to the liability portion of its core claims. In the opinion of the Panel, the Claimant should also be designated the prevailing party in relation to its Request for Emergency Interim Relief, insofar as the Respondent eventually agreed to keep .WEB on hold until this IRP is concluded, consistent with the rationale of the Board’s decision of November 2016 to defer consideration of the issues raised in relation to .WEB and the status of NDC’s application, post-DAA, while accountability mechanisms remained

³¹⁶ The equivalent provision in the Interim Procedures, Ex. C-59, Rule 13 b., differs slightly in that it requires the IRP Panel Decision to “specifically designate the prevailing party as to each Claim”.

³¹⁷ See also Section 4.3(e)(ii) of the Bylaws, which requires an IRP Panel to award to ICANN all reasonable fees and costs incurred by ICANN in the IRP in the event it is the prevailing party in a case in which the Claimant failed to participate in good faith in a CEP.

pending.

364. With respect to Phase I of this IRP, the Claimant has argued that the prevailing party remained to be determined depending on the outcome of Phase II.³¹⁸ This is correct in regard to those aspects of the Claimant's Rule 7 Claim that were joined to the Claimant's other claims in Phase II, pursuant to the Panel's Decision on Phase I. However, the Respondent prevailed in Phase I on the question of whether the Panel had jurisdiction over actions or failures to act committed by the IOT and, importantly, on the principle of the *Amici's* requests to participate in the IRP as *amici curiae*. These requests were both granted, albeit with narrower participation rights than those advocated by the Respondent.³¹⁹ In light of the foregoing, the Panel does not consider that the Claimant can be designated as the prevailing party in respect of Phase I of the IRP.
365. Turning to the requests for relief sought by the Claimant, the Respondent must be designated as the prevailing party in regard to all aspects of the Claimant's requests for relief other than (a) the request for a declaration that ICANN acted inconsistently with its Articles and Bylaws as described, among others, in paragraph 8 of this Final Decision and the *Dispositif*, and (b) the outstanding aspects of the Rule 7 Claim. With regard to the latter, which the Panel has determined have become moot by the participation of the *Amici* in this IRP in accordance with the Panel's Decision on Phase I, the Claimant cannot be designated as the prevailing party either, the matter not having been adjudicated upon. For the reasons set out in next section of this Final Decision, however, the fact that those aspects of the Rule 7 Claim have become moot and are therefore not decided in this Final Decision is without consequence on the Claimant's cost claim in relation to the Rule 7 Claim because, in the opinion of the Panel, it simply cannot be argued that the Respondent's defence to the Rule 7 Claim was frivolous and abusive.

³¹⁸ See *Afilias' Reply Costs Submission*, para. 9.

³¹⁹ See *Decision on Phase I*, paras. 96-97.

VI. COSTS

A. Submissions on Costs

366. In its decision on Phase I, the Panel deferred to Phase II the determination of costs in relation to Phase I of this IRP.³²⁰ The Parties' submissions on costs therefore relate to both phases of the IRP.

1. Claimant's Submissions on Costs

367. The Claimant submitted its cost submissions in a brief separate from, but filed simultaneously with its PHB, on 12 October 2020.³²¹ The Claimant argues that it should be declared the prevailing party on all of its claims in the IRP. Relying on Section 4.3(r) of the Bylaws, the Claimant requests that the Panel shift all of its fees and costs to the Respondent on the ground that the Respondent's defences in the IRP were "frivolous or abusive". In the alternative, the Claimant argues that the Respondent should at least bear all of its costs and fees related to the participation of the *Amici* in the IRP and the Emergency Interim Relief proceedings.

368. The Claimant states that there was no need for this IRP to be as procedurally and substantively complicated as it has been.³²² First, the Claimant avers that the Respondent used the CEP as cover to push through "interim procedures" that would provide the Respondent with a limitations defence. Second, the Claimant argues that the Respondent ought not to have forced the Claimant to seek emergency interim relief to protect against the .WEB contention set being taken off hold. Third, the Claimant blames the Respondent's belated disclosure of the DAA for the need for it to have filed an Amended Request for IRP. Fourth, the Claimant reproaches the Respondent for pressing for the *Amici*'s participation in the IRP, particularly Verisign, which was not even a member of the contention set. Finally, the Claimant contends that the Respondent ought

³²⁰ Decision on Phase I, para. 205(c).

³²¹ The Claimant's Submissions on Costs were corrected on 16 October 2020 apparently due to a technical problem with Afiliias' exhibit management software.

³²² Claimant's Submissions on Costs, paras. 1-2.

not to have hidden its central defence – the Board’s decision of November 2016 – until the filing of its Rejoinder.

369. In the Claimant’s submission, the Respondent’s central defence in this IRP – articulated for the first time on 1 June 2020 and based on an alleged Board decision taken during the November 2016 Workshop – frivolously and abusively sought to immunize the Respondent from any accountability and to render the present IRP an empty shell.³²³ The Claimant argues that it was abusive for the Respondent to center its defence around a decision that had never been made public or disclosed to Afilias prior to the Respondent’s Rejoinder.³²⁴
370. The Claimant also contends that the Respondent’s defence frivolously and abusively sought to deprive the Claimant of an effective forum. In that regard, the Claimant avers that ICANN’s enactment of the Interim Procedures, weeks before the Claimant filed its IRP, was frivolous and abusive because it allowed the Respondent to advance a time-limitation defence that would otherwise not have been available to it previously and to enable the participation of the *Amici* in the IRP. In the Claimant’s view, the circumstances in which ICANN enacted the Interim Procedures made it clear that they were specifically targeted to undermine the Claimant’s position in the present IRP.³²⁵
371. The Claimant submits that ICANN’s refusal to put .WEB on hold after the filing of the IRP was also frivolous and abusive and needlessly forced the Claimant to pursue a “costly, distracting, and unwarranted Emergency Interim Relief phase”. The Claimant avers that the Respondent’s action was frivolous and abusive because the Respondent later abandoned its refusal to put .WEB on hold – but only after the Claimant had incurred extensive fees and costs on the Request for Emergency Interim Relief.³²⁶
372. The Claimant argues as well that the Respondent must bear its costs and fees associated with the *Amici*’s participation in the IRP. This is so because, in the submission of

³²³ Claimant’s Submissions on Costs, para. 16.

³²⁴ *Ibid*, paras. 12-17.

³²⁵ *Ibid*, paras. 19-25.

³²⁶ *Ibid*, paras. 26-27.

the Claimant, the Respondent abusively included Rule 7 in the Interim Supplementary Procedures in view of the present IRP and then used the *Amici* as surrogates for its defence.

2. Respondent's Submissions on Costs

373. The Respondent's submissions on costs are set out in its PHB dated 12 October 2020.

374. The Respondent takes the position that the Bylaws and Interim Procedures authorize the Panel to shift costs only in the event of a finding that, when viewed in its entirety, a party's case was frivolous or abusive. The Respondent stresses that while this is an uncommonly high standard for international arbitration, it is more permissive than the "American rule" under which legal fees cannot ordinarily be shifted to the non-prevailing party. The Respondent also recalls that, under the Bylaws, it is the Respondent that bears all the administrative costs of maintaining the IRP mechanism, including the fees and expenses of the panelists and the ICDR.³²⁷

375. ICANN states that it does not view the Claimant's case as a whole to be frivolous or abusive, even though, in the Respondent's submission, the Claimant has from time to time employed abusive tactics and taken positions that clearly have no merit. The Respondent therefore does not seek an award for costs.

376. The Respondent argues that the Claimant cannot plausibly contend that ICANN's defence triggers the Panel's authority to allocate legal expenses in favour of the Claimant. For these reasons, ICANN contends that the Parties should bear their own legal expenses.³²⁸

3. Claimant's Reply Submission on Costs

377. In its Reply Costs Submissions dated 23 October 2020, the Claimant argues that the Panel is empowered to shift costs if any part of the Respondent's defence lacked merit or was otherwise improper. In the Claimant's view, the standard for cost shifting must be informed, not by the California Code of Civil Procedure, which is relied upon by

³²⁷ Respondent's PHB, paras. 232-234.

³²⁸ *Ibid*, paras. 235-240.

the Respondent, but by international arbitration norms and ICANN’s obligation to conduct its activities “consistently, neutrally, objectively, and fairly” and “transparently.”³²⁹

378. The Claimant avers that the Respondent’s PHB underscores that its defence has been frivolous and abusive, both in general and in its particulars.³³⁰ The Claimant argues that the three (3) main planks of ICANN’s substantive defence were each frivolous and abusive: the belatedly disclosed Board decision of November 2016,³³¹ the allegedly limited remedial jurisdiction of the Panel,³³² and the time bar defence, based on Rule 4, which was made applicable to this IRP by distorting the Respondent’s rule-making process and violating the “fundamental rule” against retroactivity.³³³ The Claimant also asserts that the Respondent’s alleged reliance on the *Amici* as a defensive tactic allegedly to deflect attention from its own conduct has been frivolous and abusive, “both in conception and execution” in that it was facilitated by improper collaboration with Verisign in the process of adoption of Rule 7, and by using the *Amici* participation as an excuse to avoid answering the Claimant’s claims.³³⁴

379. In light of the foregoing, the Claimant requests that the Panel order the Respondent to pay the Claimant: USD 11,291,997.13 in compensation for the total fees and costs incurred by the Claimant in this IRP; or, in the alternative: USD 2,383,703.11 for the Claimant’s fees and costs incurred in relation to the *Amici* participation; and USD 823,811.88 for the fees and costs incurred in relation to the Emergency Interim Relief phase, along with pre- and post-award interest “at a reasonable rate from the date of this filing”.³³⁵

4. Respondent’s Response Submission on Costs

380. In its 23 October 2020 Response to Afiliias’ Costs Submission, the Respondent contends

³²⁹ Claimant’s Reply Submissions on Costs, paras. 3-4.

³³⁰ *Ibid*, para. 5.

³³¹ *Ibid*, para. 6.

³³² *Ibid*, para. 7.

³³³ *Ibid*, para. 8.

³³⁴ *Ibid*, para. 9.

³³⁵ *Ibid*, paras. 10-11.

that the Claimant's request for an order requiring ICANN to pay all its costs and legal fees should be denied because it is legally and factually baseless. In the Respondent's submission, the Claimant applies an incorrect standard for cost shifting, since Section 4.3(r) of the Bylaws allows the Panel to shift legal expenses and costs only when a party's IRP Claim or defence as a whole is found to be frivolous or abusive.³³⁶ The Respondent further argues that the Claimant's cost-shifting arguments are misplaced and baseless since its arguments in defence were not frivolous or abusive.³³⁷ Finally, the Respondent avers that the Claimant's legal fees and costs are unreasonable as to both their total amount and their allocation as between the subject matters in relation to which separate cost shifting requests are made.³³⁸

381. For those reasons, the Respondent requests that the Claimant's request for an order requiring the Respondent to reimburse its costs and legal fees should be denied in its entirety.³³⁹

B. Analysis Regarding Costs

1. Applicable Provisions

382. The Panel begins its analysis by citing the provisions of the Bylaws and Interim Procedures that are relevant to the Claimant's cost claim.

383. Section 4.3(r) of the Bylaws reads as follows:

(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.

³³⁶ Respondent's Reply Submissions on Costs, paras. 4-8.

³³⁷ *Ibid*, paras. 9-24.

³³⁸ *Ibid*, paras. 25-28.

³³⁹ *Ibid*, para. 29.

384. Rule 15 of the Interim Procedures is to the same effect:

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.

385. As discussed in the previous section of this Final Decision, it is pursuant to the provisions of Section 4.3(t) that the Panel is required to designate the prevailing party “as to each part of a Claim”.³⁴⁰

2. Discussion

386. A threshold issue that falls to be determined is whether the Respondent is correct in arguing that costs and legal expenses can only be shifted, pursuant to Section 4.3(r) and Rule 15, if a Claim as a whole, or an IRP defence as a whole, is found by the Panel to be frivolous or abusive. In support of its position, the Respondent relies on the definition of Claim in Section 4.3(d) of the Bylaws, which reads as follows:

(d) An IRP shall commence with the Claimant's filing of a written statement of a Dispute (a “**Claim**”) with the IRP Provider (described in Section 4.3(m) below). For the EC to commence an IRP (“**Community IRP**”), the EC shall first comply with the procedures set forth in Section 4.2 of Annex D.

387. Based on this definition, the Respondent submits that “costs and legal expenses may be shifted onto the Claimant only if the Request for IRP as a whole is frivolous or abusive”.³⁴¹ By parity of reasoning, the Respondent argues that the same standard must apply to the Panel’s authority to shift legal expenses onto ICANN which, so the argument goes, can only be done if ICANN’s defence as a whole is found to be frivolous or abusive.

388. The Panel cannot accept the Respondent’s proposed interpretation of the Bylaws

³⁴⁰ Rule 13 b. of the Interim Procedures, Ex. C-59, requires the Panel to designate the prevailing party “as to each Claim”.

³⁴¹ ICANN’s Response to Afilias’ Costs Submission, para. 5.

and Interim Procedures, which the Panel considers to be inconsistent with Section 4.3(t) of the Bylaws and Rule 13 b. of the Interim Procedures, and which would considerably restrict the scope of application of a carve-out that is already very narrow. The Panel's reasons in that respect are as follows.

389. The cost-shifting authority of IRP Panels is contingent upon two (2) findings. First, that the party claiming its costs be the prevailing party; and second, that the IRP Panel identify the losing party's Claim or defence as frivolous or abusive.
390. The Panel's obligation to designate the prevailing party is based on Section 4.3(t), which requires the Panel to make such a designation "as to each part of a Claim". It seems to the Panel that there would be no purpose in designating a prevailing party as to "each part of a Claim" if the Panel were required to consider "a Claim" as an indivisible whole for the purpose of the Panel's cost-shifting authority.
391. The Respondent's argument also fails if consideration is given to the slightly different wording used in Rule 13 b. of the Interim Procedures, which calls for the designation of the prevailing party "as to each Claim".
392. Finally, it would seem that the interpretation of the applicable provisions advocated by the Respondent would be unfair if it mandated that a single, isolated well-founded element of a Claim otherwise manifestly frivolous or abusive would suffice to save a Claimant from a potential cost-shifting order.
393. The better interpretation, one that harmonizes the provisions of Sections 4.3(r) and 4.3(t) of the Bylaws (that are clearly meant to operate in tandem) and reflects the practice of international arbitration, is the interpretation that allows IRP Panels to shift costs in relation to "parts" of the losing party's Claim or defence, which parts are the necessary reflection of the "parts" in respect of which the other party is designated as the prevailing party.
394. Applying the relevant provisions of the Bylaws and Interim Procedures, properly construed, to the facts of this IRP, the only parts of the Claimant's case as to which it has been designated as the prevailing party are the liability portion of its core claims and its Request for Emergency Interim Relief. This being so, those are the only parts of

the Claimant's case as to which the Panel needs to evaluate whether the Respondent's defence was frivolous or abusive.

395. While the Respondent has failed in its defence of the conduct of its Staff and Board in relation to the Claimant's core claims, the Panel cannot accept the Claimant's submission that ICANN's defence of its conduct in relation to these aspects of the case was frivolous or abusive.

396. To state the obvious, not every claim or defence that does not prevail in an IRP will result in an award of costs. The applicable cost shifting rule requires that the claim or defence be found to be frivolous or abusive. This standard binds the Parties as well as the Panel.

397. The Bylaws and Interim Procedures do not define the terms "frivolous" or "abusive". The Respondent has contended that they should be interpreted having regard to their well-established meaning under California law. The Panel agrees with the Claimant that there are good reasons not to seek guidance for the interpretation of those terms in a California statutory standard, which operates in an environment where the default rule is the so-called "American Rule" under which legal fees cannot ordinarily be shifted to the non-prevailing party.

398. In the opinion of the Panel, the terms "frivolous" and "abusive" as used in the Bylaws and Interim Procedures should be given their ordinary meanings. According to the Merriam-Webster Dictionary, "frivolous" means "of little weight or importance", "having no sound basis (as in fact or law)" or "lacking in seriousness".³⁴² According to Black's Law Dictionary, "[a]n answer or plea is called 'frivolous' when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the plaintiff."³⁴³ For its part, the term "abusive" is defined by the Merriam-Webster Dictionary as "characterized by wrong or improper use or action"³⁴⁴, while the term "abuse" is defined in Black's Law

³⁴² Merriam-Webster *s.v.* "frivolous": <https://www.merriam-webster.com/dictionary/frivolous> (consulted on 23 March 2021).

³⁴³ Black's Law Online Dictionary, 2nd ed., *s.v.* "frivolous": <https://thelawdictionary.org/frivolous/> (consulted on 23 March 2021).

³⁴⁴ Merriam-Webster *s.v.* "abusive": <https://www.merriam-webster.com/dictionary/abusive> (consulted on 23 March 2021).

Dictionary as a “misuse of anything”.³⁴⁵

399. In the case of the Claimant’s core claims, the Respondent’s defences consisted in the main of the time limitations defence, and the rejection of the Claimant’s arguments based on the Respondent’s so-called competition mandate and on the asserted manifest incompatibility of the DAA with the provisions of the Guidebook and Auction Rules. The Respondent also raised as a defence the deference owed to its Board’s business judgment when it decided to take no action regarding the .WEB contention set while a related accountability mechanism was pending.
400. The time limitations defence was asserted by the Respondent in circumstances where the validity of Rule 4, unlike that of Rule 7, had not been directly challenged by the Claimant. While the Panel has expressed concern as a matter of principle with the retroactive application of a time limitations rule, the Respondent’s reliance on a rule, the validity of which had not been challenged and that on its face appeared to provide a defence, was not, in the opinion of the Panel, abusive or frivolous.
401. As regards the Respondent’s other defences, the Panel does not accept that it was frivolous or abusive for the Respondent to argue that it was reasonable for its Board to defer consideration of the issues raised with .WEB while accountability mechanisms were pending; that the propriety of the DAA under the New gTLD Program Rules was a debatable issue requiring careful consideration by the Respondent’s Board; or that the Respondent did not have the “competition mandate” contended for by the Claimant. These were all defensible positions and there is no evidence that they were advanced for an improper purpose or in bad faith. While the Respondent did fail in its contention that there was nothing for its Staff or Board to pronounce upon in the absence of a formal accountability mechanism challenging their action or inaction in relation to .WEB, the Respondent’s position in this respect cannot, in the opinion of the Panel, be said to have been frivolous or abusive. Accordingly, the Claimant’s claim for reimbursement of its costs in relation to the liability portion of its core claims must be dismissed.

³⁴⁵ Black’s Law Online Dictionary, 2nd ed., s.v. “abuse”: <https://thelawdictionary.org/abuse/> (consulted on 23 March 2021).

402. The Panel does consider that the Claimant’s cost claim in relation to its Request for Emergency Interim Relief is meritorious. The Claimant was forced to introduce this request as a result of the Respondent’s refusal to keep the .WEB contention set on hold in spite of the Claimant having commenced an IRP upon the termination of its CEP. When this decision was made, the .WEB contention set had already been on hold for more than two (2) years, precisely because accountability mechanisms were pending. The Board’s decision to defer consideration of the questions raised in relation to .WEB in November 2016 was likewise based on the fact that accountability mechanisms were pending. This is how the Claimant describes the sequence of events in its Request for Emergency Interim Relief:

13. On 13 November 2018, Afiliás and ICANN participated in a final CEP meeting, following which ICANN terminated the CEP. On 14 November 2018, Afiliás filed its Request for IRP. Hours later, ICANN responded by informing Afiliás that it intended to take the .WEB contention set “off hold” on 27 November 2018 even though Afiliás had commenced an ICANN accountability procedure that follows-on from a failed CEP.³⁰ ICANN provided Afiliás with no explanation justifying its decision.

14. On 20 November 2018, Afiliás wrote to ICANN about its decision to proceed with the delegation of .WEB despite Afiliás’ commencement of the IRP.³¹ In its letter, Afiliás questioned ICANN’s motives for removing the hold on .WEB, given that ICANN had voluntarily delayed the delegation of .WEB for several years and the lack of any apparent harm to ICANN if the .WEB contention set were to remain on hold for the duration of the IRP. Afiliás requested an explanation justifying what appeared to be rash and arbitrary conduct by ICANN in proceeding with delegation of .WEB at this time, as well as the production of relevant documents. Afiliás wrote to ICANN again on 24 November 2018 requesting a response to its 20 November 2018 letter.

15. ICANN did not respond to Afiliás’ letter until after 9:00 pm EDT on 26 November 2018—quite literally the eve of the deadline that ICANN previously set for Afiliás to submit this Interim Request to prevent ICANN from taking the .WEB contention set “off hold.”³² ICANN noted in its response that ICANN’s practice is to remove the hold on contention sets following CEP, notwithstanding the pendency of an IRP and despite the unanimous criticism of this practice in previous IRPs. ICANN also rejected Afiliás’ request to produce documents related to its dealings with NDC and VeriSign about .WEB. Instead, ICANN inexplicably offered to keep the .WEB contention set “on hold” for another two weeks, until 11 December 2018, something that Afiliás had not requested and that did not remotely address any of the concerns Afiliás had raised.³³

16. It is because of ICANN’s unreasonable conduct and refusal to act in a transparent manner—as required by its Articles and Bylaws—that Afiliás has been forced to file, at significant cost and expense, this Interim Request.

³⁰ Email from Independent Review (ICANN) to A. Ali and R. Wong (Counsel for Afiliás) (14 Nov. 2018), [Ex. C-64], p. 1.

³¹ Letter from A. Ali (Counsel for Afiliás) to Independent Review (ICANN) (20 Nov. 2018), [Ex. C-65].

³² Letter from J. LeVee (Jones Day) to A. Ali (Counsel for Afiliias) (26 Nov. 2018), [Ex. C-66].

³³ Letter from J. LeVee (Jones Day) to A. Ali (Counsel for Afiliias) (26 Nov. 2018), [Ex. C-66], p. 1.

403. Having forced the Claimant to initiate emergency interim relief proceedings, the Respondent eventually changed course and agreed to keep .WEB on hold until the conclusion of this IRP.
404. In the opinion of the Panel, the Respondent's requirement, as part of its defence strategy, that the Claimant introduce a Request for Emergency Interim Relief at the outset of the IRP, failing which the Respondent would lift the "on hold" status of the .WEB contention set, was "abusive" within the meaning of the cost shifting provisions of the Bylaws and Interim Procedures, all the more so in light of the Respondent's subsequent decision to agree to keep the .WEB contention set on hold until the conclusion of this IRP. In the opinion of the Panel, this conduct on the part of the Respondent was unjustified and obliged the Claimant to incur wasted costs that it would be unfair for the Claimant to have to bear.
405. The Claimant has claimed in relation to its Request for Emergency Interim Relief an amount of USD 823,811.88. This is said to represent 50% of the Claimant legal fees from 14 November 2018 to 10 December 2018; 33% of the Claimant's total fees from 11 December 2018 through 31 March 2019; and 50% of its fees from 1 April 2019 through 14 May 2019.
406. The Respondent has challenged the reasonableness of the fees claimed by the Claimant in relation to its Request for Emergency Interim Relief, pointing out that it entailed the preparation and presentation of the request, one supporting brief, and requests for production of documents which were resolved by 12 December 2018.³⁴⁶ As noted in the History of the Proceedings' section of this Final Decision, the Parties asked the Emergency Panelist to postpone further activity in January 2019.

³⁴⁶ See ICANN's Response to Afiliias' costs Submission, para. 28.

407. The Panel has difficulty accepting that such a significant amount of fees as that claimed by the Claimant in regard to the Request for Emergency Interim Relief can reasonably be attributed to the preparation of this request and the subsequent proceedings before the Emergency Panelist. Exercising its discretion in relation to the fixing of the legal expenses reasonably incurred that may be ordered to be reimbursed pursuant to a cost-shifting decision, the Panel reduces the Claimant's claim on account of the Request for Emergency Interim Relief to USD 450,000, inclusive of pre-award interest.
408. This leaves for consideration the Claimant's cost claim in relation to the outstanding aspects of the Rule 7 Claim which, pursuant to the Panel's Decision on Phase I, were joined to the Claimant's other claims in Phase II, a cost claim that the Panel takes to have been subsumed in the Claimant's global cost claim in relation to the *Amici* participation. In the opinion of the Panel, it suffices to read the Panel's Decision on Phase I to conclude that it cannot seriously be argued that the Respondent's defence to the Rule 7 Claim was frivolous and abusive. It follows from this assessment of the Respondent's defence that the fact that those aspects of the Rule 7 Claim have been found by the Panel to have become moot and are therefore not decided in this Final Decision is without consequence on the Claimant's cost claim in relation to the Rule 7 Claim. In other words, the Panel has sufficient familiarity with the Parties' respective positions on the merits of the outstanding aspects of the Rule 7 Claim to know, and hereby to determine, that regardless of the outcome, the Panel would not have accepted the submission that the Respondent's defence to this claim was frivolous and abusive.
409. The ICDR has informed the Panel that the administrative fees of the ICDR and the fees and expenses of the Panelists, the Emergency Panelist, and the Procedures Officer in this IRP total USD 1,198,493.88. The ICDR has further advised that the Claimant has advanced, as part of its share of these non-party costs of the IRP, an amount of USD 479,458.27. In accordance with the general rule set out in Section 4.3(r) of the Bylaws, the Claimant is entitled to be reimbursed by the Respondent the share of the non-party costs of the IRP that it has incurred, in the amount of USD 479,458.27.

VII. *DISPOSITIF*

410. For the reasons set out in this Final Decision, the Panel unanimously decides as follows:

1. **Declares** that the Respondent has violated its *Amended and Restated Articles of Incorporation of Internet Corporation for Assigned Names and Numbers*, as approved by the ICANN Board on 9 August 2016, and filed on 3 October 2016 (**Articles**), and its *Bylaws for Internet Corporation for Assigned Names and Numbers*, as amended on 18 June 2018 (**Bylaws**), by (a) its staff (**Staff**) failing to pronounce on the question of whether the Domain Acquisition Agreement entered into between Nu Dotco, LLC (**NDC**) and Verisign Inc. (**Verisign**) on 25 August 2015, as amended and supplemented by the “Confirmation of Understanding” executed by these same parties on 26 July 2016 (**DAA**), complied with the New gTLD Program Rules following the Claimant’s complaints that it violated the Guidebook and Auction Rules, and, while these complaints remained unaddressed, by nevertheless moving to delegate .WEB to NDC in June 2018, upon the .WEB contention set being taken “off hold”; and (b) its Board, having deferred consideration of the Claimant’s complaints about the propriety of the DAA while accountability mechanisms in connection with .WEB remained pending, nevertheless (i) failing to prevent the Staff, in June 2018, from moving to delegate .WEB to NDC, and (ii) failing itself to pronounce on these complaints while taking the position in this IRP, an accountability mechanism in which these complaints were squarely raised, that the Panel should not pronounce on them out of respect for, and in order to give priority to the Board’s expertise and the discretion afforded to it in the management of the New gTLD Program;
2. **Declares** that in so doing, the Respondent violated its commitment to make decisions by applying documented policies objectively and fairly;
3. **Declares** that in preparing and issuing its questionnaire of 16 September 2016 (**Questionnaire**), and in failing to communicate to the Claimant the decision made by the Board on 3 November 2016, the Respondent has violated its commitment to operate in an open and transparent manner and consistent with procedures to ensure

fairness;

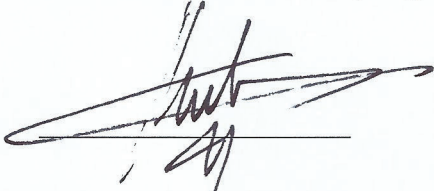
4. **Grants** in part the Claimant's Request for Emergency Interim Relief dated 27 November 2018, and directs the Respondent to stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as the Respondent has considered the present Final Decision;
5. **Recommends** that the Respondent stay any and all action or decision that would further the delegation of the .WEB gTLD until such time as the Respondent's Board has considered the opinion of the Panel in this Final Decision, and, in particular (a) considered and pronounced upon the question of whether the DAA complied with the New gTLD Program Rules following the Claimant's complaints that it violated the Guidebook and Auction Rules and, as the case may be, (b) determined whether by reason of any violation of the Guidebook and Auction Rules, NDC's application for .WEB should be rejected and its bids at the auction disqualified;
6. **Designates** the Claimant as the prevailing party in relation to the above declarations, decisions, findings, and recommendations, which relate to the liability portion of the Claimant's core claims and the Claimant's Request for Emergency Interim Relief dated 27 November 2018;
7. **Dismisses** the Claimant's other requests for relief in connection with its core claims and, in particular, the Claimant's request that that the Respondent be ordered by the Panel to disqualify NDC's bid for .WEB, proceed with contracting the Registry Agreement for .WEB with the Claimant in accordance with the New gTLD Program Rules, and specify the bid price to be paid by the Claimant, all of which are premature pending consideration by the Respondent of the questions set out above in sub-paragraph 410 (5);
8. **Designates** the Respondent as the prevailing party in respect of the matters set out in the immediately preceding paragraph;
9. **Determines** that the outstanding aspects of the Rule 7 Claim that were joined to the Claimant's other claims in Phase II have become moot by the participation of

the *Amici* in this IRP in accordance with the Panel's Decision on Phase I and, for that reason, decides that no useful purpose would be served by the Rule 7 Claim being addressed beyond the findings and observations contained in the Panel's Decision of Phase I;

10. **Fixes** the total costs of this IRP, consisting of the administrative fees of the ICDR, and the fees and expenses of the Panelists, the Emergency Panelist, and the Procedures Officer at USD 1,198,493.88, and in accordance with the general rule set out in Section 4.3(r) of the Bylaws, **declares** that the Respondent shall reimburse the Claimant the full amount of the share of these costs that the Claimant has advanced, in the amount of USD 479,458.27;
11. **Finds** that the Respondent's requirement, as part of its defence strategy, that the Claimant introduce a Request for Emergency Interim Relief at the outset of the IRP, failing which the Respondent would lift the "on hold" status of the .WEB contention set, was abusive within the meaning of the cost shifting provisions of the Bylaws and Interim Procedures in light of the Respondent's subsequent decision to agree to keep the .WEB contention set on hold until the conclusion of this IRP; and, as a consequence of this finding,
12. **Grants** the Claimant's request that the Panel shift liability for the Claimant's legal fees in connection with its Request for Emergency Interim Relief, **fixes** at USD 450,000, inclusive of pre-award interest, the amount of the legal fees to be reimbursed to the Claimant on account of the Emergency Interim Relief proceedings, and **orders** the Respondent to pay this amount to the Claimant within thirty (30) days of the date of notification of this Final Decision, after which 30 day-period this amount shall bear interest at the rate of 10% *per annum*;
13. **Dismisses** the Claimant's other requests for the shifting of its legal fees in connection with this IRP;
14. **Dismisses** all of the Parties' other claims and requests for relief.

411. This Final Decision may be executed in counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

Place of the IRP: London, England



Catherine Kessedjian

Richard Chernick

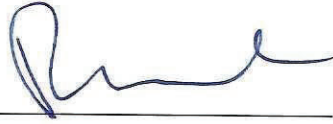
Pierre Bienvenu, Ad. E., Chair

Dated: May 2021

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Place of the IRP: London, England

Catherine Kessedjian



Richard Chernick

Pierre Bienvenu, Ad. E., Chair

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Place of the IRP: London, England

Catherine Kessedjian

Richard Chernick



Pierre Bienvenu, Ad. E., Chair

Dated: 20 May 2021