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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 V
ARBITRATION
AUGUST 7, 2020

BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR
465536



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FRIDAY, AUGUST 7, 2020
ARBITRATION HEARING HELD BEFORE

PIERRE BIENVENU
RICHARD CHERNICK
CATHERINE KESSEDJIAN

VOLUME V
(Pages 788-1008)

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

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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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25

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

6 Redacted - Third-Party Designated Confidential Information

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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,

14 Redacted - Third-Party Designated Confidential Information

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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

25 Redacted - Third-Party Designated Confidential Information

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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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5 A. Yes.

6 Q. And you had to

7 Redacted - Third-Party Designated Confidential Information

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12 Do you recall those requirements?

13 A. Yes, I do. I recall their

14 Redacted - Third-Party Designated Confidential Information so I felt that
15 these provisions were appropriate.

16 Q. I am not asking whether they are
17 appropriate. I am just asking if -- if my
18 understanding of them is consistent with yours,
19 which is that

20 Redacted - Third-Party Designated Confidential Information

21
22 A. Correct.

23 Q. Redacted - Third-Party Designated Confidential Information

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

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

Q. Okay. And that's true even if Redacted - Third-Party Designated Confidential Information

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.

16 Redacted - Third-Party Designated Confidential Information

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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 Confidential Information

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

Redacted - Third-Party Designated Confidential Information

A. I think in terms of Redacted - Third-Party Designated Confidential Information

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

Redacted - Third-Party Designated Confidential Information

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

18
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

Redacted - Third-Party Designated Confidential Information

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
21 Redacted - Third-Party Designated Confidential Information

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Q. Yeah, we'll come to that, sir.

Redacted - Third-Party Designated Confidential Information

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
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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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

1 worked. Redacted - Third-Party Designated Confidential Information

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3 Q. Redacted - Third-Party Designated Confidential Information

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7 A. Redacted - Third-Party Designated Confidential Information

8 Q. Redacted - Third-Party Designated Confidential Information

9 A. Redacted - Third-Party Designated Confidential Information

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11 Q. Redacted - Third-Party Designated Confidential Information

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

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

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

24 Q. Did VeriSign provide any
25 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.

8 Redacted - Third-Party Designated Confidential Information

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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
23 Redacted - Third-Party Designated Confidential Information

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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?

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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Do you recall that?

A. I do recall.

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. That's correct.

Q. Redacted - Third-Party Designated Confidential Information

A. That seems likely, yes.

Q. Redacted - Third-Party Designated Confidential Information

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A. That's correct.

Q. Redacted - Third-Party Designated Confidential Information

A. Yes, it did.

Q. Redacted - Third-Party Designated Confidential Information

A. That is correct.

Q. Redacted - Third-Party Designated Confidential Information

A. We did receive that, yes.

Q. Redacted - Third-Party Designated Confidential Information

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Redacted - Third-Party Designated Confidential Information

A. Redacted - Third-Party Designated Confidential Information

Q. Redacted - Third-Party Designated Confidential Information

A. That's correct.

Q. Redacted - Third-Party Designated Confidential Information

A. We have.

Q. Redacted - Third-Party Designated Confidential Information

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
Confidential Information

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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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1 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.

10 Redacted - Third-Party Designated Confidential Information

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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

19
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

9
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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22

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

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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
Redacted - Third-Party Designated Confidential Information

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,
9 Redacted - Third-Party Designated Confidential Information

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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.

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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,
6 Redacted - Third-Party Designated Confidential Information

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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

22 Redacted - Third-Party Designated Confidential Information

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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,

9 Redacted - Third-Party Designated Confidential Information

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14 You don't remember

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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

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15 Tell me how this worked.

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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,
18 Redacted - Third-Party Designated Confidential Information

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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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,
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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

25

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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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 Afiliias' 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 preauction 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 preauction 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 preauction
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 Afilias'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 Afiliias' 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 Afiliias' 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 Afiliias' 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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	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
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