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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 VI  
ARBITRATION  
AUGUST 10, 2020

BALINDA DUNLAP, CSR 10710, RPR, CRR, RMR  
465537



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 Respondent. )  
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MONDAY, AUGUST 10, 2020  
ARBITRATION HEARING HELD BEFORE

PIERRE BIENVENU  
RICHARD CHERNICK  
CATHERINE KESSEDJIAN

VOLUME VI  
(Pages 1011-1100)

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

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

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CALIFORNIA, AUGUST 10, 2020

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

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

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

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

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

1 issues that are before you.

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

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

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

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

24 ARBITRATOR BIENVENU: I follow what you  
25 said, and I am sure there is more to come on



1 matters of argument, and you have had and will  
2 continue to have an argument to address us on that.

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

5 Mr. LeVee, would you like to add anything?

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

10 ARBITRATOR CHERNICK: Speak louder,  
11 Mr. LeVee.

12 MR. LeVEE: Those experts were responding  
13 to the Afiliias experts. So the Afiliias experts had  
14 submitted their witness statements first, and then  
15 the Amici and the ICANN experts responded to those  
16 witness statements.

17 Once Afiliias made the decision that they  
18 were not going to examine the three experts  
19 tendered by the Amici and ICANN, we felt that on  
20 that basis and because of the testimony that came  
21 in last week, there really was no reason to  
22 cross-examine Mr. Sadowsky or Mr. Zittrain, who --  
23 and we will argue their relevance in the  
24 posthearing briefs. So I do agree with Mr. Ali on  
25 that.

1 I think if the Panel were to begin  
2 asking -- request asking questions of any of the  
3 experts, we run the risk of an unbalanced record.

4 ARBITRATOR BIENVENU: We are aware of  
5 that.

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

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

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

25 ARBITRATOR BIENVENU: Very well. I said,

1 in reacting to what you were submitting, Mr. LeVee,  
2 we are aware of that, not just I am aware of that.

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

8 MR. LeVEE: Thank you all.

9 ARBITRATOR BIENVENU: Thank you, Mr. Ali.  
10 Thank you, Mr. LeVee.

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

14 Welcome, again, Mr. Blackburn.

15 MR. BLACKBURN: Good morning.

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

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

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

1 real time, and he'll be able to speak in real time.

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

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

6 MR. VAUGHAN: For Afiliias it will be me,  
7 Chuck Vaughan.

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

10 MR. LITWIN: He is joining us from  
11 Chicago.

12 ARBITRATOR BIENVENU: Mr. McAuley.

13 THE WITNESS: Yes. This is David McAuley  
14 speaking.

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

21 Can you see us on your screen, sir?

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

25 THE WITNESS: Can you hear me?

1 MR. ENGLISH: There you go.

2 THE WITNESS: JD, should I start my video?

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

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

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

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

17 ARBITRATOR BIENVENU: Well, these things  
18 happen.

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

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

24 THE WITNESS: JD, can you hear me?

25 MR. ENGLISH: Yes, and I can see you.

1 THE WITNESS: Thank you. I can see myself  
2 and another gentleman. I can see four -- myself  
3 and three other people. I believe they are the  
4 Panel members, and now I can see five video  
5 screens.

6 ARBITRATOR BIENVENU: Excellent.

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

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

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

19 THE WITNESS: Thank you.

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

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

25 ARBITRATOR BIENVENU: Excellent. Very

1 well.

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

4 THE WITNESS: Thank you.

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

9 THE WITNESS: Yes, sir.

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

14 THE WITNESS: Yes, sir.

15 ARBITRATOR BIENVENU: May I ask you,  
16 Mr. McAuley, in relation to the evidence that you  
17 will give to the Panel today, likewise solemnly to  
18 affirm that it will be the truth, the whole truth  
19 and nothing but the truth?

20 THE WITNESS: Yes, sir, I do.

21 ARBITRATOR BIENVENU: Thank you very much.  
22 Mr. Blackburn.

23 MR. BLACKBURN: Thank you, Mr. Chairman.

24 Mr. McAuley, good morning. Before we --

25 THE WITNESS: Good morning.

1 MR. BLACKBURN: -- we begin, are there any  
2 corrections or amendments to your witness statement  
3 that you would like to make at this time?

4 THE WITNESS: No, sir.

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

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

10 Mr. Litwin, would you like to begin your  
11 cross-examination?

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

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

17 Is JD available to troubleshoot us out of  
18 this?

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

23 MR. LITWIN: I'll try again.

24 MR. ENGLISH: There you go.

25 MR. LITWIN: That was not my headphones,



1 but let me see. Does this work or is it still bad?

2 MR. ENGLISH: No, you sound normal.

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

5 CROSS-EXAMINATION

6 BY MR. LITWIN

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

11 A. I was, yes.

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

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

20 Q. Sure.

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

25 THE WITNESS: Okay. I have opened it.

1 Thank you.

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

4 THE WITNESS: Hello.

5 MR. LITWIN: That's a good idea.

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

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

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

18 Q. Okay.

19 A. Can you hear me?

20 Q. I can.

21 MR. LITWIN: Balinda, will that work?

22 THE REPORTER: Yes. Thank you, Ethan.

23 THE WITNESS: I think that will work.

24 ARBITRATOR BIENVENU: We can hear you,  
25 Mr. McAuley. Can you hear us?

1 THE WITNESS: Yes.

2 ARBITRATOR BIENVENU: Please proceed.

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

10 A. Okay.

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

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

21 Q. Okay. Anything else that you recall?

22 A. I don't think so.

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

25 A. Yes, I am.

1 Q. And how long have you been employed by  
2 VeriSign?

3 A. Almost six years, from late September of  
4 2014.

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

8 A. Yes.

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

11 A. Yes, they do.

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

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

15 Q. We can hear you.

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

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

20 Q. Okay.

21 MR. LITWIN: Mr. Chairman, I know that  
22 most of, if not all of the firms, except for mine  
23 on the phone, have offices in Chicago. Given we  
24 are not cross-examining -- ICANN is not  
25 cross-examining Dr. Sadowsky this afternoon, does

1 it makes sense to adjourn so we can get a better  
2 connection? This is awkward enough sort of as it  
3 is.

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

10 So let's see once he's reconnected.

11 MR. LITWIN: Okay.

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

16 MR. LITWIN: We can, Mr. McAuley.

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

19 MR. ENGLISH: Yeah, I am here.

20 THE WITNESS: Or if you can connect me.  
21 If you could try again, JD, but I am on the phone,  
22 I am just not on the video. The turning wheel is  
23 now gone. I am on Trial Graphix Zoom Room.

24 MR. ENGLISH: Yeah, so the problem is your  
25 bandwidth is not able to sustain the video

1 connection. That's why you keep getting kicked  
2 out.

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

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

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

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

19 MR. LITWIN: Yes.

20 MR. ENGLISH: Okay.

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

22 (Whereupon a recess was taken.)

23 ARBITRATOR BIENVENU: Thank you very much,  
24 JD.

25 Mr. McAuley, welcome again.

1 THE WITNESS: Thank you for your patience.

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

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

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

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

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

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

16 What role do you have in business  
17 development?

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

22 Q. Mr. McAuley, are you a lawyer?

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

25 Q. When was that?

1           A.    I started pursuing a second career, I  
2 believe, in 2004.

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

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

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

8           A.    I believe that's the time.

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

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

15          Q.    And who is your boss?

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

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

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

20          Q.    And how do you submit those reports?

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

23          Q.    Okay.  And during the period from, let's  
24 say, November 2016 through October 2018, was  
25 Mr. Drazek your boss at that point?



1           A.    No, not directly.  I reported to a woman  
2 by the name of Iren Borissova, and her boss was  
3 Keith Drazek.  While I now report to Keith  
4 directly, at the time I reported to Iren Borissova.

5           Q.    How do you spell the last name?

6           A.    B-o-r-i-s-s-o-v-a.

7           Q.    Okay.  And it was the same process with  
8 Ms. Borissova, you provided oral reports?

9           A.    I did periodically.

10          Q.    And when you say "periodically," how often  
11 was that?

12          A.    I would say with respect to the IOT, they  
13 were not often.

14          Q.    Okay.  So the IOT, I will say just in the  
15 general of its existence, tended to meet about once  
16 a month during most of the months of the year.  Did  
17 you report after every IOT meeting?

18          A.    I did not.

19          Q.    Would you say you reported four or five  
20 times a year?

21          A.    I would probably have reported four times  
22 a year.

23          Q.    When you provided your reports, did you  
24 share the IOT's work product as part of your  
25 reporting?

1 A. No.

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

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

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

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

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

15 A. I don't believe that I did.

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

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

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

24 MR. BLACKBURN: I would caution the  
25 witness at this point if any of those

1 communications were with counsel, that they would  
2 be privileged. Otherwise he can answer.

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

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

9 A. No.

10 Q. Consolidation?

11 A. No.

12 Q. Intervention?

13 A. No.

14 Q. Participation as an amicus?

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

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

22 A. No, not that I recall.

23 Q. Did anyone at VeriSign ever suggest  
24 anything that you should consider in light of your  
25 role in the IOT?

1 A. No.

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

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

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

14 A. Sorry.

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

20 A. I can't say I remember what October the  
21 19th was, but I do know that as the interim rules  
22 were coming up for review, there was a last-minute  
23 issue regarding Rule 4, "Time for Filing," and I  
24 believe we were in Barcelona, and I may have  
25 mentioned that to Keith Drazek.

1 Q. In the IOT's work on the rules of  
2 procedure, the IOT was assisted by the Sidley law  
3 firm; is that right?

4 A. That's correct.

5 Q. And I assume that the lawyers at Sidley  
6 who worked with the IOT practiced in international  
7 arbitration; is that right?

8 A. I don't know.

9 Q. You -- well, who were the lawyers at  
10 Sidley who you worked with?

11 A. I didn't work with them. I believe that  
12 Sam Eisner did. I did once in a while, very  
13 infrequently, correspond with a lawyer at Sidley by  
14 the name of Holly Gregory. I believe that was very  
15 early on in the work of the IOT, and that's the  
16 best of my recollection.

17 Q. You also note in your witness statement  
18 that the IOT was comprised of between 25 and 26  
19 members; is that correct?

20 A. Yes.

21 Q. I would like to direct your attention to  
22 Paragraph 5 of your witness statement.

23 A. Oh, it is -- never mind.

24 Q. This is actually the full paragraph that  
25 Chuck has blown up. You state that the IOT's roles

1 and responsibilities were set forth at Section  
2 4.3(n) of ICANN's bylaws; is that correct?

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

5 Q. Sure.

6 A. Okay.

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

11 A. That's correct.

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

16 A. I am on Page 15 right now.

17 Q. Great.

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

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

21 A. Yes.

22 Q. I am going to direct your attention to the  
23 top of the next page, and there the bylaws provide  
24 that the IOT shall, quote, "Develop clear published  
25 rules for the IRP ('Rules of Procedure') that

1 conform with international arbitration norms and  
2 are streamlined, easy to understand and apply  
3 fairly to all parties."

4 Do you see that?

5 A. I do.

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

11 Do you see that, sir?

12 A. I do.

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

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

21 Q. Correct, correct.

22 A. Yes, yes.

23 Q. Now, let's take a look at the purposes of  
24 the IRP. I would direct your attention to Section  
25 4.3(a) of the bylaws that can be found on Page 9 of

1 the exhibit at Tab 2 in your binder.

2 Do you see that, Mr. McAuley?

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

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

9 Do you see that, sir?

10 A. I do.

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

15 Do you see that, sir?

16 A. I do.

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

22 A. I am not sure I would say it that way. I  
23 would think of it that it would hear disputes to  
24 determine whether ICANN had exceeded its mission  
25 and did not comply with its articles or bylaws.



1           In other words, I think I understood the  
2 question to be was the Panel to ensure that they  
3 did, and I would have stated it differently, that I  
4 thought the Panel would resolve disputes where  
5 someone claimed that they had not.

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

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

12          A.    I believe that's right.

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

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

21          Q.    So the plain language, therefore, would  
22 require the IOT to draft the rules consistently  
23 with this purpose to ensure that ICANN does not  
24 exceed the scope of its mission and otherwise  
25 comply with its articles and bylaws; is that right?

1           A.     I am not sure.  I might be confused by  
2 your question, and I think the way that I read  
3 this -- frankly, I had read Bylaw 4.3 quite a lot  
4 over the last four years or whatever it is, but I  
5 think what I took this to mean is that a Panel  
6 would be addressing or hearing disputes and trying  
7 to resolve disputes where a party, a claimant,  
8 claimed that ICANN had not complied with its  
9 articles or bylaws.

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

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

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

23           A.     I'm sorry, sorry.

24           Q.     Nope.  Let me try and go back over this.

25                 So Section 4.3(n) instructs the IOT to

1 draft the rules of procedure to be consistent with  
2 the purposes of the IRP; is that right?

3 A. I believe that's correct.

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

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

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

10 A. I believe that that's right.

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

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

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

19 A. It does.

20 Q. -- instructed to draft rules of procedure  
21 that are consistent with the purposes of the IRP,  
22 and one of those purposes is to ensure that ICANN  
23 does not exceed the scope of its mission and  
24 otherwise complies with its articles of  
25 incorporation and bylaws, then the bylaws

1 themselves are instructing the IRP to develop  
2 procedures to ensure that ICANN does not exceed the  
3 scope of its mission and otherwise complies with  
4 its articles of incorporation and bylaws; isn't  
5 that right?

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

12 Q. Sorry, you said 4.8?

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

18 Q. Okay. Well, let me move on, and perhaps  
19 it will become clear as we go on, Mr. McAuley.

20 So I am looking now at Subparagraph (ii)  
21 of 4.3(a), and here the bylaws say that one of the  
22 purposes of the IRP is to "Empower the global  
23 Internet community and Claimants to enforce  
24 compliance with the Articles of Incorporation and  
25 Bylaws through meaningful, affordable and

1 accessible expert review of Covered Actions"; is  
2 that right?

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

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

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

15 Q. Yes.

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

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

23 A. Yes. Can I make a comment, though, with  
24 respect to -- I don't want to -- I think I am not  
25 sure I am understanding. Because when you

1 underscore the words "to ensure that ICANN," I want  
2 to go back, as I did a minute ago, to say this is  
3 all in the context of a dispute where someone has  
4 claimed that ICANN has not done this. In other  
5 words, this is a standard by which something will  
6 be judged, not an independent oversight. That's my  
7 understanding of what an IRP is.

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

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

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

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(Discussion off the record.)

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

ARBITRATOR BIENVENU: Yes, please proceed.

MR. LITWIN: Thank you.

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

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

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

A. I think so.

Q. You say -- well, that was a very long question. Maybe I should break it down for you and then be clearer.

1           So the IRP is intended to operate as an  
2 alternative to civil court jurisdiction, right?

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

7           Q.    Yes, I think that's right.

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

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

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

24          A.    I do not recall that.

25          Q.    So in developing the rules of procedure



1 for the IRP, the IOT didn't consider how they would  
2 apply in the context of ICANN's New gTLD Program?

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

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

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

13 Q. Sure.

14 I'll just break it down for you.

15 ICANN legal had representatives at the IOT  
16 meetings, right?

17 A. Yes, they did.

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

22 A. I don't remember that.

23 Q. Did the IOT -- and what you're saying is  
24 that you don't recall whether the IOT considered  
25 that its work should be informed by that litigation

1 waiver that was in the new gTLD guidebook; is that  
2 what you're saying?

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

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

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

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

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

20 A. Okay.

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

23 A. Okay.

24 Q. Assuming that that litigation waiver says  
25 what it does, should the IOT have interpreted the

1 rules of the IRP in reference to ICANN's bylaws --  
2 let me strike that.

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

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

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

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

23 MR. LITWIN: Now, Mr. Chairman, I have  
24 sort of lost track on where we are on time here,  
25 but I am going to continue going even though we are

1 technically an hour and a half into this hearing;  
2 is that okay, sir?

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

7 MR. LITWIN: Okay.

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

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

24 Is that a correct reflection of what you  
25 have in Paragraph 24?

1           A.    I believe it is, yes.

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

8           A.    I believe that's correct.

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

11          A.    I would believe so, yes.

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

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

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

23          A.    I don't know about several. I think that  
24 we -- I think that we looked at the rules of the  
25 International Centre for Dispute Resolution, and I

1 don't recall others. We may have looked -- I don't  
2 recall others.

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

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

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

18 A. I did not.

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

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

24 Let me just also mention, when I answered  
25 the last question, I did from time to time look at

1 the rules of ICDR, International Centre for Dispute  
2 Resolution, but I was not in touch with Sidley  
3 myself insofar as I can recall.

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

8 A. I don't recall.

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

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

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

1           Is that what you recall?

2           A.    I don't recall it.

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

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

14           A.    It sounds like there might be, yes.

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

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

22           Q.    And that's because if the case was brought  
23 in a civil court like the United States federal  
24 courts, that party would have a right to intervene  
25 in that litigation; is that right?



1           A.     Well, I actually think my thinking was  
2 derived from the purposes -- from reading from  
3 Bylaw 4.3.

4           Q.     What about 4.3?

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

11                    So I may have been influenced by what you  
12 just said, but I think it was also my thinking on  
13 this topic was also influenced by the language in  
14 4.3.

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

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

1 case is brought in an IRP?

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

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

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

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

25 Q. Okay.

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

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

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

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

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

25           Q.     Perhaps I can -- perhaps I can help you

1 with this, Mr. McAuley.

2 If you turn to Tab 3 in your binder, this  
3 is a copy of the transcript from the October 9,  
4 2018, IOT meeting. If you turn to Page 16, that's  
5 our Page 16, of that exhibit, you'll see that  
6 you're speaking in the middle of that page. Let me  
7 know when you get there.

8 A. I'm there on the page. Wait a minute.  
9 Yes, I am on Page 16.

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

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

21 A. I think that's a fair statement.

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

25 ARBITRATOR BIENVENU: That's fine with me.

1 Perfect.

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

7 THE WITNESS: Thank you.

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

9 (Whereupon a recess was taken.)

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

13 Mr. Litwin.

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

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

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

23 Q. Sure.

24 A. Yes.

25 Q. Now, if you turn to Tab 4 in your binder,

1 I'll just ask if the document there is the email  
2 you referred to in Paragraph 25?

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

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

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

11 Q. Can you see that, Mr. McAuley?

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

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

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

22 A. I am looking at -- I am just going to take  
23 a second here to read that. I am not sure. So  
24 this is an attachment to the email of October 11th;  
25 is that correct?

1 Q. Correct. You'll see at the bottom of Page  
2 2 of the exhibit it says that there is an  
3 attachment, and then what's reproduced behind it is  
4 that attachment.

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

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

16 Do you see that, sir?

17 A. I do.

18 Q. Did you personally make these edits?

19 A. I believe that that's correct.

20 Q. Did anyone at VeriSign draft any of the  
21 edits reflected in this attachment to your October  
22 11 email?

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

24 Q. Did anyone at VeriSign assist you in  
25 drafting any of the edits reflected in the

1 attachment to your October 11 email?

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

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

8 A. Not that I recall.

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

12 A. I believe that's right.

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

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

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



1 Do you see that, sir?

2 A. I do see that, yes.

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

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

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

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

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

25 I am starting at the second full paragraph

1 on Page 15. "But if it was moved to an amicus  
2 thing, I would like to look at the language you  
3 came up with. You can tell between this and Rule  
4 8, where I'm coming from is a competitive  
5 situation, where members of contracted party houses  
6 or others have contracts with ICANN or others that  
7 have contracts that are affected by ICANN have to  
8 be able to protect their interest in competitive  
9 situations, so I used language that largely  
10 followed U.S. federal rules of procedure. But  
11 these rules are fairly -- I think at least in  
12 common-law countries, fairly routinely accepted,  
13 that someone has an interest can defend themselves  
14 because they can't look for defendants to make  
15 their argument for them."

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

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

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

22 A. I believe that that's correct.

23 Q. And at the time, October 11th, 2018, NDC  
24 had a contract with ICANN in the form of its .WEB  
25 application, correct?

1           A.     That I don't know. I was not involved in  
2 any of that.

3           Q.     Well, I'll represent to you that NDC had  
4 an application pending with ICANN on October 11,  
5 2018, for the .WEB gTLD. Are you aware that ICANN  
6 considers those applications to form a contract?

7           A.     Yes.

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

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

14          Q.     Well, I'll represent to you that NDC and  
15 VeriSign executed an agreement called the Domain  
16 Acquisition Agreement in August of 2015, and that  
17 the contract was not fully performed as of October  
18 11, 2018.

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

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

25          Q.     And are you aware, sir, that VeriSign has

1 argued in this IRP that its contract with NDC would  
2 be affected by this IRP, correct?

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

6 Q. Okay. Fair enough.

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

12 Do you see that, sir?

13 A. Yes.

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

16 A. That's my understanding.

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

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

23 Q. And I am now reading the fifth paragraph  
24 here. In this paragraph you write that, "As  
25 Sam" -- that is Ms. Eisner -- "attempted to draft

1 the compromise in this respect she encountered  
2 difficulty in capturing the language that she felt  
3 would be consistent with the bylaws."

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

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

8 Do you see that, sir?

9 A. Yes.

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

18 A. That's the way it appears.

19 Q. And, again, the compromise was that while  
20 you had suggested granting entities with a  
21 significant interest in the subject of an IRP the  
22 right to intervene as a claimant, as we saw from  
23 your edit, Ms. Eisner, as we saw from your witness  
24 statement, had proposed a compromise to move the,  
25 quote, "protection for persons with a significant

1 interest to the amicus curiae section"; is that  
2 right?

3 A. I believe that's correct.

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

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

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

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

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

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

25 Q. Sure. Perhaps I can refer you to some

1 language and then ask my question.

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

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

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

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

25 A. Just one second. I think that's correct.

1 Q. And because if you look at particularly  
2 the last line, she says, "Depending upon the scope  
3 of the final rule we propose, we then have to see  
4 how significant a change it is from what was posted  
5 for comment previously."

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

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

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

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

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

23 Q. Now, I will represent to you, Mr. McAuley,  
24 that October 12th, 2018, was a Friday. Do you  
25 recall emailing Ms. Eisner that you would review



1 her email over the weekend?

2 A. I do not recall that.

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

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

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

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

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

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

24 A. I recall having discussions with Sam about  
25 this because we were -- we did not agree on this.

1 As to when we said what we said, I don't recall.

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

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

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

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

24 A. No, I don't think she was saying that. In  
25 fact, things just take a long time. I think Sam

1 recognized -- it is very complex, but in Rule 4,  
2 "Time for Filing," Rule 4 has two sort of timing  
3 things. One is when you file, when you learn of  
4 some acts that harmed you, but the second part of  
5 Rule 4 is there would be an end date, that no  
6 matter what a party knew, there would be a time  
7 within which a claim would just get old and  
8 couldn't be made anymore.

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

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

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

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

25 A. Let me think. We began -- that sounds

1 about right, yes, just before the bylaws were  
2 adopted, I think.

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

6 A. I don't recall when it was.

7 Q. I will represent to you that it was, in  
8 fact, the end of November 2016.

9 Do you recall that the comments came in  
10 in -- by February 2017?

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

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

18 A. I believe that's correct.

19 Q. And, you know, during this time between  
20 February 2017 and October '18 -- let me just say  
21 from February 2017 through, let's say, June of  
22 2018, ICANN didn't say during any IOT meeting that  
23 it was under tremendous pressure to get this done  
24 immediately; is that right?

25 A. Not that I recall. I don't recall

1 anything like that.

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

8 Do you recall that?

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

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

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

20 Q. Let me help you refresh your recollection.

21 If you could turn back to Tab 5, which is  
22 the October 11th transcript, and look at the top of  
23 Page 16.

24 What Ms. Eisner states there -- on the  
25 prior page you'll see that it was Ms. Eisner

1 speaking here. She says, "But there will be a  
2 point that we can agree that we could get a set of  
3 interim rules in place so that we will have  
4 something, because from our standpoint, from the  
5 ICANN Org side, we are getting very nervous that we  
6 are on the precipice of having IRPs filed for which  
7 we don't have an adequate set of procedures to meet  
8 the bylaws. So we have that pressure."

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

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

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

17 Do you see that?

18 A. Yes.

19 Q. So if I could just summarize the timeline,  
20 because we have looked at a few different things,  
21 you send an email with suggested revisions on  
22 October 11th. They are discussed later that day at  
23 the IOT meeting on October 11th. During that  
24 meeting Ms. Eisner says she will come back on list  
25 and propose something to the group.

1           Ms. Eisner on October 12th sends you an  
2 email saying that she's got these concerns that we  
3 went through. And now on October 16th she has sent  
4 this email with her proposed language.

5           Is that the timeline as you understand it,  
6 sir?

7           A. I think so.

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

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

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

25                   Do you see that?

1           A.     I do.

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

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

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

17                   Do you see that, sir?

18           A.     I do.

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

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

22           Q.     And if you look down at the next set of  
23 edits -- or just as it continues after that  
24 sentence, you'll see you made the same edit  
25 regarding any entity that is external to the



1 dispute, you again replaced "may participate" with  
2 "shall be permitted to participate."

3 Do you see that?

4 A. I see that.

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

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

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

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

25 My observation there and question to you,

1 sir, is that you did not change "may participate"  
2 there to "shall participate"; is that correct?

3 A. That looks to be the case.

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

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

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

13 (Whereupon a recess was taken.)

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

19 THE WITNESS: Thank you.

20 Can you all hear me?

21 MR. LITWIN: We can.

22 THE WITNESS: Thank you.

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

25 Any questions from my fellow panelists,

1 Professor Kessedjian, Mr. Chernick?

2 ARBITRATOR KESSEDJIAN: No questions for  
3 me. Thank you.

4 ARBITRATOR CHERNICK: None for me. Thank  
5 you.

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

11 THE WITNESS: I do, yes.

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

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

19 THE WITNESS: No, sir, I did not.

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

24 THE WITNESS: No, they weren't.

25 MR. BLACKBURN: I'm sorry, I was on mute.

1 I would caution the witness not to reveal any  
2 communications with counsel regarding the Phase I  
3 decision.

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

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

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

18 So how would you summarize your present  
19 responsibilities at VeriSign?

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

24 Perhaps I should have made a point of it  
25 when Ms. Borissova suggested that as a title, but I

1 didn't. I didn't make an issue of it. I am  
2 talking about the business development part.

3 ARBITRATOR BIENVENU: Thank you.

4 Do you know Mr. Paul Livesay?

5 THE WITNESS: The name rings a bell.

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

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

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

18 THE WITNESS: Not that I recall.

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

21 Mr. Blackburn, do you have any redirect?

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

25 ARBITRATOR BIENVENU: Yes. Absolutely.

1 Just let us know when you're ready.

2 MR. BLACKBURN: Thank you.

3 (Whereupon a recess was taken.)

4 ARBITRATOR BIENVENU: Please proceed,  
5 Mr. Blackburn.

6 REDIRECT EXAMINATION

7 BY MR. BLACKBURN

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

12 A. Yes, roughly.

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

16 MR. LITWIN: Objection; leading.

17 THE WITNESS: In my opinion the IRP  
18 process --

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

21 THE WITNESS: Sure.

22 ARBITRATOR BIENVENU: You're asking --  
23 could you reformulate your question, Mr. Blackburn?  
24 Surely you're asking the witness for his  
25 understanding, correct?

1 MR. BLACKBURN: Yes, yes.

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

5 MR. LITWIN: This is also leading.

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

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

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

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

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

22 MR. BLACKBURN: I'll rephrase.

23 Q. Mr. McAuley, you just testified that to  
24 your understanding, anyone who qualifies as a  
25 claimant could participate -- could file an IRP

1 under ICANN's bylaws; is that correct?

2 A. Yes. Anybody who feels that any action or  
3 inaction by ICANN, whatever that might be, could  
4 be -- could bring a claim at an IRP if they allege  
5 that ICANN's actions violated the bylaws or its  
6 articles of incorporation and cause them harm.

7 Q. To your understanding, was there any  
8 limitation on the subject matter that a claimant  
9 could allege was a violation of the bylaws or  
10 articles of ICANN?

11 MR. LITWIN: Mr. Chairman, I apologize,  
12 but he keeps asking yes-or-no questions to this  
13 witness, and it is totally inappropriate on  
14 redirect.

15 ARBITRATOR BIENVENU: Mr. Blackburn, do  
16 you want to reformulate it? It is true.

17 MR. BLACKBURN: I will move on.

18 Q. Mr. McAuley, do you recall Mr. Litwin  
19 asking you about a litigation waiver in the new  
20 gTLD Program guidebook?

21 A. I do.

22 Q. And were you aware of that litigation  
23 waiver in the new gTLD Program while you were  
24 performing your work on the IRP-IOT?

25 A. I was not.



1 Q. Are you aware of any other litigation  
2 waivers that ICANN has imposed with respect to any  
3 other person who may file a claim under the -- an  
4 IRP claim against ICANN?

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

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

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

14 A. Yes, I do.

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

21 A. That's my understanding, yes.

22 Q. And in looking on the page which is marked  
23 Page 5, there's a paragraph. Is that an edit by  
24 you with respect to a party's right to intervene in  
25 an IRP process?

1 MR. LITWIN: Mr. Chairman, again, these  
2 have all been yes-or-no questions. Mr. Blackburn  
3 obviously knows how not to ask a leading question,  
4 he's just not doing it.

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

7 MR. BLACKBURN: It is foundational, yes.

8 THE WITNESS: That's my --

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

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

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

17 A. Yes, sir.

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

21 A. Not that I recall.

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

25 Mr. McAuley, you testified earlier about a

1 potential call with Ms. Eisner in the October 2018  
2 time frame.

3 Do you recall that?

4 A. I recall being asked about it.

5 Q. Did you -- during your time on the  
6 IRP-IOT, did you frequently have telephone calls  
7 with Ms. Eisner?

8 A. No. I had calls with a number of people  
9 on the IOT, but I wouldn't say they were very  
10 frequent at all.

11 Q. Did you have any calls with Ms. Eisner  
12 during your time at the IOT?

13 A. I believe the answer would be yes.

14 Q. Do you recall approximately how many calls  
15 you had with Ms. Eisner in the 2016 through 2018  
16 time frame of your participation on the IRP-IOT?

17 A. I believe it would be less than five,  
18 maybe less than four. It is hard to recall  
19 honestly, but our practice was to meet -- not  
20 just -- every one of us was to meet at the meetings  
21 on the list. As I said, I spoke on the phone with  
22 a number of people, but very, very infrequently.

23 Q. Do you have any recollection of whether or  
24 not your calls with Ms. Eisner tended to be long or  
25 brief?

1           A.     They were short.  It was hard to get time,  
2 hard to -- I am not a long-phone-call person.

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

5           A.     I would generally schedule a call with  
6 her.

7           Q.     And was there any particular reason for  
8 that?

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

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

15          A.     I believe it is a Cooperative Engagement  
16 Process.

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

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

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

25          A.     I was not.

1 Q. Did Ms. Eisner ever tell you that Afiliias  
2 had instituted a CEP with ICANN regarding .WEB?

3 A. Not that I recall.

4 Q. Did Ms. Eisner ever tell you that Afiliias  
5 had threatened to file an IRP with respect to .WEB  
6 at any time prior to -- in October 2018?

7 A. Not that I recall.

8 Q. Had she told you that at any time?

9 A. I don't think so.

10 Q. Mr. McAuley, are you aware that VeriSign  
11 has participated in ICANN's new gTLD Program?

12 A. I don't know about the new gTLD Program.  
13 I think -- I think that VeriSign got an IDN, but I  
14 don't know.

15 Q. Were you involved in VeriSign's  
16 participation in ICANN's new gTLD Program?

17 A. I was not.

18 MR. BLACKBURN: I have no further  
19 questions.

20 THE WITNESS: I can't hear.

21 MR. BLACKBURN: I have no further  
22 questions.

23 ARBITRATOR BIENVENU: Forgive me. It is  
24 the second time that I forget to unmute my phone.  
25 I was told that only the administrative secretary

1 heard one of my rulings on Mr. Litwin's objections,  
2 so I apologize for that.

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

6 ARBITRATOR CHERNICK: No.

7 ARBITRATOR KESSEDJIAN: I don't.

8 ARBITRATOR BIENVENU: Thank you very much.

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

14 THE WITNESS: Thank you.

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

20 So thank you very much.

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

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

25 MR. ENGLISH: The witness is gone.

1 ARBITRATOR BIENVENU: Thank you, JD.

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

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

8 MR. JOHNSTON: The VeriSign lawyer will  
9 confirm that.

10 MR. LITWIN: My apologies.

11 MR. JOHNSTON: No problem.

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

15 MR. JOHNSTON: Correct.

16 ARBITRATOR BIENVENU: Excellent. Okay.  
17 Very good.

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

25 So from the perspective of the Panel, I

1 think that exhausts the agenda for today. Should  
2 we then resume tomorrow at the normal 8:00 a.m.  
3 Pacific time -- time to begin the hearing, yes?

4 MR. LITWIN: Yes, Mr. Chairman.

5 MR. JOHNSTON: Yes, Mr. Chairman.

6 ARBITRATOR BIENVENU: I see heads nodding.

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

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

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



1 at some point tomorrow afternoon.

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

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

11 (Discussion off the record.)

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

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

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

24 ARBITRATOR BIENVENU: Thank you. So  
25 that's perfect with us, and we'll look forward to

1 having the parties and Amici's thoughts on the  
2 briefing schedule for posthearing briefs.

3 MR. LeVEE: Thank you, Mr. Chairman.

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

7 MR. JOHNSTON: Thank you.

8 MR. LeVEE: Thank you.

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

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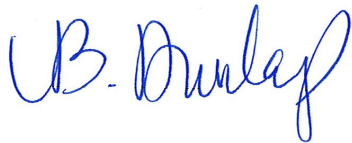
REPORTER'S CERTIFICATE

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

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

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



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

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