

**DotConnectAfrica Trust vs. Internet
Corp. for Assigned Names and Numbers**

Reporter's Transcript of Proceedings

February 06, 2019

Volume I



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1 CASE NAME : DOTCONNECTAFRICA TRUST
2 VS. INTERNET CORPORATION
3 FOR ASSIGNED NAMES AND
4 NUMBERS, ET AL.
5 CASE NUMBER: BC607494
6 LOS ANGELES, CALIFORNIA WEDNESDAY, FEBRUARY 6,
7 2019.
8 DEPARTMENT NO. 53 HON. ROBERT B. BROADBELT,
9 III, JUDGE
10 COURT REPORTER: LAURIE MILLER, CSR #6457
11 APPEARANCES: (AS HERETOFORE
12 MENTIONED.)
13 TIME: 10:32 A.M.

14
15 THE COURT: GOOD MORNING, EVERYONE. WELCOME
16 TO DEPARTMENT 53.

17 THE COURT WILL CALL NUMBER 8 ON THE
18 CALENDAR, DOTCONNECTAFRICA TRUST VERSUS INTERNET
19 CORPORATION FOR ASSIGNED NAMES AND NUMBERS. THIS IS
20 CASE NUMBER BC607494.

21 THE COURT NOTES THAT IT HAS SIGNED AND WILL
22 FILE TODAY AN ORDER APPOINTING COURT-APPROVED
23 REPORTER AS OFFICIAL REPORTER PRO TEMPORE
24 LAURIE MILLER TO SERVE AS THE OFFICIAL REPORTER PRO
25 TEMPORE FOR TODAY'S PROCEEDINGS.

26 AT THIS TIME I'LL ASK COUNSEL TO STATE
27 THEIR APPEARANCES, BEGINNING WITH PLAINTIFF'S
28 COUNSEL.

1 MR. BROWN: ETHAN BROWN ON BEHALF OF
2 PLAINTIFF, DOTCONNECTAFRICA TRUST.

3 MS. COLON: SARA COLON ON BEHALF OF
4 PLAINTIFF, DOTCONNECTAFRICA TRUST.

5 MS. YEGAZARIAN: NONA YEGAZARIAN.

6 MS. BURKE: ERIN BURKE ON BEHALF OF
7 DEFENDANT ICANN.

8 THE COURT: ONE MOMENT, PLEASE.

9 MS. BURKE: SURE.

10 MR. LEVEE: JEFF LEVEE, ALSO ON BEHALF OF
11 ICANN.

12 THE COURT: THANK YOU.

13 MS. OZUROVICH: KELLY OZUROVICH ON BEHALF OF
14 ICANN.

15 THE COURT: THANK YOU.

16 MS. PUSHINSKY: AND AMANDA PUSHINSKY ON
17 BEHALF OF ICANN.

18 THE COURT: THANK YOU.

19 ANY OTHER COUNSEL APPEARING TODAY? AND DO
20 WE HAVE -- IS THERE SOMEONE APPEARING BY COURTCALL
21 TODAY?

22 MS. BURKE: NO, YOUR HONOR. OUR CLIENT
23 WASN'T SURE IF SHE WAS GOING TO BE ABLE TO MAKE IT,
24 BUT SHE IS HERE TODAY, SO, NO, WE DON'T NEED
25 COURTCALL.

26 THE COURT: OKAY. THANK YOU. SO FEEL FREE
27 TO BE SEATED, EVERYONE. THANK YOU.

28 THE MATTER IS BEFORE THE COURT TODAY FOR TWO

1 THINGS ON CALENDAR. FIRST IS THE TRIAL, PHASE I OF A
2 BIFURCATED TRIAL, ON THE ISSUE OF DEFENDANT INTERNET
3 CORPORATION FOR ASSIGNED NAMES AND NUMBERS, WHICH IS
4 ALSO KNOWN AS ICANN, I-C-A-N-N. SO IT'S A BIFURCATED
5 ISSUE ON THE -- OR BIFURCATED TRIAL ON THE ISSUE OF
6 DEFENDANT ICANN'S AFFIRMATIVE DEFENSE ON JUDICIAL
7 ESTOPPEL.

8 THE SECOND THING THAT WE PUT ON CALENDAR
9 TODAY IS A TRIAL SETTING CONFERENCE ON THE REMAINING
10 ISSUE.

11 SO I'LL DEFER THE TRIAL SETTING CONFERENCE
12 UNTIL WE'VE COMPLETED THE PROCEEDINGS ON THE PHASE I
13 OF TRIAL, AND WE'LL ADDRESS THE TRIAL SETTING
14 CONFERENCE ON THE REMAINING ISSUES.

15 SO LET ME FIRST ADDRESS THE READINESS FOR
16 TRIAL ON PHASE I.

17 IS PLAINTIFF READY FOR TRIAL?

18 MS. COLON: YES, YOUR HONOR.

19 THE COURT: OKAY. THANK YOU.

20 AND IS DEFENDANT ICANN READY FOR TRIAL?

21 MR. LEVEE: YES, YOUR HONOR.

22 THE COURT: OKAY. THANK YOU.

23 A COUPLE MATTERS BEFORE WE BEGIN WITH
24 OPENING STATEMENTS.

25 ONE THING I DISCOVERED WHEN I WAS REVIEWING
26 THE FILE OF THIS CASE FOR TODAY'S TRIAL IS I WAS
27 TRYING TO FIND THE OPERATIVE PLEADINGS. IN OTHER
28 WORDS, THE OPERATIVE COMPLAINT AND OPERATIVE ANSWERS

1 TO THE COMPLAINT. THE -- I DON'T HAVE ALL OF THE
2 PHYSICAL COURT FILE. I THINK WE'RE ON VOLUME 15 NOW.
3 I THINK I ONLY HAVE THE LAST THREE VOLUMES. AND THEN
4 I HAD A DIFFICULT TIME TRYING TO FIND OUR IMAGE
5 DOCUMENTS ON THE COURT'S CASE MANAGEMENT SYSTEM, THE
6 OPERATIVE COMPLAINT.

7 FROM WHAT I DISCOVERED IN MY REVIEW OF THE
8 MATTER IS THAT IT'S MY UNDERSTANDING THAT THE CASE
9 WAS REMOVED TO FEDERAL COURT AT ONE POINT, AND THEN
10 THE FEDERAL COURT REMANDED THE CASE BACK TO STATE
11 COURT. AND I DID FIND -- LOOKS LIKE IT WAS ATTACHED
12 TO ONE OF THE DOCUMENTS IN THE COURT FILE -- THE
13 FEDERAL COURT ORDER, THE UNITED STATES DISTRICT
14 COURT, FILED OCTOBER 19, 2016, AND IT STATES, IN PART
15 (AS READ):

16 "ON FEBRUARY 26, 2016,
17 PLAINTIFF, DOTCONNECTAFRICA TRUST,
18 FILED A FIRST AMENDED COMPLAINT."

19 SO IT APPEARS AS THOUGH THE FIRST AMENDED
20 COMPLAINT MAY HAVE BEEN FILED IN FEDERAL COURT, BUT I
21 DON'T KNOW THE HISTORY OF IT. AND I COULDN'T FIND A
22 COPY OF THE FIRST AMENDED COMPLAINT IN THE STATE
23 COURT FILE.

24 SO MS. COLON -- IS IT MS. COLON?

25 MS. COLON: YES. MS. COLON, NOT COLON.

26 THE COURT: DO YOU WISH TO ADDRESS THAT?

27 MS. COLON: YES, IF I MAY, YOUR HONOR. IT'S
28 ACTUALLY EXHIBIT 37, JOINT EXHIBIT 37, IF THAT'S

1 HELPFUL. THE FIRST AMENDED COMPLAINT IS IN YOUR
2 TRIAL BINDER.

3 THE COURT: OKAY. THANK YOU. AND HOW ABOUT
4 ANSWERS TO THE FIRST AMENDED COMPLAINT?

5 MS. COLON: UNFORTUNATELY, NO, THERE ARE NO
6 ANSWERS AS AN EXHIBIT.

7 THE COURT: OKAY. IS THE PLAINTIFF'S FIRST
8 AMENDED COMPLAINT -- IS THAT THE OPERATIVE COMPLAINT?

9 MS. COLON: IT IS; HOWEVER, CERTAIN OF THE
10 CLAIMS WERE DISMISSED AFTER ICANN'S MOTION FOR
11 SUMMARY JUDGMENT IN THIS CASE.

12 I CAN TELL YOU WHICH CLAIMS STILL REMAIN.

13 THE COURT: THAT'S OKAY. I HAVE THE ORDER
14 ON THE SUMMARY JUDGMENT MOTION. THAT'S THE COURT'S
15 ORDER FILED AUGUST 9, 2017; DOES THAT SOUND ABOUT
16 RIGHT?

17 MS. COLON: YES. THAT'S CORRECT, YOUR
18 HONOR.

19 THE COURT: OKAY. THANK YOU.

20 AND, I'M SORRY, WHICH EXHIBIT IS PLAINTIFF'S
21 FIRST AMENDED COMPLAINT IN THIS ACTION?

22 MS. COLON: IT'S JOINT EXHIBIT 37.

23 THE COURT: OKAY. THIS IS WHAT I'M GOING TO
24 ASK PLAINTIFF TO DO, PLAINTIFF'S COUNSEL, IS I'M
25 GOING TO ORDER PLAINTIFF'S COUNSEL TO FILE -- IT CAN
26 BE A NOTICE, WHATEVER YOU WANT TO CALL IT, NOTICE OR
27 A DECLARATION, AND ATTACH TRUE AND CORRECT COPIES OF
28 PLAINTIFF'S FIRST AMENDED COMPLAINT, OF THE OPERATIVE

1 COMPLAINT, AND ALSO ATTACH COPIES OF THE DEFENDANT'S
2 ANSWERS TO THE FIRST AMENDED COMPLAINT SO I CAN MAKE
3 SURE THOSE ARE IN THE STATE COURT FILE; OKAY?

4 MS. COLON: OKAY.

5 THE COURT: CAN YOU FILE THOSE TOMORROW?

6 MS. COLON: YES, YOUR HONOR.

7 THE COURT: OKAY. THANK YOU.

8 SO THE COURT ORDERS PLAINTIFF TO FILE A
9 NOTICE OR DECLARATION ATTACHING FILE-STAMPED,
10 CONFORMED COPIES OF THE FIRST AMENDED COMPLAINT AND
11 DEFENDANT'S ANSWERS TO THE FIRST AMENDED COMPLAINT NO
12 LATER THAN FEBRUARY 7, 2019. THANK YOU.

13 ALL RIGHT. NEXT THE COURT WILL TAKE UP AND
14 ADDRESS PLAINTIFF'S MOTION IN LIMINE NUMBER ONE. THE
15 COURT PREPARED A TWO-PAGE WRITTEN TENTATIVE ORDER.

16 DID COUNSEL ON BOTH SIDES RECEIVE A COPY OF
17 THAT TODAY?

18 MS. BURKE: YES.

19 MS. COLON: NO, YOUR HONOR.

20 MR. BROWN: I THINK THEY'RE RIGHT HERE AND
21 WE JUST DIDN'T NOTICE. I APOLOGIZE.

22 THE COURT: OKAY. I GUESS WE DIDN'T BRING
23 THAT TO YOUR ATTENTION.

24 DO YOU HAVE A COPY OF THAT, MS. COLON?

25 MS. COLON: YES.

26 THE COURT: AND MR. LEVEE?

27 MR. LEVEE: YES, I DO, YOUR HONOR.

28 MS. BURKE: YES.

1 THE COURT: OKAY. I'LL GIVE YOU A MOMENT TO
2 REVIEW IT, AND THEN I'LL ALLOW COUNSEL TO BRIEFLY
3 ADDRESS MOTION IN LIMINE NUMBER ONE. THAT'S
4 PLAINTIFF'S MOTION IN LIMINE NUMBER ONE.

5

6 (BRIEF PAUSE IN THE PROCEEDINGS.)

7

8 THE COURT: LET ME KNOW WHENEVER YOU'RE
9 READY, MS. COLON.

10 MS. COLON: YES. I'M READY, YOUR HONOR.

11 THE COURT: I'M SORRY?

12 MS. COLON: I'M READY, YOUR HONOR.

13 THE COURT: OKAY. THANK YOU.

14

15 SO AT THIS TIME THE COURT WILL ADDRESS
16 PLAINTIFF'S MOTION IN LIMINE NUMBER ONE. ANYTHING
17 YOU WISH TO ADDRESS ON THE -- THE COURT'S TENTATIVE
18 IS TO DENY THE MOTION IN LIMINE NUMBER ONE FOR THE
19 REASONS STATED, BUT THE ORDER DOES STATE.

19

20 HOWEVER, PHASE I OF THE BIFURCATED TRIAL IN
21 THIS ACTION IS LIMITED TO DEFENDANT ICANN'S
22 AFFIRMATIVE DEFENSE OF JUDICIAL ESTOPPEL. THE COURT,
23 THEREFORE, EXPECTS THE PARTIES TO LIMIT THE EVIDENCE
24 AND ARGUMENT THEY PRESENT IN PHASE I OF THE
25 BIFURCATED TRIAL TO THAT WHICH IS RELEVANT TO THAT
26 AFFIRMATIVE DEFENSE.

26

27 OKAY. ANYTHING YOU WISH TO ADDRESS ON THE
28 PLAINTIFF'S MOTION IN LIMINE NUMBER ONE, MS. COLON?

28

MS. COLON: NO, YOUR HONOR. TO THE EXTENT

1 THAT THE RULING LIMITS TRIAL TO THE JUDICIAL ESTOPPEL
2 OF DCA, IT'S FINE WITH THE TENTATIVE.

3 THE COURT: OKAY. THANK YOU. AND IS IT
4 MS. BURKE?

5 MS. BURKE: IT IS.

6 THE COURT: MS. BURKE, ANYTHING YOU WISH TO
7 ADDRESS?

8 MS. BURKE: YOUR HONOR, WE'RE ALSO FINE WITH
9 THE TENTATIVE. WE HAVE NOT NOR WILL WE BE ARGUING
10 ANY DEFENSE OTHER THAN JUDICIAL ESTOPPEL. WE DO
11 RESERVE THE RIGHT TO MAKE THE ARGUMENTS AFTER THE
12 EVIDENCE IS IN ON EQUITABLE RELIEF THAT'S APPROPRIATE
13 UNDER JUDICIAL ESTOPPEL. BUT WITH THAT, WE'RE FINE
14 WITH THE TENTATIVE, YOUR HONOR.

15 THE COURT: OKAY. THANK YOU.

16 SO THE COURT'S RULING IS TO ADOPT ITS
17 WRITTEN TENTATIVE ORDER DENYING PLAINTIFF'S MOTION IN
18 LIMINE NUMBER ONE, AND THAT WILL BE FILED.

19 NEXT THE COURT WILL POINT OUT THAT THE
20 PARTIES FILED A DOCUMENT ENTITLED "DCA DEPOSITION
21 DESIGNATIONS AND ICANN'S COUNTER-DESIGNATIONS," WHICH
22 INCLUDED DESIGNATIONS OF DEPOSITION TESTIMONY TO BE
23 PRESENTED AT PHASE I OF THE BIFURCATED TRIAL AND
24 OBJECTIONS THERETO.

25 AND SO THE PARTIES INCLUDED A COLUMN ON THE
26 RIGHT-HAND SIDE OF THE PAGE FOR RULING BY COURT ON
27 OBJECTIONS, AND THE COURT HAS HANDWRITTEN ITS RULINGS
28 IN THE COLUMN, RIGHT-HAND COLUMN, FOR RULINGS BY

1 COURT ON OBJECTIONS AS TO EACH OF THE OBJECTIONS.

2 SO I JUST WANT TO POINT -- DID BOTH SIDES
3 RECEIVE A COPY OF THE COURT'S -- IT'S CALLED "ORDER
4 ON OBJECTIONS TO DCA DEPOSITION DESIGNATIONS AND
5 ICANN'S COUNTER-DESIGNATIONS" FILED TODAY?

6 MS. COLON?

7 MS. COLON: YES, YOUR HONOR.

8 THE COURT: OKAY. THANK YOU.

9 AND MR. LEVEE?

10 MR. LEVEE: YES, WE HAVE, YOUR HONOR.

11 THE COURT: OKAY. THANK YOU.

12 ALL RIGHT. AND AS TO PHASE I OF THE
13 TRIAL -- I THINK WE DISCUSSED THIS AT THE FINAL
14 STATUS CONFERENCE -- WHAT I ENVISION IS THAT THE
15 DEFENDANT, ICANN, WILL PRESENT ITS CASE-IN-CHIEF ON
16 THE BIFURCATED TRIAL ON THE ISSUE OF THE AFFIRMATIVE
17 DEFENSE JUDICIAL ESTOPPEL FIRST BECAUSE THEY HAVE THE
18 BURDEN OF PROOF.

19 AND THEN WHEN THEY'VE COMPLETED THEIR
20 PRESENTATION OF THEIR CASE IN CHIEF, THEN THE
21 PLAINTIFF WILL HAVE AN OPPORTUNITY TO PRESENT ITS
22 CASE-IN-CHIEF.

23 AND THEN WHEN BOTH SIDES REST, THE COURT
24 INTENDS TO ORDER CLOSING ARGUMENTS BE PRESENTED BY
25 WRITTEN BRIEF.

26 AS TO WITNESSES IN THIS BIFURCATED TRIAL, IN
27 PHASE I, THE COURT HAS A JOINT WITNESS LIST THAT THE
28 PARTIES FILED.

1 SO LET ME JUST FIND OUT FROM, FIRST OF ALL,
2 DEFENDANT ICANN, WHO ARE THE WITNESSES THAT DEFENDANT
3 ICANN INTEND TO CALL IN PHASE I IN THEIR
4 CASE-IN-CHIEF?

5 MR. LEVEE: SO WE HAVE TWO WITNESSES, YOUR
6 HONOR. WE'LL CALL FIRST THE PLAINTIFF'S EXECUTIVE
7 DIRECTOR, MR. BEKELE, B-E-K-E-L-E, AND THEN WHEN HE
8 IS DONE, WE WILL CALL AN ICANN WITNESS, CHRISTINE
9 WILLETT, AND THEN WE WILL REST OUR CASE.

10 THE COURT: OKAY. THANK YOU.

11 AND THEN IN PLAINTIFF'S CASE-IN-CHIEF, WHO
12 ARE THE WITNESSES YOU INTEND TO CALL?

13 MS. COLON: WE WILL BE CALLING THOSE
14 WITNESSES AS WELL, YOUR HONOR, IN ADDITION TO A
15 WITNESS, AKRAM ATALLAH.

16 AND, YOUR HONOR, DCA WOULD LIKE TO BE HEARD
17 ON THE RULINGS ON THE DEPOSITION DESIGNATIONS AT SOME
18 POINT.

19 THE COURT: OKAY.

20 SO AS TO THE WITNESSES, I THINK WE MIGHT
21 HAVE DISCUSSED THIS AT THE FINAL STATUS CONFERENCE.
22 WHAT I WOULD EXPECT COUNSEL TO DO IS: I EXPECT EACH
23 WITNESS TO BE CALLED ONCE, AND FOR EACH PARTY CONDUCT
24 ALL OF THEIR EXAMINATION THAT THEY WOULD HAVE
25 CONDUCTED EITHER ON THEIR CROSS-EXAMINATION OF THE
26 WITNESS OR THEIR DIRECT EXAMINATION OF THE WITNESS IN
27 THEIR CASE -- TO CONDUCT IT AT THAT TIME SO I DON'T
28 INTEND TO IMPOSE SCOPE LIMITATIONS AS FAR AS THE

1 EXAMINATION OF A WITNESS WHEN THEY'RE CROSS-EXAMINED.

2 SO I EXPECT EACH WITNESS TO BE CALLED ONCE
3 UNLESS THERE'S GOOD CAUSE TO CALL THEM AGAIN IN THAT
4 PARTY'S CASE OR FOR REBUTTAL FOR SOME REASON.

5 OKAY. ON THE COURT'S ORDER ON OBJECTIONS TO
6 THE DEPOSITION DESIGNATIONS, MS. COLON, DID YOU WISH
7 TO BE HEARD?

8 MS. COLON: YES, YOUR HONOR. I JUST WANT TO
9 BE HEARD ON A FEW OF THESE RULINGS.

10 THE FIRST WOULD BE FOR THE DEPOSITION OF
11 STEVEN CROCKER. THE PARTICULAR DESIGNATION AT ISSUE
12 HERE IS AT PAGE 74, LINE 18, TO PAGE 75, LINE 9.

13 DCA RESPECTFULLY REQUESTS THAT AT LEAST PAGE
14 75, LINE 6 THROUGH LINE 9 BE ADMITTED. THAT QUESTION
15 AND ANSWER IS DIRECTLY RELEVANT TO THE ISSUE OF
16 WHETHER OR NOT THE IRP WAS A JUDICIAL OR
17 QUASI-JUDICIAL FORUM.

18 THE COURT: EXCUSE ME ONE MOMENT.

19 MR. LEVEE: YOUR HONOR, MIGHT IT BE
20 POSSIBLE -- WE WILL NOT REFER TO ANY OF THIS IN OUR
21 OPENING. SO THAT WE CAN ALL PULL EVERYTHING AND HAVE
22 IT IN FRONT OF US, MAY IT BE POSSIBLE TO ARGUE THIS
23 EITHER SOMETIME THIS AFTERNOON OR FIRST THING IN THE
24 MORNING? I'M NOT GOING TO ADDRESS ANY OF THIS
25 TESTIMONY IN MY OPENING, AND I DOUBT PLAINTIFF WILL,
26 EITHER.

27 THE COURT: OKAY. MS. COLON?

28 MS. COLON: THAT'S FINE, YOUR HONOR.

1 THE COURT: OKAY. SO IT WILL BE INCUMBENT
2 UPON YOU TO RAISE THE ISSUE AGAIN SO WE CAN ADDRESS
3 THAT.

4 MS. COLON: OKAY.

5 THE COURT: BUT WE'LL DEFER ADDRESSING THAT,
6 AND I'LL ALLOW YOU TO ADDRESS DEPOSITION DESIGNATIONS
7 AND THE COURT'S RULINGS ON THE DESIGNATIONS THEN.

8 OKAY. THANK YOU.

9 ALL RIGHT. AND THE PARTIES HAVE FILED A
10 JOINT EXHIBIT LIST ON JANUARY 17, 2019, AND IT LOOKS
11 LIKE YOU PRESENTED THE COURT WITH -- THERE ARE FIVE
12 VOLUMES OF EXHIBITS; IS THAT CORRECT?

13 MR. LEVEE: YES, YOUR HONOR. WE HAVE A
14 NUMBER OF JOINT EXHIBITS AS TO WHICH THE PARTIES HAVE
15 STIPULATED TO THEIR AUTHENTICITY. THAT WOULD TAKE US
16 FROM EXHIBIT 1 THROUGH EXHIBIT 41, AND THOSE ARE
17 JOINTLY FILED. AND WITH YOUR HONOR'S PERMISSION, WE
18 WOULD AVOID THE FOUNDATIONAL REQUIREMENTS DURING THE
19 EXAMINATIONS AND JUST HAVE THEM BE ADMITTED.

20 THE COURT: OKAY. THANK YOU.

21 SO I WILL POINT OUT THAT IF EITHER PARTY
22 WISHES TO HAVE AN EXHIBIT RECEIVED INTO EVIDENCE,
23 THEN YOU'LL NEED TO MOVE IT INTO EVIDENCE, EVEN IF
24 YOU STIPULATED.

25 MR. LEVEE: OKAY.

26 THE COURT: TO ADMISSIBILITY OF THE EXHIBIT,
27 THEN YOU'LL STILL NEED TO, IN YOUR CASE-IN-CHIEF,
28 MOVE INTO EVIDENCE WHATEVER THE EXHIBITS ARE. YOU

1 CAN JUST IDENTIFY THEM BY EXHIBIT NUMBER.

2 MR. LEVEE: SURE.

3 THE COURT: AND THEN I'LL ASK, IS THERE AN
4 OBJECTION, AND I ASSUME THERE WON'T BE IF THERE'S A
5 STIPULATION TO ADMISSIBILITY, AND THEN WE'LL MAKE A
6 RECORD -- THE CLERK WILL MAKE A RECORD AS TO WHICH
7 EXHIBITS ARE RECEIVED INTO EVIDENCE --

8 MR. LEVEE: ABSOLUTELY.

9 THE COURT: -- SO IT'S CLEAR. SO DON'T
10 ASSUME JUST BECAUSE YOU'VE STIPULATED TO ADMISSION OF
11 A DOCUMENT THAT IT WILL BE RECEIVED INTO EVIDENCE
12 WITHOUT YOU MOVING TO ADMIT IT.

13 MR. LEVEE: OKAY. WOULD YOU LIKE FOR US TO
14 MOVE AT THE END OF WHEN A WITNESS TESTIFIES, OR WOULD
15 YOU LIKE US TO DO IT DURING THE COURSE OF THE
16 EXAMINATION?

17 THE COURT: YOU CAN DO IT AT ANY TIME -- I
18 WOULD PREFER THAT YOU DO IT WHILE THE WITNESS IS
19 TESTIFYING, IF THAT WITNESS IS RESPONDING.

20 MR. LEVEE: THAT'S FINE.

21 THE COURT: BUT I WOULD PREFER THAT YOU NOT
22 WAIT UNTIL YOU FINISH YOUR CASE-IN-CHIEF TO ADMIT ALL
23 THE EXHIBITS.

24 MR. LEVEE: VERY GOOD.

25 THE COURT: DO IT AS YOU GO WOULD BE MY
26 PREFERENCE.

27 MR. LEVEE: WE'LL DO OUR BEST.

28 THE COURT: OKAY. THANK YOU.

1 ALL RIGHT. ANYTHING ELSE WE NEED TO ADDRESS
2 BEFORE EACH SIDE PRESENTS ITS OPENING STATEMENT?
3 I'LL START WITH MR. LEVEE?

4 MR. LEVEE: NO. THANK YOU, YOUR HONOR.

5 THE COURT: THANK YOU. AND MS. COLON?

6 MS. COLON: I DON'T BELIEVE SO, YOUR HONOR.

7 THE COURT: OKAY. THANK YOU.

8 AND I THINK I RECALL, AT THE FINAL STATUS
9 CONFERENCE, EACH SIDE INDICATED THAT THEY WISHED TO
10 PRESENT AN OPENING STATEMENT.

11 SO LET ME ASK MR. LEVEE, DOES THE DEFENDANT,
12 ICANN, WISH TO PRESENT AN OPENING STATEMENT?

13 MR. LEVEE: WE DO, YOUR HONOR.

14 THE COURT: WHAT'S YOUR TIME ESTIMATE?

15 MR. LEVEE: I HAD ESTIMATED BEFORE 45
16 MINUTES. I AM OPTIMISTIC I CAN BRING IT IN A FEW
17 MINUTES FASTER THAN THAT.

18 THE COURT: OKAY. AND, MS. COLON, DOES
19 PLAINTIFF WISH TO PRESENT OPENING STATEMENT?

20 MS. COLON: YES, YOUR HONOR. I ESTIMATE IT
21 WILL BE ABOUT 35 MINUTES.

22 THE COURT: OKAY. THANK YOU.

23 ALL RIGHT. MR. LEVEE, ARE YOU PREPARED TO
24 PRESENT DEFENDANT ICANN'S OPENING STATEMENT AT THIS
25 TIME?

26 MR. LEVEE: I AM.

27 THE COURT: OKAY. THANK YOU. THE COURT
28 NOTES IT'S ABOUT 10:55 A.M., AND WE WILL BEGIN AT

1 THIS TIME WITH DEFENDANT ICANN'S OPENING STATEMENT.

2 WHENEVER YOU'RE READY, MR. LEVEE?

3 MR. LEVEE: YOUR HONOR, I HAVE SLIDES AS WE
4 HAD DISCUSSED LAST TIME. THEY WILL BE UP ON THE
5 MONITOR, BUT I ALSO HAVE A COPY FOR YOUR HONOR.

6 THE COURT: GREAT. OKAY. THANK YOU.

7 AND THE SLIDES, THEY ARE NOT EXHIBITS;
8 RIGHT?

9 MR. LEVEE: THEY ARE NOT, YOUR HONOR. THEY
10 REFER TO EXHIBITS, BUT THEY ARE NOT EXHIBITS.

11 THE COURT: OKAY. THANK YOU.

12 OKAY. MR. LEVEE, WHENEVER YOU ARE READY,
13 YOU MAY PROCEED WITH DEFENDANT ICANN'S OPENING
14 STATEMENT ON PHASE 1 OF THE BIFURCATED TRIAL ON THE
15 ISSUE OF ICANN'S AFFIRMATIVE DEFENSE OF JUDICIAL
16 ESTOPPEL.

17 MR. LEVEE: THANK YOU, YOUR HONOR. MAY IT
18 PLEASE THE COURT.

19

20 OPENING STATEMENT

21

22 MR. LEVEE: WE ARE HERE FOR A VERY SHORT
23 TRIAL ON WHETHER DCA'S LAWSUIT SHOULD BE DISMISSED
24 PURSUANT TO ICANN'S AFFIRMATIVE DEFENSE OF THE
25 DOCTRINE OF JUDICIAL ESTOPPEL. THE DOCTRINE ITSELF
26 IS NOT COMPLICATED, AND WE BELIEVE THAT AT THE END OF
27 THESE COUPLE OF DAYS THE COURT WILL BE PERSUADED THAT
28 THE DOCTRINE APPLIES HERE AND THAT EQUITY DEMANDS

1 THAT DCA SHOULD NOT BE PERMITTED TO PROSECUTE A
2 LAWSUIT THAT IT REPEATEDLY AND SUCCESSFULLY TOLD A
3 PRIOR TRIBUNAL IT DID NOT HAVE THE RIGHT TO FILE.

4 SO NOW I'M GOING TO TAKE YOU THROUGH THE
5 SLIDES, AND I'LL IDENTIFY, YOUR HONOR, WE'RE ON SLIDE
6 ONE. I WANTED TO GIVE JUST A BRIEF OVERVIEW OF
7 ICANN. YOUR HONOR'S ALREADY NOTED THAT IT STANDS FOR
8 THE INTERNET CORPORATION FOR ASSIGNED NAMES AND
9 NUMBERS. IT'S MOST TYPICALLY REFERRED TO AS ICANN.

10 THE COURT: OKAY. JUST -- SORRY TO
11 INTERRUPT YOU. SO JUST TO BE CLEAR, WHEN YOU REFER
12 TO SLIDES, YOU'RE REFERRING TO A POWERPOINT
13 PRESENTATION WITH SLIDES AND THE -- IT'S BEING
14 PROJECTED ONTO MONITORS THAT ARE SET UP IN THE
15 COURTROOM. THERE'S ONE ON THE BENCH, AND THEN
16 THERE'S MONITORS AT COUNSEL TABLE AND A MONITOR ON
17 THE WITNESS STAND AS WELL.

18 STORY TO INTERRUPT YOU.

19 MR. LEVEE: THANK YOU, YOUR HONOR.

20 ICANN WAS INCORPORATED IN 1998 AS A
21 CALIFORNIA NOT-FOR-PROFIT PUBLIC BENEFIT CORPORATION.
22 ITS MISSION IS TO MAINTAIN AND COORDINATE THE GLOBAL
23 INTERNET'S NAMING SYSTEM, SHORT NAME FOR THE
24 OPERATION. WHAT DOES THAT MEAN? ICANN ADMINISTERS
25 WHAT WE CALL THE DOMAIN NAME SYSTEM. IT CONVERTS
26 EASILY REMEMBERED DOMAIN NAMES -- LACOURT.ORG,
27 GOOGLE.COM, AMAZON.COM -- INTO NUMERIC IP ADDRESSES
28 THAT OUR COMPUTERS CAN UNDERSTAND, AND ICANN ALSO

1 OVERSEES THE PROCESS FOR ADDING WHAT YOU'LL HEAR A
2 LOT ABOUT TODAY, NEW TOP-LEVEL DOMAINS TO THE
3 INTERNET.

4 SO WHAT IS THE TOP-LEVEL DOMAIN? THE
5 TOP-LEVEL DOMAIN ARE THOSE LETTERS THAT OCCUR AFTER
6 THE LAST DOT. SO, IN MY EXAMPLE, GOOGLE.COM, ".COM"
7 IS THE TOP-LEVEL DOMAIN. AND UNDER ICANN'S
8 SUPERVISION, OVER A THOUSAND TOP-LEVEL DOMAINS HAVE
9 BEEN APPROVED TO BE ADDED TO THE INTERNET JUST WITHIN
10 THE LAST FEW YEARS, ONE OF ICANN'S PRIMARY FUNCTIONS.

11 TURN TO THE SECOND SLIDE.

12 SO HOW IS ICANN ORGANIZED? ICANN IS ORGANIZED
13 PURSUANT TO WHAT IT CALLS A GLOBAL MULTI-STAKEHOLDER
14 MODEL. IT'S A COMMUNITY THAT REPRESENTS MULTIPLE
15 GROUPS THAT EACH REPRESENT DIFFERENT INTERESTS. SO
16 THERE ARE INDIVIDUALS WHO USE THE INTERNET --
17 INDUSTRY, GOVERNMENTS; THERE'S ACADEMIA AND SO FORTH.
18 AND ICANN TRIES, THROUGH WHAT IT CALLS A
19 CONSENSUS-DRIVEN POLICY APPROACH, TO COME UP WITH NEW
20 POLICIES FOR THE DOMAIN NAME SYSTEM.

21 ICANN IS ORGANIZED SOMEWHAT UNIQUELY, AND
22 THIS IS ALL PURSUANT TO BYLAWS.

23 ICANN HAS WHAT IT CALLS ADVISORY COMMITTEES
24 AND SUPPORTING ORGANIZATIONS. SUPPORTING
25 ORGANIZATIONS DEVELOP AND LITERALLY RECOMMEND POLICY
26 TO THE ICANN BOARD. AND YOU'RE GOING TO HEAR, DURING
27 THE COURSE OF THE TRIAL, ABOUT ONE PARTICULAR
28 SUPPORTING ORGANIZATION THAT WAS RELEVANT TO THIS

1 TRIAL.

2 SECOND, ICANN HAS WHAT ARE CALLED ADVISORY
3 COMMITTEES, AND THEY PROVIDE ADVICE TO THE BOARD
4 REGARDING PARTICULAR ISSUES OR POLICIES. AND, AGAIN,
5 YOU'RE GOING TO HEAR ABOUT ONE PARTICULAR ADVISORY
6 COMMITTEE IN A MOMENT.

7 THE BOARD IS MADE UP OF 16 VOTING MEMBERS
8 AND FOUR NON-VOTING LIAISONS FROM ALL OVER THE WORLD,
9 AND, LITERALLY, OF THE 20 BOARD MEMBERS, THEY COME
10 FROM, LITERALLY, ALL OVER THE WORLD.

11 I SHOULD NOTE ALSO THAT ICANN HAS IMPORTANT
12 FEATURES TO ENSURE ACCOUNTABILITY AND TRANSPARENCY,
13 AND YOU'RE GOING TO HEAR ABOUT IT TODAY, AND I WANT
14 YOU TO APPRECIATE WHAT IT MEANS.

15 NEARLY EVERYTHING ICANN DOES IN TERMS OF
16 ANNOUNCING THINGS OR BOARD MEETINGS, IT POSTS ON ITS
17 WEBSITE. SO IF THERE ARE BOARD MEETINGS OR DECISIONS
18 OR RESOLUTIONS, THESE THINGS ARE ROUTINELY POSTED ON
19 THE WEBSITE, AND YOU'LL HEAR WITNESSES REFER TO IT
20 BEING POSTED. WHAT THAT MEANS IS IT'S TYPICALLY
21 POSTED ON ITS WEBSITE, WHICH IS ICANN.ORG.

22 I MENTION THAT YOU WILL HEAR ABOUT THE
23 GOVERNMENTAL ADVISORY COMMITTEE. THIS IS AN ADVISORY
24 COMMITTEE THAT WAS CREATED UNDER ICANN'S BYLAWS, AND
25 IT SERVES AS THE VOICE OF THE WORLD'S GOVERNMENTS AND
26 GOVERNMENTAL ORGANIZATIONS TO SUBMIT POLICY
27 RECOMMENDATIONS TO ICANN.

28 YOU WILL HEAR WITNESSES REFER TO THE

1 GOVERNMENT ADVISORY COMMITTEE AS THE GAC, AND,
2 REGRETTABLY, YOU'RE GOING TO HEAR A LOT OF THOSE
3 KINDS OF ACRONYMS SHORTENED. THE GAC IS ONE OF THE
4 ONES YOU'LL HEAR A LOT ABOUT TODAY AND TOMORROW.

5 THE GAC REPRESENTS OVER 170 REPRESENTATIVES
6 FROM COUNTRIES AND GOVERNMENTAL ORGANIZATIONS FROM
7 AROUND THE WORLD, AND IT'S THE WAY GOVERNMENTS AROUND
8 THE WORLD PROVIDE INPUT TO ICANN ON ISSUES OF PUBLIC
9 POLICY.

10 IN ADDITION, ICANN'S BYLAWS -- YOU'LL HEAR
11 ABOUT THIS IN TESTIMONY -- ACTUALLY HIRE THE BOARD TO
12 CONSIDER ADVICE THAT THE GAC FORMALLY PROVIDES TO
13 ICANN. AND SO THERE WILL BE SOME DISCUSSION, BOTH
14 TODAY AND TOMORROW, ABOUT ADVICE THAT THE GAC
15 PROVIDED WITH RESPECT TO DCA'S APPLICATION.

16 SLIDE 4.

17 THIS LAWSUIT BASICALLY INVOLVES ONE
18 PARTICULAR TOP-LEVEL DOMAIN DOT EFFORT, AND IT
19 RELATES TO WHAT ICANN REFERS TO AS THE NEW GTLD
20 PROGRAM.

21 IN 2007 -- I MENTIONED THE SUPPORTING
22 ORGANIZATIONS; THIS PARTICULAR ONE IS THE GNSO, THE
23 GENERIC NAMES SUPPORTING ORGANIZATION. IT'S A POLICY
24 BODY, AND IT ENDORSED A VERY WIDE EXPANSION OF THE
25 ONE OTHER TOP-LEVEL DOMAIN NAMES. PREVIOUSLY, ICANN
26 HAD ADDED SOME TOP-LEVEL DOMAINS -- .INFO, .BIZ,
27 .MUSEUM -- BUT THEY HAD DONE SO IN A VERY MEASURED
28 WAY.

1 THE DECISION THAT WAS MADE IN 2007 WAS THAT
2 THE GNSO RECOMMENDED IF THERE WERE INTERESTED
3 APPLICANTS THAT WERE CAPABLE OF OPERATING THE
4 TOP-LEVEL OF DOMAINS, THERE WERE NO RESTRICTIONS ON
5 THE NUMBERS.

6 ICANN THEN CREATED A PRETTY THICK BOOK.
7 IT'S GOING TO BE MARKED INTO EVIDENCE LATER TODAY.
8 IT'S ACTUALLY EXHIBIT 2, THE GUIDEBOOK. AND THE
9 GUIDEBOOK IS THE DOCUMENT PURSUANT TO WHICH ICANN
10 EVALUATED ALL OF THE APPLICATIONS THAT CAME IN, AND
11 IT CONTAINS ALL THE REQUIREMENTS FOR WHAT THE
12 APPLICANTS HAVE TO DO; WHAT TECHNICAL, FINANCIAL AND
13 OTHER WHEREWITHAL THEY HAVE TO HAVE. AND THERE'S A
14 PARTICULAR ISSUE UNDER THE GUIDEBOOK THAT RELATES TO
15 DCA'S APPLICATION. I'M NOT GOING TO FORESHADOW IT;
16 PRIMARILY, IT RELATES TO PHASE II OF THIS TRIAL, BUT
17 THERE'S A LOT OF INFORMATION IN THE GUIDEBOOK.

18 THE GUIDEBOOK IS SET UP IN MODULES, SO THERE
19 ARE SIX MODULES, AND THEY ARE PUBLISHED ONLINE.
20 THERE WERE DRAFTS OF THE GUIDEBOOK. AND OVER THE
21 COURSE OF YEARS, THERE WERE A NUMBER OF DRAFTS, AND,
22 ULTIMATELY, ICANN FINALIZED THE GUIDEBOOK. AND
23 YOU'LL HEAR TESTIMONY FROM PLAINTIFF'S CHIEF
24 EXECUTIVE LATER TODAY THAT SHE ACTUALLY PARTICIPATED,
25 NOT ONLY IN THE GNSO, BUT SHE ALSO REVIEWED DRAFTS OF
26 THE GUIDEBOOK AND MADE COMMENTS ON THOSE DRAFTS.

27 IN 2012, ICANN LAUNCHED WHAT IS, AS I SAID,
28 WE CALLED THE NEW GTLD PROGRAM, AND, SOMEWHAT

1 UNEXPECTEDLY, RECEIVED 1,930 APPLICATIONS FOR NEW
2 GTLD, PROBABLY WITH AN EXPECTATION THEY'D RECEIVE
3 500; INSTEAD, THEY RECEIVED 1,900.

4 AND AS I SAID, AS OF TODAY, WELL OVER A
5 THOUSAND HAVE BEEN APPROVED BY ICANN TO BE LAUNCHED
6 INTO THE DOMAIN NAME SYSTEM.

7 NOW, I MENTIONED THE MODULE OF THE
8 GUIDEBOOK, AND ONE OF THE MOST IMPORTANT MODULES IS
9 MODULE 6, AND IT CONTAINS WHAT I'M GOING TO REFER TO
10 AS THE COVENANT.

11 AND IF YOU DON'T MIND, YOUR HONOR, I'M GOING
12 TO PASS OFF TO MR. BROWN AND TAP HIM ON THE SHOULDER.
13 I BLEW UP THE GUIDEBOOK. I WILL REFERENCE THE
14 SPECIFIC EXHIBIT NUMBER WHEN I GET BACK TO THE
15 PODIUM, BUT I WANTED TO JUST SHOW YOU, THIS IS
16 LANGUAGE FROM THE GUIDEBOOK. APPLICANTS, WHEN THEY
17 SUBMIT THEIR APPLICATIONS, CERTIFY THAT THEY'VE READ
18 THE GUIDEBOOK AND THAT THEY UNDERSTAND ALL OF ITS
19 TERMS APPLY TO THEM. MODULE 6 IS SORT OF THE TERMS
20 AND CONDITIONS. AND WHAT IT SAYS IS IT'S A COVENANT
21 NOT TO SUE. I'M GOING TO CALL IT THE COVENANT IN THE
22 NEXT COUPLE OF DAYS, BUT I'M GOING TO READ YOU SOME
23 OF THE RELEVANT LANGUAGE SO YOU UNDERSTAND WHY I CALL
24 IT THAT. (AS READ):

25 "THE APPLICANT HEREBY RELEASES
26 ICANN AND THE ICANN AFFILIATED
27 PARTIES" -- WE'LL COME TO THAT IN A
28 MINUTE -- "OF ANY AND ALL CLAIMS BY

1 APPLICANT THAT ARISE OUT OF OR ARE
2 BASED UPON OR IN ANY WAY RELATED TO
3 ANY ACTION OR FAILURE TO ACT BY
4 ICANN OR ICANN-AFFILIATED PARTIES."
5 WHAT'S AN AFFILIATED PARTY? WELL, ICANN
6 HIRED VENDORS AND OTHERS TO ASSIST ICANN WITH THE
7 REVIEW OF THE APPLICATIONS. AND THERE WERE LITERALLY
8 FINANCIAL REVIEWS AND TECHNICAL REVIEWS AND ALSO A
9 REVIEW YOU'RE GOING TO HEAR MORE ABOUT IN THIS TRIAL
10 AS TO WHAT HAPPENS WHEN AN APPLICANT WANTS TO HAVE A
11 NAME THAT REPRESENTS THE NAME OF A CONTINENT. SO
12 IT'S A GEOGRAPHIC NAME, AFRICA, AND THERE'S A REVIEW
13 THAT'S INVOLVED IN THAT.

14 SO NOW I'M GOING TO GO TO THE CAPS HERE.
15 (AS READ):

16 "APPLICANT" -- IN THIS INSTANCE DCA --
17 "AGREES NOT TO CHALLENGE IN
18 COURT OR IN ANY OTHER JUDICIAL FORA
19 ANY FINAL DECISION MADE BY ICANN
20 WITH RESPECT TO THE APPLICATION AND
21 IRREVOCABLY WAIVES ANY RIGHT TO SUE
22 OR PROCEED IN COURT OR ANY OTHER
23 JUDICIAL FORA."

24 SO PRETTY STRONG LANGUAGE. MAKES IT CLEAR
25 THAT AN APPLICANT CAN'T DO WHAT DCA HAS DONE: FILE A
26 LAWSUIT.

27 SO I TOLD YOU I WOULD GIVE YOU THE CITATION,
28 SO YOUR HONOR HAS IT. IT IS EXHIBIT 2, AND IT'S PAGE

1 331.

2 SO NOW WHAT I WANTED TO DO IS GIVE YOU AN
3 OVERVIEW OF THE FACTS, AND I'M GOING TO DO IT VIA
4 THIS TIMELINE. NOW I'M ON SLIDE 5.

5 SO IN JANUARY OF 2012, ICANN BEGAN ACCEPTING
6 APPLICATIONS FOR THE NEW TLD PROGRAM, AND YOU SEE AT
7 THE BOTTOM, IN THE SPRING, DCA AND AN ENTITY KNOWN AS
8 ZACR SUBMITTED APPLICATIONS FOR .AFRICA. ZACR IS THE
9 INTERVENOR IN THIS LAWSUIT. THEY ARE AN AFRICAN
10 ENTITY OUT OF SOUTH AFRICA. SO WE HAD TWO APPLICANTS
11 APPLY FOR THE SAME TOP-LEVEL DOMAIN. TECHNICALLY,
12 DCA ACTUALLY SUBMITTED AN APPLICATION THAT WAS
13 INCORRECT, AND ICANN LET IT CHANGE ITS APPLICATIONS
14 SO THAT IT WAS SUBMITTED CORRECTLY. NEITHER HERE NOR
15 THERE FOR PURPOSES OF JUDICIAL ESTOPPEL.

16 IN APRIL OF 2013, THE GAC, THE GOVERNMENTAL
17 ADVISORY COMMITTEE THAT I MENTIONED BEFORE, ISSUED
18 WHAT IT REFERRED TO AS CONSENSUS ADVICE -- THAT'S A
19 TERM OF ART UNDER THE BYLAWS -- AGAINST DCA'S
20 APPLICATION. SO THE GAC LITERALLY GAVE ICANN A
21 COMMUNIQUE THAT SAID "WE DO NOT WISH DCA'S
22 APPLICATION TO PROCEED."

23 AND IN JUNE OF 2013, ICANN'S BOARD ACCEPTED
24 THAT ADVICE, AND SO ICANN STOPPED THE PROCESSING OF
25 DCA'S APPLICATION AT THAT TIME.

26 IN OCTOBER OF 2013, DCA INSTITUTED WHAT WE
27 CALL IRP PROCEEDINGS. AND YOU'RE GOING TO HEAR A LOT
28 OF IRP PROCEEDING, INDEPENDENT REVIEW. THESE ARE

1 PROCEEDINGS THAT ARE ESTABLISHED UNDER ICANN'S
2 BYLAWS. A VERY FORMAL PROCEEDING. AND I'M GOING TO
3 INTRODUCE YOU TODAY, A LITTLE BIT NOW AND MUCH MORE
4 DURING THE EXAMINATION OF THE PLAINTIFF'S EXECUTIVE
5 DIRECTOR, AS TO WHAT THE IRP WAS, THE FORMALITIES
6 ASSOCIATED WITH IT, ET CETERA.

7 THERE WAS DISCOVERY; THERE WERE HEARINGS;
8 THERE WERE BRIEFS. THERE WAS THEN A LIVE HEARING
9 WITH WITNESSES WHO WERE SWORN. THERE WERE THREE
10 JUDGES -- I'M GOING TO TALK ABOUT THEM IN A SECOND --
11 WHO PRESIDED OVER THE IRP, AND THE STATEMENTS THAT
12 FORMED THE BASIS FOR OUR AFFIRMATIVE DEFENSE OF
13 JUDICIAL ESTOPPEL, STATEMENTS IN WHICH DCA TOLD THE
14 PANEL, THE INDEPENDENT REVIEW PANEL, THAT THEY DID
15 NOT HAVE THE RIGHT TO FILE A LAWSUIT AGAINST ICANN,
16 THOSE STATEMENTS WERE MADE IN THE IRP OVER THE COURSE
17 OF 2013 TO 2015.

18 THE IRP HAD A HEARING IN MAY OF 2015, AND ON
19 JULY 9TH OF 2015, THE PANEL RULED AND IT ISSUED A
20 FINAL DECLARATION IN DCA'S FAVOR, AND THE GUTS OF THE
21 DECLARATION, WHICH I WILL SHOW YOU LATER, IS THAT
22 THEY WERE DETERMINATIVE THAT THE BOARD OF ICANN
23 SHOULD NOT HAVE ACCEPTED IN THE WAY THAT THEY DID THE
24 GAC'S ADVICE, AND THEY SAID TO ICANN, "YOU SHOULD PUT
25 DCA'S APPLICATION BACK INTO PROCESSING."

26 AND ONE WEEK LATER, ON JULY 16 OF 2015,
27 ICANN DID THAT, AND THEY PUT DCA'S APPLICATION BACK
28 INTO PROCESSING VIA A RESOLUTION THAT I WILL SHOW YOU

1 IN A MOMENT.

2 FROM JULY THROUGH DECEMBER OF 2015 --
3 ACTUALLY, IT GOES A LITTLE PAST THAT -- ICANN
4 BEGAN -- RESUMED THE PROCESSING OF DCA'S APPLICATION,
5 AND THE APPLICATION FAILED. AND THE REASON IT FAILED
6 IS THAT DCA DID NOT HAVE, IN THE JUDGMENT OF ICANN'S
7 VENDOR, THE SUPPORT OF THE SUFFICIENT NUMBER OF
8 COUNTRIES FROM THE CONTINENT OF AFRICA. THE
9 GUIDEBOOK SAYS YOU HAVE TO HAVE
10 60 PERCENT SUPPORT. DCA DID NOT HAVE THAT SUPPORT.

11 THE REASONS FOR THAT, YOUR HONOR, ARE A
12 PHASE II ISSUE. I'M NOT GOING TO GET TOO MUCH INTO
13 IT TODAY. DOESN'T REALLY RELATE TO JUDICIAL
14 ESTOPPEL.

15 WHAT DOES RELATE TO JUDICIAL ESTOPPEL IS
16 THAT IMMEDIATELY AFTER ICANN TOLD DCA THAT ITS
17 APPLICATION WOULD FAIL, DCA FILED THIS LAWSUIT.

18 SO THE NEXT SLIDE, SLIDE 6.

19 YOU'VE SEEN THIS IN THE BRIEFS. I'M NOT
20 GOING TO DWELL ON IT. THE PURPOSE OF JUDICIAL
21 ESTOPPEL IS TO PRECLUDE A PARTY FROM GAINING AN
22 ADVANTAGE BY TAKING ONE POSITION AND THEN SEEKING A
23 SECOND ADVANTAGE BY TAKING AN INCOMPATIBLE POSITION,
24 AND THAT'S WHAT DCA DID.

25 THE FACTORS THAT APPLY ARE THESE. AND WHAT
26 I'VE ALSO DONE, YOUR HONOR, IS THAT I'VE BLOWN UP THE
27 FACTORS. I'M GOING TO REFER TO THEM PERIODICALLY
28 DURING EXAMINATION, WHICH IS WHY THEY'RE BLOWN UP ON

1 THIS BOARD WHICH IS SITTING IN THE JURY BOX.

2 FACTORS ARE PRETTY STRAIGHTFORWARD. YOU
3 HAVE THE SAME PARTY TAKING TWO POSITIONS. THE
4 POSITIONS WERE TAKEN IN JUDICIAL OR QUASI-JUDICIAL
5 ADMINISTRATIVE POSITION. THE PARTY -- THAT WOULD BE
6 DCA -- WAS SUCCESSFUL IN ASSERTING THE FIRST
7 POSITION. THE TWO POSITIONS WERE TOTALLY
8 INCONSISTENT, AND THE FIRST POSITION, THAT IS, IN
9 THIS INSTANCE, THAT DCA COULD NOT SUE ICANN, WAS NOT
10 TAKEN AS A RESULT OF IGNORANCE, FRAUD OR MISTAKE.

11 THESE ARE WELL-ESTABLISHED FACTORS UNDER
12 CALIFORNIA LAW. THE PARTIES CITE BRIEFS THAT ALL SET
13 FORTH THE SAME FACTORS.

14 DURING THE COURSE OF THE TRIAL, WHAT I THINK
15 YOU'RE GOING TO HEAR IS DCA TRYING TO CHANGE THE
16 SUBJECT. DCA'S TRIAL BRIEF -- AND I'M GOING TO GIVE
17 SOME EXACT QUOTES IN A MINUTE -- TRIES TO DIVERT OUR
18 ATTENTION FROM DCA'S CONDUCT, AND THEY WANT TO TALK
19 ABOUT ICANN'S CONDUCT AND WHAT ICANN DID OR DID NOT
20 DO, WHICH IS, ESSENTIALLY, CONDUCT WHAT IS RELEVANT
21 TO PHASE II, SHOULD PHASE II OF THIS TRIAL EVER
22 OCCUR.

23 BUT THE LAW IS VERY CLEAR. I'M GOING TO GO
24 THROUGH A COUPLE OF THE CASES. THE POSITIONS THAT
25 DCA TOOK ARE THE POSITIONS THAT MATTER FOR PURPOSES
26 OF JUDICIAL ESTOPPEL. THE INQUIRY IS ON DCA'S
27 CONDUCT. IT'S NOT ON ANYTHING ICANN DID.

28 AND SO WE'RE GOING TO FOCUS ON JUDICIAL

1 ESTOPPEL. WE'RE NOT GOING TO TALK ABOUT, AS WE ARE
2 ACCUSED OF IN THE TRIAL BRIEF -- WE'RE NOT TALKING
3 ABOUT COLLATERAL ESTOPPEL; WE'RE NOT TALKING ABOUT
4 RES JUDICATA. IT'S JUDICIAL ESTOPPEL. IT'S THE ONLY
5 DOCTRINE YOU'RE GOING TO HEAR US DISCUSS TODAY.

6 SO THE FIRST AND THE THIRD INQUIRIES ARE
7 USUALLY TAKEN UP BY THE COURTS AT THE SAME TIME. DID
8 THE PARTY TAKE TWO POSITIONS, AND WAS THE PARTY
9 SUCCESSFUL?

10 AND WHAT I'D LIKE TO DO IS JUST WALK YOU
11 THROUGH A COUPLE OF THEM. I'M GOING TO DO MANY OF
12 THEM DURING THE CROSS-EXAMINATION OF THE WITNESSES.
13 BUT THE POINT IS THAT DCA ASSERTED IN THE IRP THAT IT
14 CANNOT SUE ICANN, AND IT DID SO TO GAIN A STRATEGIC
15 ADVANTAGE ON SEVEN DIFFERENT ISSUES. IT DID SO IN
16 ORDER TO SEEK AND THEN ACHIEVE CERTAIN INTERIM
17 RELIEF. THEY DID SO WHEN REQUESTING AN EXCHANGE OF
18 DOCUMENTS. THEY DID SO WHEN REQUESTING LIVE WITNESS
19 TESTIMONY. THEY DID SO WHEN REQUESTING ADDITIONAL
20 BRIEFING. THEY DID SO WHEN THEY ASKED THE PANEL TO
21 RULE THAT ITS DECISION WAS BINDING, AND THEY DID SO
22 WHEN THEY ASKED THE PANEL TO APPLY A DE NOVO STANDARD
23 OF REVIEW.

24 ON ALL SIX OF THESE ISSUES, ICANN ARGUED THE
25 OPPOSITE. DCA ARGUED THAT THEY HAD CERTAIN
26 PROCEDURAL THINGS THAT THEY FELT WERE IMPORTANT, AND
27 THEY TOLD THE PANEL, THESE THINGS ARE IMPORTANT, AND
28 WE CAN'T SUE ICANN. YOU'RE THE LAST TIME WE GET TO

1 HAVE OUR RIGHTS ADJUDICATED. AND EACH OF THESE
2 TIMES, AS WE WILL SHOW YOU DURING THE COURSE OF THE
3 TRIAL, THE PANEL ADOPTED DCA'S POSITION, INCLUDING
4 NUMBER SEVEN -- DCA ASKED FOR ALL OF ITS COSTS AFTER
5 THE IRP PANEL RULED, AND THE PANEL AGREED.

6 NOW, THE TRIAL BRIEF THAT DCA FILED IMPLIES
7 THAT OUR JUDICIAL ESTOPPEL ARGUMENT RELATES TO ONLY
8 ONE SUBJECT, NUMBER 5, WHETHER THE DECISION IS
9 BINDING. WHAT YOU WILL HEAR TODAY IS THAT DCA TOOK
10 THIS POSITION IN CONJUNCTION WITH ALL SEVEN OF THESE
11 ISSUES, AND THEY WON EVERY TIME. THEY TOLD THE PANEL
12 THEY COULD NOT SUE ICANN, AND THEN SIX MONTHS AFTER
13 THE PANEL RULED IN THEIR FAVOR, THEY FILED A LAWSUIT
14 AGAINST ICANN THAT BRINGS US HERE.

15 THIS IS, LITERALLY, THE QUINTESSENTIAL
16 SITUATION FOR THE APPLICATION OF THE DOCTRINE OF
17 JUDICIAL ESTOPPEL. SO HERE ARE A FEW EXAMPLES.

18 THIS IS TRIAL EXHIBIT 39 (INDICATING). THIS
19 IS A BRIEF, LETTER BRIEF THAT DCA FILED WITH THE IRP
20 PANEL IN APRIL OF 2014. THE HIGHLIGHTED PORTION SAYS
21 (AS READ):

22 "IN EXERCISING SUCH
23 DISCRETION" -- THIS RELATES TO MORE
24 DISCOVERY THAT DCA WANTED -- "THE PANEL
25 SHOULD BE GUIDED BY THE CARDINAL
26 PRINCIPLE SET OUT IN THE ICDR
27 ARBITRATION AWARD."

28 LET ME PAUSE THERE. ICDR IS THE

1 INTERNATIONAL WING OF THE AAA, AND ICANN USES THE
2 ICDR TO ADMINISTER THIS INDEPENDENT REVIEW DECISION.

3 SO PICKING UP THE QUOTE (AS READ):

4 "THE ICDR RULES THAT EACH
5 PARTY SHALL BE GIVEN FULL AND FAIR
6 OPPORTUNITY TO BE HEARD. THE
7 PRINCIPAL THAT MUST ALSO BE VIEWED
8 IN THE CONTEXT OF THE FACT THAT
9 THESE PROCEEDINGS WILL BE THE FIRST
10 AND LAST OPPORTUNITY DCA WILL HAVE
11 TO HAVE ITS RIGHTS DETERMINED BY AN
12 INDEPENDENT BODY."

13 SLIDE 10 IS FROM JOINT EXHIBIT 15, ONE OF
14 DCA'S BRIEFS TO THE PANEL. THEY WERE ARGUING IN
15 FAVOR OF LIVE WITNESS TESTIMONY AND SOME ADDITIONAL
16 BRIEFS. ICANN'S BYLAWS ACTUALLY, AT THE TIME,
17 ACTUALLY PROHIBITED LIVE WITNESSES FROM TESTIFYING AT
18 THESE PROCEEDINGS, AND DCA SAID, "NO, WE WANT LIVE
19 WITNESSES," AND THIS IS WHAT THEY SAID (AS READ):

20 "IT IS ALSO CRITICAL TO
21 UNDERSTAND THAT ICANN CREATED THE
22 IRP AS AN ALTERNATIVE TO ALLOWING
23 DISPUTES TO BE RESOLVED BY COURTS.
24 BY SUBMITTING ITS APPLICATION FOR A
25 GTLD, DCA AGREED TO EIGHT PAGES OF
26 TERMS AND CONDITIONS, INCLUDING A
27 NEARLY PAGE-LONG STRING OF WAIVERS
28 AND RELEASES."

1 THE PAGE-LONG STRING IS MODULE 6, THE
2 COVENANT NOT TO SUE THE BOARD, THAT I READ THROUGH
3 WITH YOU EARLIER.

4 AMONG THOSE CONDITIONS WAS THE WAIVER OF ALL
5 OF ITS RIGHTS TO CHALLENGE ICANN'S DECISION ON DCA'S
6 APPLICATION IN COURT. FOR DCA AND OTHER GTLD
7 APPLICATIONS, THE IRP IS THEIR ONLY RECOURSE. NO
8 OTHER LEGAL REMEDY IS AVAILABLE.

9 THE MOST IMPORTANT POINT I WANT YOU TO TAKE
10 FROM THIS SLIDE, YOUR HONOR, IS THAT THERE'S NO
11 HEDGING HERE. DCA'S BRIEF SAYS, "WELL, IF OUR
12 POSITION WAS IF THE COVENANT, THE WAIVER, IS
13 UNENFORCEABLE, THEN, YEAH, WE WANT TO -- WE CAN'T SUE
14 ICANN."

15 BUT THAT'S NEVER WHAT DCA TOLD THE PANEL.
16 IT NEVER SAID, "I'M NOT SURE THE COVENANT'S
17 ENFORCEABLE, AND WE WANT YOU TO KNOW THAT IF IT'S
18 ENFORCEABLE, WE NEED YOU TO DO CERTAIN THINGS."

19 INSTEAD, DCA NEVER SAID ANYTHING ABOUT THE
20 ENFORCEABILITY OF THE COVENANT OR THAT IT WAS HEDGING
21 ITS POSITION, AND IT ALWAYS SAID THAT IT SIMPLY COULD
22 NOT SUE ICANN.

23 HERE'S MY LAST EXAMPLE, YOUR HONOR. THIS IS
24 FROM THE TRIAL TRANSCRIPT OF THE HEARING. IT'S JOINT
25 EXHIBITS 35 AND 36. THIS IS THE TWO-DAY HEARING IN
26 FRONT OF THE INDEPENDENT REVIEW PANEL.

27 DURING THE OPENING STATEMENT -- THAT'S THE
28 PORTION ON THE TOP -- DCA'S LAWYER, MR. ALI, A-L-I,

1 SAID (AS READ):

2 "THIS IS THE ONLY OPPORTUNITY
3 THAT CLAIMANT HAS FOR INDEPENDENT
4 AND IMPARTIAL REVIEW OF ICANN'S
5 CONDUCT. THE ONLY OPPORTUNITY."

6 AND THEN THE NEXT BOX, MR. ALI WAS ASKED
7 DURING HIS CLOSING ARGUMENT WHETHER THE LITIGATION
8 WAIVER PREVENTS DCA FROM SUING ICANN.

9 AND HE WAS ASKED -- "ARE YOU REFERRING TO
10 THE LITIGATION WAIVER?" HE WAS ASKED BY ONE OF THE
11 PANELISTS, AND THIS WAS HIS RESPONSE (AS READ):

12 "YES. WE" -- DCA -- "CANNOT
13 TAKE YOU TO COURT. WE CANNOT TAKE
14 TO YOU ARBITRATION. WE CAN'T TAKE
15 YOU ANYWHERE YOU" -- "YOU" MEANING
16 ICANN -- "WE CAN'T SUE YOU, ICANN,
17 FOR ANYTHING."

18 AS I SAID BEFORE, DCA -- I'M MOVING TO THE
19 NEXT SLIDE.

20 DCA'S TRIAL BRIEF SAYS THAT, IN THE IRP, ITS
21 POSITION WAS, IF THE COVENANT WAS ENFORCEABLE, THEN
22 THE IRP HAD TO BE BINDING. WELL, BINDING WAS ONLY
23 ONE VERY SMALL SUBJECT. IT WAS AN IMPORTANT SUBJECT
24 BUT ONLY ONE OF MANY SUBJECTS OF WHICH DCA TOOK THE
25 POSITION THAT THEY CAN'T SUE ICANN, AND YOU'RE NOT
26 GOING TO SEE ANYTHING IN THE COURSE OF THIS TRIAL
27 THAT DURING THE INDEPENDENT REVIEW PROCESS, ALMOST A
28 TWO-YEAR PROCESS WITH A TWO-DAY HEARING, DCA SAYS,

1 WELL, NOT SURE ABOUT THE ENFORCEABILITY OF THE
2 COVENANT, SO WE THINK YOU OUGHT TO RULE IN A CERTAIN
3 WAY. THE POSITION WAS UNEQUIVOCAL. WE SIGNED THE
4 LITIGATION WAIVER, SO YOU OUGHT TO TAKE US SERIOUSLY
5 BECAUSE WE CAN NEVER SUE ICANN.

6 SLIDE 13, YOUR HONOR.

7 DCA ALSO ARGUES IN ITS TRIAL BRIEF THAT IT
8 IS IMPOSSIBLE THAT DCA'S ARGUMENTS OF THE COVENANT
9 DURING THE IRP WERE MADE WITH REGARD TO THE CURRENT
10 CLAIMS AS THEY DID NOT EXIST. WHAT THEY'RE
11 ESSENTIALLY SAYING IS, WELL, WE REALIZE THAT MAYBE
12 ONE DAY JUDGE HALM MIGHT RULE THAT THE COVENANT MIGHT
13 NOT APPLY WITH RESPECT TO FRAUD CLAIMS, BUT THAT'S
14 NOT THE POINT. THE LAW OF JUDICIAL ESTOPPEL
15 LITERALLY DOES NOT LOOK AT WHETHER THE ISSUES IN THE
16 TWO MATTERS ARE THE SAME. THE LAW DOES NOT LOOK AT
17 WHETHER EVEN SOMETIMES THE PARTIES ARE THE SAME, AND
18 I'M GOING TO SHOW YOU THAT IN A MINUTE.

19 AS IT HAPPENS, MOST OF DCA'S CLAIMS IN THIS
20 LAWSUIT WERE ACTUALLY RAISED IN THE IRP, BUT THAT'S
21 NOT OUR POINT. THE ISSUES DON'T HAVE TO BE THE SAME.
22 IF YOU SAID SOMETHING DEFINITELY IN THE FIRST
23 LAWSUIT, YOU JUST CAN'T DO SOMETHING DIFFERENTLY IN
24 THE SECOND LAWSUIT.

25 YOUR HONOR, SLIDE 14 IS A SUMMARY, AND
26 YOU'RE GOING TO HEAR THAT EVIDENCE LATER, SO I'M NOT
27 GOING TO SPEND A LOT OF TIME.

28 THESE ARE THE DIFFERENT SITUATIONS AND

1 DIFFERENT SUBJECTS ON WHICH DCA ARGUED THAT THE IRP,
2 THE INDEPENDENT REVIEW, WAS THEIR ONLY AVAILABLE
3 PROCEEDING, THEIR FIRST AND LAST OPPORTUNITY. AND AS
4 I SAID, IN CLOSING ARGUMENT MR. ALI SAID WE CANNOT
5 TAKE ICANN TO COURT. IT'S NOT AMBIGUOUS.

6 IN ORDER FOR US TO WIN JUDICIAL ESTOPPEL,
7 NUMBER 3, DCA HAS TO BE SUCCESSFUL IN ITS ARGUMENTS,
8 AND THAT IS IN FACT THE CASE EVERY TIME. THE IRP
9 PANEL GRANTED DCA'S REQUEST FOR INTERIM RELIEF,
10 GRANTED AN EXCHANGE OF DOCUMENTS, ORDERED LIVE
11 WITNESS TESTIMONY, GRANTED DCA'S REQUEST FOR
12 ADDITIONAL BRIEFING, ORDERED THAT ITS DECISION WOULD
13 BE BINDING ON THE PARTIES AND APPLIED A DE NOVO
14 STANDARD OF REVIEW OVER ICANN'S OBJECTION. IT ALSO
15 AWARDED DCA ITS COSTS.

16 THIS, YOUR HONOR, IS JOINT TRIAL EXHIBIT 33.
17 IT'S THE FINAL IRP DECLARATION, SLIDE 16
18 (INDICATING).

19 AND IT SAYS -- THESE ARE THE TWO PARAGRAPHS.
20 I'M GOING TO TAKE YOU THROUGH THEM IN SOME DETAIL,
21 BUT BASICALLY THE PANEL RULED THAT ICANN HAD TO
22 CONTINUE TO REFRAIN FROM DELEGATING THE .AFRICA GTLD,
23 PERMIT DCA'S APPLICATION TO PROCEED, AND THEN IN
24 PARAGRAPH 150 IT PROVIDED ICANN HAD TO PAY THE
25 TOTALITY OF DCA'S COSTS.

26 DCA'S TRIAL BRIEF THEN SAYS (AS READ):

27 "ICANN TREATED THE IRP PANEL
28 AS LACKING AUTHORITY TO MAKE

1 BINDING RULINGS" -- THIS IS THE SENTENCE
2 THAT REALLY BOTHERS ME, YOUR HONOR. (AS READ):

3 "ICANN TREATED THE PANEL'S
4 RULING WITH TOTAL DERISION AND
5 ELECTED TO FASHION A SOLUTION OF
6 ITS OWN CONTRIVANCE."

7 THE ASSERTION IS JUST FALSE. NO WITNESS
8 WILL TESTIFY THAT ICANN'S BOARD TREATED THE PANEL'S
9 DECISION WITH DERISION, CAME UP WITH A SOLUTION OF
10 ITS OWN CONTRIVANCE. THE WITNESSES WILL TESTIFY THAT
11 THE BOARD ADOPT THE PANEL'S RECOMMENDATIONS AS FULL.
12 YOU DON'T HAVE TO BELIEVE ME. ALL YOU HAVE TO DO IS
13 LOOK AT SLIDE 18.

14 IN SLIDE 18 I TOOK THE FINAL IRP
15 DECLARATION, AND I JUXTAPOSED IT AGAINST THE BOARD
16 RESOLUTION.

17 AND SO YOU'LL SEE THAT ICANN WAS ORDERED TO
18 CONTINUE TO REFRAIN FROM DELEGATING THE .AFRICA GTLD
19 AND PERMIT DCA'S APPLICATION TO PROCEED. AND THAT'S
20 PARAGRAPHS ONE AND TWO OF THE BOARD'S RESOLUTION ON
21 THE RIGHT-HAND SIDE OF THE PAGE.

22 AND THEN PARAGRAPH 150 ON THE LEFT, THE IRP
23 PANEL DECLARED THAT ICANN HAD TO BEAR THE TOTALITY OF
24 DCA'S COSTS. AND IN PARAGRAPH 3 OF THE RESOLUTION,
25 ICANN AGREED TO REIMBURSE DCA'S COSTS, ACTUALLY
26 REFERENCING PARAGRAPH 150.

27 YOU WILL HEAR SOME TESTIMONY, PROBABLY
28 TOMORROW, THAT THERE ARE A COUPLE OTHER THINGS IN THE

1 RESOLUTION. AND YOU WILL HEAR TESTIMONY EXPLAINING
2 THAT ICANN SAID, WELL, THE GAC HAD RULED PREVIOUSLY,
3 AND SO WE BETTER LET THE GAC KNOW WHAT WE'RE DOING.

4 AND THE REASON FOR THAT IS ICANN'S BYLAWS
5 OBLIGATE ICANN'S BOARD TO LET THE GAC KNOW, IF WE'RE
6 NOT GOING TO FOLLOW YOUR ADVICE, WE'RE GOING TO LET
7 YOU KNOW.

8 THOSE ADDITIONAL -- THAT ADDITIONAL LANGUAGE
9 DOESN'T CHANGE ANYTHING IN TERMS OF THE ACTUAL
10 IMPLEMENTATION OF THE PANEL'S RULING.

11 OKAY. THE NEXT ISSUE UNDER THE ELEMENTS OF
12 JUDICIAL ESTOPPEL IS WHETHER WE WERE IN A JUDICIAL OR
13 QUASI-JUDICIAL ADMINISTRATIVE PROCEEDING.

14 THE IRP QUALIFIES BECAUSE IT BEARS WHAT THE
15 COURTS CALL THE FORMAL HALLMARKS OF A JUDICIAL
16 PROCEEDING. THERE WAS A SWEARING OF OATH OF
17 TRUTHFULNESS, BRIEFS, ARGUMENTS, EVIDENCE; THERE WERE
18 WITNESSES, THREE OF WHOM TESTIFIED, AND YOU'LL HEAR
19 LATER TODAY, ALL UNDER OATH, EXAMINED BY ALL THE
20 LAWYERS, EXAMINED BY THE PANEL, AND A NEUTRAL PARTY
21 PRESIDING OVER IT.

22 IN ADDITION, THE IRP, AS I SAID, WAS
23 ADMINISTERED BY THE ICDR, THE INTERNATIONAL DIVISION
24 OF THE AMERICAN ARBITRATION ASSOCIATION. IT WAS
25 PRESIDED OVER BY AN INDEPENDENT PANEL OF THREE
26 PRESTIGIOUS PANELISTS.

27 DCA NOMINATED DR. CATHERINE KESSEDJIAN.
28 SHE'S A DEPUTY DIRECTOR OF THE COLLEGE OF PARIS AND

1 PROFESSOR OF EUROPEAN BUSINESS LAW AND A VERY LONG
2 TITLE WE'LL READ LATER DURING THE EXAMINATION.

3 ICANN NOMINATED FORMAL COURT OF APPEAL
4 JUSTICE RICHARD NEAL, AND, REGRETTABLY, JUSTICE NEAL
5 PASSED RIGHT IN THE MIDDLE OF THE PROCESS BEFORE THE
6 HEARING. AND SO THEN ICANN NOMINATED JUDGE CAHILL, A
7 RETIRED FORMER SUPERIOR COURT JUDGE WITH THE J.A.M.S.
8 PROGRAM UP IN SAN FRANCISCO.

9 THE ICDR THEN APPOINTED THE CHAIR, AND THE
10 CHAIR WAS BABAK BARIN, A CANADIAN LAWYER, VERY
11 SEASONED ARBITRATOR.

12 AS I SAID, THERE WAS A TWO-DAY HEARING.
13 LIVE WITNESSES TESTIFIED. THE IRP PANEL ISSUED A
14 COMPREHENSIVE 63-PAGE DECISION THAT IT SAID IN THE
15 DECISION THAT IT WAS BINDING ON THE PARTIES.

16 IN SLIDE 21 -- THIS IS JOINT EXHIBIT 15 --
17 DCA ACTUALLY ADMITTED THAT THE IRP BORE THE FORMAL
18 HALLMARKS. THIS IS DCA'S BRIEF TO THE PANEL. IT
19 SAYS (AS READ):

20 "IN LIGHT OF THE FOREGOING,
21 DCA SUBMITS THAT THE IRP PROCESS IS
22 AN ARBITRATION IN ALL BUT NAME. IT
23 IS A DISPUTE RESOLUTION PROCEDURE
24 ADMINISTERED BY AN INTERNATIONAL
25 ARBITRATION SERVICE PROVIDER IN
26 WHICH THE DECISION MAKERS ARE
27 NEUTRAL THIRD PARTIES CHOSEN BY THE
28 PARTIES TO THE DISPUTE. THERE ARE

1 MECHANISMS IN PLACE TO ENSURE THE
2 NEUTRALITY OF THE DECISION MAKERS
3 AND THE RIGHTS OF EACH PARTY TO BE
4 HEARD. "

5 THE LAW IS CLEAR THAT FOR PURPOSES OF
6 JUDICIAL ESTOPPEL, THE INQUIRY IS WHAT THE IRP
7 ACTUALLY WAS, NOT WHAT ICANN WANTED IT TO BE BECAUSE
8 ICANN DISAGREED WITH A LOT OF THE PROCESS.

9 THE PANEL AGREED WITH DCA ON ALL OF THE
10 PROCESS, AND IT BECAME, IF IT WASN'T ALREADY, A
11 QUASI-JUDICIAL ADMINISTRATIVE PROCEEDING. AND IT
12 SHOULD BE NOTED THE COURTS ROUTINELY RECOGNIZE THAT
13 ARBITRATIONS ARE QUASI-JUDICIAL PROCEEDINGS.

14 SO THE FOURTH FACTOR I'M GOING TO SPEND LESS
15 THAN 30 SECONDS ON; ARE THE POSITIONS TOTALLY
16 INCONSISTENT? THE ANSWER IS CLEARLY YES.

17 IN SLIDE 32, I TOOK THE DCA LAWYER'S
18 STATEMENT FROM HIS CLOSING THAT, "WE CAN'T TAKE YOU
19 TO COURT; WE CAN'T SUE YOU; WE CAN'T DO ANYTHING,"
20 AND THEN ON THE RIGHT-HAND SIDE OF THE SLIDE,
21 OBVIOUSLY, PLAINTIFF'S FIRST AMENDED COMPLAINT. YOU
22 ACTUALLY INQUIRED ABOUT IT BEFORE I STARTED MY
23 OPENING. IT WAS IN FACT FILED IN THE FEDERAL COURT
24 BEFORE THE REMAND, AND THE FACT OF DCA'S LAWSUIT HERE
25 IS AN INCONSISTENT POSITION. ALMOST DONE. I HAVE A
26 COUPLE OF CASES.

27 DCA HAS SOME DEFENSES, AND MOST OF THIS
28 WE'LL SAVE FOR CLOSING, BUT JUDICIAL ESTOPPEL IS

1 APPLIED WHEN STATEMENTS ARE MADE IN DIFFERENT
2 CONTEXTS. DCA ARGUES, WELL, THE CONTEXTS OF THE TWO
3 PROCEEDINGS WERE DIFFERENT AND SO JUDICIAL ESTOPPEL
4 DOESN'T APPLY. WELL, THAT'S JUST FALSE. CONTEXT IS
5 IRRELEVANT.

6 DCA ALSO ARGUES, WELL, THE CLAIMS WERE
7 DIFFERENT. WE HAVE DIFFERENT CLAIMS IN THIS CASE
8 THAN WE HAD IN THE IRP. AGAIN, ABSOLUTELY
9 IRRELEVANT.

10 AND JUDICIAL ESTOPPEL DOES NOT REQUIRE EVEN
11 THAT THE CLAIMS IN THE FIRST PROCEEDING WERE FINALLY
12 ADJUDICATED LIKE RES JUDICATA DOES REQUIRE, BUT IN
13 THIS INSTANCE THEY WERE FINALLY ADJUDICATED. THE
14 PANEL RULED IN DCA'S FAVOR.

15 SO A COUPLE OF VERY IMPORTANT CASES. THIS
16 IS MILTON GREENE VERSUS MARILYN MONROE. AND I
17 WOULDN'T ASK YOU TO READ THE SLIDE, YOUR HONOR. I'LL
18 JUST GIVE YOU VERY SIMPLE CONTEXT.

19 IN THIS CASE THE REPRESENTATIVES OF
20 MS. MONROE'S ESTATE CLAIMED SHE HAD BEEN DOMICILED IN
21 NEW YORK FOR PURPOSES OF AVOIDING CALIFORNIA STATE
22 TAXES. SO THE TAX MAN COMES AND SAYS, "I WANT TO
23 COLLECT ALL YOUR TAXES OUT OF CALIFORNIA," AND THE
24 PEOPLE CONTROLLING HER ESTATE SAY, "HUH-UH. SHE'S A
25 NEW YORK RESIDENT OR WAS A NEW YORK RESIDENT BEFORE
26 SHE DIED."

27 COUPLE YEARS LATER THERE'S A LAWSUIT IN
28 CALIFORNIA, AND THE REPRESENTATIVES CHANGE THEIR MIND

1 AND SAY, "OH, ACTUALLY, SHE WAS DOMICILED IN
2 CALIFORNIA." AND WHY DO WE NOW SAY THAT? WELL,
3 CALIFORNIA HAS A LAW THAT PERMITS -- IT'S A POSTHUMUS
4 RIGHT OF PUBLICITY. YOU HAVE THE RIGHT TO YOUR OWN
5 PUBLICITY EVEN AFTER YOU PASS ON, AND NEW YORK DIDN'T
6 HAVE THAT LAW. SO THE PEOPLE WHO CONTROLLED HER
7 ESTATE CHANGED THEIR MINDS.

8 SO THE TWO LAWSUITS WERE COMPLETELY
9 DIFFERENT. ONE WAS A TAX CASE; ONE WAS FOR THE RIGHT
10 OF PUBLICITY. AND THE COURT SAID, EVEN THOUGH THE
11 CONTEXTS ARE DIFFERENT, THIS IS A TEXTBOOK CASE FOR
12 APPLYING JUDICIAL ESTOPPEL, AND THE COURT JUDICIALLY
13 ESTOPPED THE REPRESENTATIVES IN THE SECOND LAWSUIT
14 FROM TAKING THE POSITION THAT MS. MONROE WAS
15 DOMICILED IN CALIFORNIA, MEANING THAT SHE IMMEDIATELY
16 LOST THE LAWSUIT FOR RIGHT OF PUBLICITY UNDER
17 CALIFORNIA LAW.

18 ANOTHER VERY IMPORTANT CASE IS THE DRAIN VS.
19 BETZ LABORATORIES CASE. AGAIN, PRETTY SIMPLE CASE.
20 PLAINTIFF IS A LITIGANT WHO CLAIMED WORKERS' -- IN
21 WORKERS' COMPENSATION PROCEEDINGS THAT HE WAS TOTALLY
22 DISABLED. HE LEFT WORK BECAUSE HE WAS TOTALLY
23 DISABLE AND UNABLE TO WORK, AND ON THAT BASIS HE GETS
24 WORKMAN'S COMPENSATION BENEFITS UNDER CALIFORNIA LAW.

25 AFTER HE GETS THE BENEFITS OF BEING TOTALLY
26 DISABLED, HE FILES A LAWSUIT SAYING THAT HE WAS
27 WRONGFULLY TERMINATED. HE SAYS HE'S WRONGFULLY
28 TERMINATED BECAUSE -- AND THAT'S WHY HE LEFT HIS JOB.

1 AND THE COURTS SAID, WELL, WAIT A SECOND. YOU
2 ALREADY TOLD A CALIFORNIA TRIBUNAL, WORKERS'
3 COMPENSATION TRIBUNAL, THAT YOU'RE DISABLED. YOU
4 CAN'T WORK. IT CAN'T ALSO BE THAT YOU WERE FIRED
5 FROM YOUR WORK, WRONGFULLY TERMINATED, BECAUSE YOU
6 ALREADY STOPPED WORKING BECAUSE YOU SAID YOU
7 COULDN'T, AND ON THAT BASIS THE COURT AND COURT OF
8 APPEALS DISMISSED THE ENTIRE SECOND LAWSUIT.
9 GROUNDS? JUDICIAL ESTOPPEL.

10 SO COURTS DO NOT DRAW DISTINCTIONS AS TO
11 WHETHER THE CLAIMS ARE THE SAME, WHETHER THE LEGAL
12 THEORIES ARE THE SAME. LITERALLY DOES NOT MATTER.
13 THE ONLY ISSUE IS WHETHER THE STATEMENTS THAT FORM
14 THE BASIS FOR JUDICIAL ESTOPPEL IN THE FIRST CASE
15 CONTRADICT THE STATEMENTS IN THE SECOND.

16 THAT'S ESSENTIALLY WHAT SLIDE 26 PROVIDES,
17 AND SO I'M GOING TO SKIP IT BECAUSE I'M RUNNING OUT
18 OF TIME.

19 LAST CASE. THIS IS THE BLIX STREET CASE,
20 YOUR HONOR. YOU WILL HEAR A LOT ABOUT IT IN CLOSING
21 ARGUMENT.

22 IN THIS CASE THE PARTIES TOLD THE TRIAL
23 COURT THAT THEY HAD AN ENFORCEABLE SETTLEMENT. THEY
24 HAD MEDIATED, AND THEN THEY TOLD THE MEDIATOR THEY
25 HAD AN ENFORCEABLE SETTLEMENT, AND THEY DID THE
26 THINGS UNDER THE CIVIL CODE THAT ONE DOES TO HAVE AN
27 ENFORCEABLE SETTLEMENT. PEOPLE SIGNED IT. SO THE
28 TRIAL COURT DISMISSED THE CASE.

1 BLIX STREET THEN HIRES NEW LAWYERS, AND THE
2 NEW LAWYERS SAY, WELL, WE'RE NOT VERY HAPPY WITH THE
3 SETTLEMENT, AND THEY SAY, YOU KNOW WHAT? THE
4 SETTLEMENT IS LEGALLY UNENFORCEABLE AND SO YOU COULD
5 SET IT ASIDE. WE HAVE NO SETTLEMENT.

6 THE COURT OF APPEAL SAID, WELL, IT MAY BE --
7 IT MAY BE THAT YOUR SETTLEMENT IS LEGALLY
8 UNENFORCEABLE, BUT YOU TOLD THE TRIAL COURT -- BY THE
9 WAY, AFTER A JURY HAD BEEN PICKED, THEY HAD TAKEN A
10 HIATUS FROM THE JURY BEING PICKED -- YOU TOLD THE
11 TRIAL COURT YOU HAD A SETTLEMENT. YOU WANTED THE
12 SETTLEMENT TO BE ENFORCED, AND THE COURT IN BLIX
13 STREET SAYS, WELL, ESTOPPEL CAN BE USED TO BIND
14 PARTIES TO WHAT WOULD OTHERWISE BE AN UNENFORCEABLE
15 CONTRACT. THAT'S THE SAME ISSUE WE HAVE HERE.

16 DCA SAYS THE WAIVER IS UNENFORCEABLE, BUT
17 THE ENFORCEABILITY OF THE WAIVER IS NOT THE POINT.
18 THE POINT IS THAT THEY SAID THAT IT WAS ENFORCEABLE.

19 LAST SLIDE BEFORE I CONCLUDE.

20 THE LAST FACTOR, NUMBER FIVE, IS THE FIRST
21 POSITION, THAT I CAN'T SUE ICANN WAS NOT TAKEN AS A
22 RESULT OF IGNORANCE, FRAUD OR MISTAKE.

23 I WANT YOUR HONOR TO KNOW THAT DCA TAKES THE
24 POSITION, ACTUALLY ON PAGE 1 OF THE TRIAL BRIEF, THAT
25 THIS IS ICANN'S RESPONSIBILITY. WE ACTUALLY HAVE TO
26 COME FORWARD WITH EVIDENCE THAT THERE WAS NO MISTAKE,
27 NO FRAUD, ET CETERA; THAT THE BURDEN OF PROOF IS ON
28 US TO ACTUALLY HAVE EVIDENCE THAT -- THAT DCA TOOK

1 ITS POSITION AS A RESULT OF IGNORANCE, FRAUD OR
2 MISTAKE. THAT'S JUST WRONG. THERE'S NO CASE THAT
3 SAYS THAT. IN FACT THE BLIX STREET COURT
4 SPECIFICALLY RULED THAT, IF THERE'S NO EVIDENCE THAT
5 EITHER SIDE SUBMITS, THEN THE ELEMENT IS MET. SO
6 ICANN DOESN'T HAVE THE BURDEN OF PROVING IT.

7 WHAT YOU WILL HEAR THIS AFTERNOON IS THAT
8 DCA WAS REPRESENTED BY COUNSEL'S CHOSEN SPECIFIC HIRE
9 FOR HIS EXPERIENCE LITIGATING AGAINST ICANN
10 DCA'S EXECUTIVE DIRECTOR IS A SOPHISTICATED
11 BUSINESSWOMAN. SHE'S EDUCATED IN THE UNITED STATES.
12 SHE WENT TO SCHOOL IN THE UNITED STATES. SHE'S BEEN
13 ACTIVE IN THE ICANN COMMUNITY SINCE 2005. SHE SERVED
14 ON THE GNSO; SHE WAS INVOLVED IN THE DEVELOPMENT OF
15 THE APPLICANT GUIDEBOOK. SHE LOOKED AT A COPY OF THE
16 RELEASE BEFORE SHE SIGNED IT BECAUSE IT WAS
17 WELL-KNOWN IN THE ICANN COMMUNITY THAT ICANN WAS
18 INSISTING THAT APPLICANTS SIGN THE COVENANT.

19 DCA AND ITS ATTORNEYS DID REVIEW THE
20 COVENANT, AND NEVER ONCE DID THEY QUALIFY THEIR
21 STATEMENTS, AS I ALREADY SAID, THAT THE PANEL -- WHEN
22 THEY SAID TO THE PANEL THAT THEY COULDN'T SUE ICANN
23 BECAUSE OF THE COVENANT, AND SO THE MISTAKE OF LAW,
24 WHICH IS NOW WHAT DCA'S ARGUING, THEY DIDN'T REALIZE
25 THAT THE COVENANT WOULD BE ENFORCEABLE. THAT'S NOT A
26 MISTAKE FOR PURPOSES OF JUDICIAL ESTOPPEL.

27 SO LET ME CONCLUDE. EACH ELEMENT OF
28 JUDICIAL ESTOPPEL HERE IS EASILY AND CLEARLY MET.

1 THE PURPOSE OF THE DOCTRINE IS TO PREVENT LITIGANTS
2 FROM TAKING POSITIONS AND WINNING ON THOSE POSITIONS
3 ONLY TO TURN AROUND AND TAKE THE ABSOLUTE CONTRARY
4 POSITION LATER. THAT'S WHY WE'RE HERE, BECAUSE THEY
5 TOOK THE ABSOLUTE CONTRARY POSITION. COURTS REALLY
6 DO DISMISS LAWSUITS ON THE BASIS OF JUDICIAL
7 ESTOPPEL. LAWSUITS I'VE CITED IN MY SLIDES ARE
8 EXAMPLES OF THOSE SITUATIONS.

9 DCA HAS ALWAYS HAD A REMEDY AVAILABLE TO IT,
10 NOT THAT IT MATTERS FOR PURPOSES OF JUDICIAL
11 ESTOPPEL, BUT DCA, YOU WILL HEAR EVIDENCE TODAY AND
12 TOMORROW, THAT THEY COULD HAVE SUBMITTED A REQUEST
13 FOR SECOND IRP AFTER THEIR APPLICATION WAS DENIED.
14 THEY DID NOT DO THAT.

15 DCA TOLD THE IRP PANEL IN CONJUNCTION WITH
16 SEVEN DIFFERENT ISSUES THAT IT HAD GIVEN UP ITS RIGHT
17 TO FILE A LAWSUIT AGAINST ICANN. THE PANEL RULED IN
18 DCA'S FAVOR EVERY TIME, AND SO THE APPLICATION OF
19 JUDICIAL ESTOPPEL IS APPROPRIATE BECAUSE DCA DID
20 PRECISELY WHAT IT TOLD THE IRP PANEL IT COULD NEVER
21 DO. THEY FILED A LAWSUIT IN THE SUPERIOR COURT OF
22 CALIFORNIA AGAINST ICANN, AND THAT'S WHAT IT TOLD THE
23 PANEL IT COULDN'T DO, AND IT'S UNFAIR TO THIS COURT
24 AND TO ICANN AND ALL OF THOSE WHO HONORED THE
25 COVENANT AND UNDERSTOOD WHAT THE COVENANT MEANT.
26 IT'S UNFAIR TO ALL OF THOSE PEOPLE NOT TO APPLY
27 JUDICIAL ESTOPPEL.

28 THANK YOU, YOUR HONOR.

1 THE COURT: THANK YOU, MR. LEVEE. THE COURT
2 NOTES IT'S ABOUT 11:40 A.M.

3 AND NOW I'LL ASK PLAINTIFF'S COUNSEL, DO YOU
4 WISH TO GIVE YOUR OPENING STATEMENT AT THIS TIME?

5 MS. COLON: YES, YOUR HONOR.

6 THE COURT: OKAY. THANK YOU. AND THAT WILL
7 BE YOU, MS. COLON?

8 MS. COLON: YES.

9 THE COURT: OKAY. THANK YOU. AND YOU MAY
10 PROCEED WHENEVER YOU'RE READY.

11 MS. COLON: WE ALSO HAVE A COPY OF OUR
12 SLIDES HERE, YOUR HONOR (INDICATING).

13 THE COURT: OKAY. THANK YOU. YOU CAN
14 PRESENT THAT TO THE CLERK.

15

16 OPENING STATEMENT

17

18 MS. COLON: GOOD MORNING, YOUR HONOR. I
19 REPRESENT PLAINTIFF DOTCONNECTAFRICA TRUST, REFERRED
20 TO OFTEN AS DCA. AND BEFORE I LAUNCH INTO THE ISSUE
21 OF JUDICIAL ESTOPPEL, I DO WANT TO HIGHLIGHT A FEW
22 FACTS ABOUT ICANN THAT MR. LEVEE DID NOT COVER.

23 FIRST, ALTHOUGH ICANN IS A NONPROFIT, IT HAS
24 HUNDREDS OF MILLIONS OF DOLLARS IN ASSETS. IT ALSO
25 HAS A MONOPOLY ON GTLD, SO ANYONE WHO WANTS TO
26 OPERATE UNDER A GTLD, IT HAS TO APPLY THROUGH ICANN.
27 IT'S THE ONLY PLACE IN THE WORLD WHERE SOMEONE CAN
28 APPLY TO OPERATE A GTLD.

1 FINALLY, THE APPLICANT GUIDEBOOK, WHICH ALL
2 APPLICANTS ARE REQUIRED TO SIGN IN ORDER TO APPLY FOR
3 A GTLD, IS HUNDREDS OF PAGES LONG.

4 WITH THAT IN MIND, I'D LIKE TO BRIEFLY GO
5 OVER WHY THIS TRIAL WILL SHOW THAT ICANN CANNOT PROVE
6 ANY OF THE ELEMENTS OF JUDICIAL ESTOPPEL, LET ALONE
7 ALL OF THEM.

8 FIRST, DCA HAS NOT TAKEN INCONSISTENT
9 POSITIONS WITH REGARD TO THE APPLICABILITY OR
10 ENFORCEABILITY OF ICANN'S WAIVER OR WITH REGARD TO
11 THE IRP AS THE SOLE FORUM FOR DCA.

12 YOUR HONOR JUST HEARD ICANN GO THROUGH SEVEN
13 OR SO POSITIONS THAT DCA TOOK WITH REGARD TO THINGS
14 LIKE DISCOVERY OR COSTS OR PROCEDURE THAT REALLY HAVE
15 NOTHING TO DO WITH JUDICIAL ESTOPPEL.

16 JUDICIAL ESTOPPEL SHOULD BE FOCUSED ON ANY
17 POSITION DCA TOOK WITH REGARD TO THE IRP AS THE SOLE
18 FORUM, AND AS DCA WILL EXPLAIN TODAY, THAT POSITION
19 WAS IN THE CONTEXT OF THE CLAIMS THAT EXISTED THEN.
20 ICANN LIKES TO SAY THAT THE CONTEXT DOESN'T MATTER,
21 BUT THE CONTEXT DOES MATTER. SPECIFICALLY, THE
22 CLAIMS AT ISSUE THEN VERSUS THE CLAIMS AT ISSUE NOW
23 DO MATTER BECAUSE DCA'S STATEMENTS WERE WITH REGARD
24 TO THOSE CLAIMS, UNLIKE THE CASE LAW THAT ICANN CITES
25 TO.

26 FURTHER, JUDGE HALM ALREADY RULED ON ICANN'S
27 MOTION FOR SUMMARY JUDGMENT THAT DCA'S CURRENT CLAIMS
28 ARE OUTSIDE THE SCOPE OF THE WAIVER. THE WAIVER IS

1 NO LONGER AT ISSUE IN THIS CASE.

2 AND, FINALLY, THIS IS A DIFFERENT CASE THAN
3 THE CASE THAT DCA BROUGHT TO THE IRP. THIS IS A CASE
4 ABOUT THINGS THAT HAPPENED AFTER THE IRP. CERTAINLY
5 SOME OF THE FACTS THAT WERE DISCUSSED IN THE IRP ARE
6 DISCUSSED IN THIS CASE, BUT PHASE II IS LARGELY BASED
7 ON ACTION THAT ICANN TOOK AFTER THE IRP.

8 SECOND, THE IRP IS NOT A QUASI-JUDICIAL
9 PROCEEDING. ICANN DIDN'T SPEND MUCH TIME DISCUSSING
10 THIS ELEMENT. ICANN'S POSITION IS THAT BECAUSE IT
11 FOLLOWED THE IRP, IT SHOULD BE ENOUGH, BUT THE IRP
12 WAS NOT BINDING, AND AS THE CALIFORNIA COURT IN THE
13 NADA CASE, WHICH ICANN ACTUALLY CITED TO IN ITS TRIAL
14 BRIEF, STATED, THE MOST IMPORTANT FACTOR WHEN
15 CONSIDERING WHETHER A FORUM IS A QUASI-JUDICIAL FORUM
16 IS WHETHER OR NOT THAT FORUM CAN ACTUALLY MAKE A
17 DECISION. AND THE COURT THERE SAID A FORUM CAN'T
18 MAKE A DECISION IF ALL IT CAN DO IS ISSUE A
19 NON-BINDING RECOMMENDATION, WHICH IS EXACTLY WHAT THE
20 IRP HERE ISSUED.

21 SECOND, ICANN GOT TO DECIDE WHETHER OR NOT
22 TO ACCEPT THE IRP'S RULING OR COMPLETELY IGNORE IT.
23 AND AS DCA WILL EXPLAIN MORE TODAY, IT DIDN'T JUST
24 ACCEPT THE IRP'S RULING AS A BINDING JUDGMENT. IT
25 ACTUALLY VOTED ON WHAT TO DO WITH THE IRP'S RULING.

26 FURTHER, THE IRP WAS NOT A QUASI-JUDICIAL
27 PROCEEDING BECAUSE THE IRP WAS A LIMITED PROCEDURE.
28 THE IRP WAS LIMITED TO RULING ONLY ON ICANN'S BOARD

1 ACTION OR INACTION PURSUANT TO ICANN'S OWN BYLAWS AND
2 ARTICLES OF INCORPORATION. THAT WAS THE UNIVERSE OF
3 ISSUES THAT THE IRP PANEL WAS ALLOWED TO DECIDE.
4 AND, AGAIN, MANY OF THE ISSUES FOR PHASE II FALL
5 OUTSIDE OF THAT SCOPE.

6 THIRD, DCA WAS NOT SUCCESSFUL IN ITS
7 POSITION ON THE IRP AS THE SOLE FORUM. EVEN IF THE
8 COURT BELIEVES THAT DCA TOOK THE POSITION THAT THE
9 IRP WAS THE ONLY FORUM FOR ANY OF ITS CLAIMS OF PAST,
10 YOU KNOW, OR FUTURE, THE IRP PANEL DIDN'T ACTUALLY
11 RULE ON THAT POSITION. SO DCA COULD NOT HAVE BEEN
12 SUCCESSFUL ON THAT POSITION.

13 AND, AGAIN, THAT IS THE POSITION THAT SHOULD
14 BE AT ISSUE TODAY. ICANN HAS RAISED THESE ISSUES
15 ABOUT PROCEDURE, ABOUT WITNESSES, ABOUT COSTS, AND
16 SAID, WELL, LOOK, THE IRP RULED IN DCA'S FAVOR ON
17 THOSE ISSUES; THEREFORE, DCA WAS SUCCESSFUL BUT THAT
18 CONFUSES THINGS BECAUSE, REALLY, THE ONLY POSITION
19 THAT DCA NEEDED TO HAVE BEEN SUCCESSFUL IN ORDER FOR
20 JUDICIAL ESTOPPEL TO APPLY WAS THE POSITION ABOUT THE
21 IRP AS THE ONLY FORUM, AND THE IRP DID NOT RULE ON
22 THAT ISSUE FOR THE REASON I JUST EXPLAINED, WHICH IS
23 THAT THE IRP IS LIMITED TO RULING ON ICANN BOARD
24 ACTION OR INACTION PURSUANT TO THE BYLAWS AND
25 ARTICLES OF INCORPORATION.

26 FURTHERMORE, THE ONLY THING THAT THE IRP
27 ACTUALLY SAID ABOUT WHETHER OR NOT THE WAIVER WAS
28 ENFORCEABLE AND WHETHER IT WAS THE ONLY FORUM WAS

1 THAT ASSUMING THAT THE WAIVER WAS ENFORCEABLE, THEN
2 THE IRP SHOULD BE BINDING. AND AS YOU'LL SEE A BIT
3 LATER IN THE SLIDES, IT ALSO SAID THAT IF THE -- IF
4 THE WAIVER WAS NOT -- EXCUSE ME. IF THE IRP WAS NOT
5 BINDING, THAT THE IRP SHOULD NOT BE THE ONLY FORUM
6 FOR DCA. THAT THAT WOULD BE UNFAIR.

7 FINALLY, THE PURPOSE BEHIND JUDICIAL
8 ESTOPPEL IS TO PREVENT BAD FAITH ACTION BY THE
9 PARTIES. IT'S THE LAST ELEMENT WHICH REQUIRES THAT
10 THE STATEMENTS WERE NOT TAKEN AS A RESULT OF MISTAKE
11 OR FRAUD OR IGNORANCE, AND DCA WAS MISTAKEN AT THE
12 TIME OF THE IRP TO THE EXTENT THAT IT SAID THAT THE
13 WAIVER WAS ALWAYS ENFORCEABLE OR THAT THE IRP WAS THE
14 ONLY FORUM FOR IT BECAUSE IT DIDN'T HAVE THE
15 PRIVILEGE OF JUDGE HALM'S RULING AT THAT TIME, AND
16 THE ISSUE HADN'T EVER BEEN ADJUDICATED BEFORE. ICANN
17 HAD THIS WAIVER THAT ALL OF THE APPLICANTS SIGNED
18 BECAUSE THEY HAD TO AND NOBODY HAD EVER TAKEN ICANN
19 TO COURT ON THE ISSUE OF THE WAIVER AT THE TIME OF
20 THE IRP.

21 SO WHO IS DCA? DCA IS A MAURITIUS
22 NON-PROFIT ESTABLISHED IN JULY 2010. IT WAS FORMED
23 WITH THE CHARITABLE PURPOSE OF ADVANCING INFORMATION
24 TECHNOLOGY IN AFRICA WITH A FOCUS ON WOMEN AND YOUTH
25 AND PROVIDING .AFRICA THE GTLD TO THE PEOPLE OF
26 AFRICA.

27 SOPHIA BEKELE, WHO IS HERE TODAY AND WHO
28 WILL BE TESTIFYING ON BEHALF OF DCA, IS THE FOUNDER

1 AND CEO, AND SHE WAS BORN AND RAISED IN ETHIOPIA,
2 EDUCATED IN THE UNITED STATES. AS ICANN
3 ACKNOWLEDGED, SHE IS A SUCCESSFUL BUSINESSWOMAN,
4 INTERNATIONAL ENTREPRENEUR WITH EXPERTISE ON BUSINESS
5 STRATEGY, CORPORATE GOVERNMENTS AND INFORMATION AND
6 COMMUNICATIONS TECHNOLOGY. SHE HAS A LOT OF
7 EXPERIENCE IN AFRICA AND A STRONG BASE THERE.
8 HOWEVER, SHE DOES NOT HAVE ANY LEGAL TRAINING.

9 SO HOW DID DCA GET HERE? WELL, AS ICANN
10 WENT OVER HERE A LITTLE BIT, IN 2008 ICANN BEGAN
11 ACTIVELY PREPARING THEIR APPLICATION FOR THE GTLD
12 PROGRAM, AND THE PROGRAM OFFICIALLY LAUNCHED IN 2011,
13 BUT MEMBERS OF THE ICANN COMMUNITY KNEW THIS PROGRAM
14 WAS COMING AND STARTED PREPARING APPLICATIONS AHEAD
15 OF TIME.

16 THE SAME IS TRUE FOR DCA. DCA BEGAN
17 PREPARING THEIR APPLICATION FOR 2007, WHICH IS
18 ACTUALLY FIVE YEARS BEFORE DCA EVEN APPLIED. AND WHY
19 ALL THAT TIME? WELL, THERE WERE MULTIPLE
20 REQUIREMENTS THAT DCA HAD -- EXCUSE ME -- ICANN HAD
21 FOR APPLICANTS WHO WANTED TO OPERATE A GTLD. THERE
22 WERE TECHNICAL REQUIREMENTS, THERE WERE FINANCIAL
23 REQUIREMENTS, AND FOR APPLICANTS WHO WERE SEEKING A
24 GEOGRAPHIC GTLD LIKE .AFRICA, THERE WERE ENDORSEMENT
25 REQUIREMENTS. THE APPLICANT HAD TO COLLECT A CERTAIN
26 AMOUNT OF ENDORSEMENTS FROM CERTAIN GOVERNMENTS.

27 SO DCA SPENT FIVE YEARS PREPARING
28 ENDORSEMENTS AND FUNDRAISING AND MAKING SURE THAT ITS

1 TECHNICAL REQUIREMENTS WERE IN PLACE. THEY FINALLY
2 APPLIED FOR THE GTLD IN THE SPRING OF 2012 AND PAID
3 THE \$185,000 APPLICATION FEE THAT PRESUMABLY ALL OF
4 THE 1,900 GTLD APPLICANTS PAID, AND IT AGREED TO
5 FOLLOW THE GUIDEBOOK BECAUSE IT HAD TO.

6 AT THAT POINT ICANN BEGAN REVIEWING DCA'S
7 APPLICATION. AND AS ICANN MENTIONED THIS MORNING,
8 THE ICC, WHICH IS A COMPANY INTERCONNECT
9 COMMUNICATIONS, A COMPANY THAT CONTRACTED WITH ICANN,
10 ICANN BASICALLY OUTSOURCED TO ICC TO REVIEW
11 APPLICANTS' ENDORSEMENTS.

12 NOW, DCA PASSED THE FINANCIAL PORTION OF THE
13 INITIAL REVIEW; DCA PASSED THE TECHNICAL PORTION OF
14 THE INITIAL REVIEW, BUT WHILE DCA WAS IN THE ICC
15 BEING REVIEWED FOR ITS ENDORSEMENTS, THE GAC -- THE
16 GOVERNMENTAL ADVISORY COMMITTEE, WHICH IS ICANN'S
17 COMMITTEE -- ADVISED ICANN TO STOP PROCESSING DCA'S
18 APPLICATION.

19 NOW, THE REASONS WHY ICANN DECIDED TO
20 ULTIMATELY ACCEPT THAT GAC ADVICE IS THE BASIS FOR
21 PHASE II OR RELATES TO PHASE II, SO I WON'T GO INTO
22 THOSE DETAILS HERE, BUT SUFFICE IT TO SAY THAT THE
23 GAC ADVISED THAT ICANN STOP PROCESSING DCA'S
24 APPLICATION, AND THE ICANN BOARD ACCEPTED THAT GAC
25 ADVICE.

26 BASED ON THAT DECISION, IN JUNE OF 2013, DCA
27 FILED WHAT IS CALLED A REQUEST FOR RECONSIDERATION BY
28 THE ICANN BOARD GOVERNANCE COMMITTEE. THAT IS A

1 PROCESS AMONG MULTIPLE PROCESSES THAT ICANN HAS FOR
2 APPLICANTS TO RESOLVE DISPUTES WITH ICANN. IT IS THE
3 FIRST PROCESS AN APPLICANT HAS TO TAKE.

4 SO DCA TOOK THAT STEP; HOWEVER, ON
5 AUGUST 1ST, 2013, THE BGC DENIED DCA'S REQUEST FOR
6 RECONSIDERATION. SO THE NEXT STEP IN ICANN'S DISPUTE
7 RESOLUTION PROCESSES IS SOMETHING CALLED A
8 COOPERATIVE ENGAGEMENT PROCESS OR A CEP, AND THAT
9 FAILED AS WELL. THAT TOOK PLACE FROM AUGUST 2013 TO
10 OCTOBER 2013.

11 SO, FINALLY, ON OCTOBER 2013 -- EXCUSE ME --
12 ON OCTOBER 24TH, 2013, DCA FILED A NOTICE OF
13 INDEPENDENT REVIEW AND STARTED THE INDEPENDENT REVIEW
14 PROCESS TO DEAL WITH THIS ISSUE OF THE GAC ADVICE.
15 AND IT'S IMPORTANT TO UNDERSTAND THAT ULTIMATELY THAT
16 IS ALL THAT THE IRP RULED ON, WAS ICANN'S TREATMENT
17 OF THE GAC ADVICE.

18 AGAIN, VERY DIFFERENT FROM THE ISSUES THAT
19 DCA IS ASKING THIS COURT TO RESOLVE IN THIS LAWSUIT.

20 SO BEFORE IT ISSUED ITS FINAL DECLARATION,
21 THE IRP MADE A COUPLE OF IMPORTANT INTERIM ORDERS.

22 THE FIRST ORDER THAT IT MADE WAS THAT THE --
23 THAT ICANN SHOULD STOP PROCESSING ANY OTHER
24 APPLICATION FOR .AFRICA WHILE THIS IRP WITH DCA WAS
25 PENDING.

26 NOW, WHY DID THE IRP HAVE TO MAKE THAT
27 RULING? WELL, IT'S BECAUSE EVEN THOUGH DCA STARTED
28 THE IRP PROCESS ABOUT WHETHER ITS APPLICATION WAS

1 PROPERLY HALTED, ICANN SIGNED A REGISTRY AGREEMENT TO
2 GIVE THE GTLD TO DCA'S COMPETITOR. AND, SO, THE IRP
3 SAID, WELL, YOU CAN'T DO THAT. YOU HAVE TO WAIT
4 UNTIL THIS ISSUE IS RESOLVED BEFORE YOU CAN GIVE THE
5 GTLD TO SOMEONE ELSE. ICANN ELECTED TO FOLLOW THAT
6 RULING.

7 THE NEXT INTERIM ORDER THAT THE IRP MADE WAS
8 AUGUST 14TH, 2014, WHERE THE IRP ISSUED AN ORDER
9 STATING THAT ITS ORDERS -- THAT DECLARATION ON AUGUST
10 14TH AND ITS FUTURE ORDERS AND DECLARATIONS WERE
11 BINDING ON THE PARTIES. AND AS DCA WILL EXPLAIN
12 TODAY, ICANN DID NOT ACTUALLY FOLLOW THAT FINAL IRP
13 DECLARATION AS IT SAYS IT DID.

14 THE FINAL DECLARATION WAS ISSUED ON
15 JULY 9TH, 2015, AND HERE YOU CAN SEE THE LANGUAGE
16 THAT ICANN HAS ALREADY POINTED TO (INDICATING),
17 SAYING THAT THE -- DCA'S APPLICATION SHOULD BE ABLE
18 TO PROCEED THROUGH THE REMAINDER OF THE NEW GTLD
19 APPLICATION PROCESS AND AWARDING DCA COSTS.

20 AND YOU'LL NOTE AS WELL THAT THE PANEL
21 CLEARLY SAYS THAT (AS READ):

22 "ASSUMING THAT THE FOREGOING
23 WAIVER OF ANY AND ALL JUDICIAL
24 REMEDIES IS VALID AND ENFORCEABLE,
25 THEN THE ONLY AND ULTIMATE
26 ACCOUNTABILITY REMEDY FOR APPLICANT
27 IS IRP."

28 AGAIN, IT DOESN'T MAKE A FINAL RULING ON THE

1 WAIVER; IT DOESN'T MAKE A FINAL RULING ON THE
2 ABILITY -- THE AVAILABILITY OF THE IRP AS THE ONLY
3 FORUM FOR DCA'S CLAIM. IT CAN'T MAKE A RULING ON
4 THESE ISSUES BECAUSE IT'S LIMITED TO ICANN BOARD'S
5 ACTION OR INACTION.

6 INTERESTINGLY, AND AN EXAMPLE OF ICANN'S
7 DISREGARD FOR THE IRP'S AUTHORITY, ICANN POSTED A
8 REDACTED VERSION OF THIS DECLARATION ON ITS WEBSITE.

9 HERE YOUR HONOR CAN SEE MORE LANGUAGE FROM
10 THE FINAL DECLARATION OF THE IRP (INDICATING).
11 SPECIFICALLY, THIS HIGHLIGHTED PORTION SHOWS THAT THE
12 PANEL'S RULING AGAIN WAS LIMITED TO THE ACTIONS AND
13 INACTIONS OF THE BOARD WITH RESPECT TO THE ICANN
14 BYLAWS AND ARTICLES OF INCORPORATION.

15 I APOLOGIZE IF I'M GOING TO START TO SOUND
16 LIKE A BROKEN RECORD REPEATING THAT LANGUAGE, BUT IT
17 DOES COME UP A LOT.

18 AGAIN, THIS IS JUST THE LANGUAGE WHERE THE
19 PANEL IS RECOMMENDING THAT ICANN CONTINUE TO REFRAIN
20 FROM ACTUALLY DELEGATING .AFRICA AND PERMIT DCA'S
21 APPLICATION TO PROCEED THROUGH THE REMAINDER OF THE
22 GTLD APPLICATION PROCESS.

23 NOW, ONE OF THE DISPUTES FOR PHASE II IS
24 WHETHER OR NOT ICANN ACTUALLY FOLLOWED THE SPIRIT OF
25 THIS RULING.

26 SO WHAT DID THE ICANN BOARD DO WHEN IT GOT
27 THIS RULING FROM THE IRP? WELL, IT DIDN'T TREAT IT
28 LIKE A COURT JUDGMENT. THE ICANN BOARD ACTUALLY

1 DECIDED TO VOTE ON WHAT TO DO WITH THE IRP FINAL
2 RULING, HENCE, THE BOARD RESOLUTIONS ON THE ISSUE.
3 HOWEVER, ICANN HASN'T SHOWN ALL OF THE RESOLUTIONS
4 THAT THE BOARD MADE THAT DAY ABOUT THE IRP FINAL
5 RULING. IT DID ALLUDE TO THEM, BUT I THINK IT'S
6 IMPORTANT THAT YOUR HONOR SEE THEM.

7 FIRST, AS YOU CAN SEE HERE (INDICATING), THE
8 BOARD DOES PICK UP THE LANGUAGE ABOUT ALLOWING DCA'S
9 APPLICATION TO PROCEED THROUGH THE REMAINDER OF THE
10 NEW GTLD APPLICATION PROCESS. THAT'S IN POINT
11 NUMBER 2.

12 BUT THEN IT SAYS, "AS SET OUT BELOW." AND
13 WHAT FOLLOWS IS LANGUAGE THAT ACTUALLY INSTRUCTS
14 THE -- ACTUALLY INSTRUCTS ICANN TO TAKE INTO ACCOUNT
15 THE VERY GAC ADVICE THAT THE IRP HAD FOUND ICANN TO
16 WRONGFULLY ACCEPT. AND THE GAC ADVICE PERIOD HAD
17 ALREADY CLOSED AT THAT POINT.

18 SO ICANN DID NOT MERELY FOLLOW THE IRP
19 PANEL'S RULING. THIS IS MORE LANGUAGE FROM THE BOARD
20 MEETING AFTER THE IRP PANEL'S FINAL DECLARATION
21 REGARDING HOW TO PROCESS DCA'S APPLICATION THAT DID
22 NOT COME FROM THE IRP'S FINAL DECLARATION
23 (INDICATING).

24 AND DCA'S APPLICATION WAS RETURNED TO WHERE
25 IT HAD ALREADY BEEN WITH THE ICC, AND THE SAME PANEL,
26 THE SAME ICC PANEL, REVIEWED DCA'S APPLICATION AND
27 ULTIMATELY REJECTED IT.

28 AGAIN, THE DETAILS OF WHAT HAPPENED DURING

1 THAT TIME ARE THE ISSUES FOR PHASE II. BUT AFTER
2 DCA'S APPLICATION WAS REJECTED, IT FILED SUIT IN THIS
3 COURT FOR FRAUD AND OTHER CLAIMS BASED ON WILLFUL
4 INJURY, AND IT IS ASKING THIS COURT TO REVIEW THOSE
5 CLAIMS PURSUANT TO CALIFORNIA LAW AND STATUTE, NOT
6 PURSUANT TO ICANN'S BYLAWS OR ARTICLES OF
7 INCORPORATION, AS WAS THE CASE WITH THE IRP AND THE
8 ISSUE OF THE GAC.

9 AS I SAID, JUDGE HALM HAS ALREADY RULED THAT
10 DCA'S CLAIMS ARE NOT BARRED BY THE WAIVER. THIS IS
11 LANGUAGE FROM JUDGE HALM'S RULING ON ICANN'S MOTION
12 FOR SUMMARY JUDGMENT. HERE JUDGE HALM NOTES THAT
13 (AS READ):

14 "ACTS OF FRAUD ARE THOSE THAT
15 CAUSE WILLFUL INJURY AND DID NOT
16 ARISE OUT OF ICANN'S PROCESSING OF
17 APPLICATIONS, AND THEY ARE
18 EXTRA-PROCEDURAL. THEY ARE NOT
19 RELATED TO THE PROCESSING ITSELF
20 BUT ARE ACTS THAT ICANN -- THAT
21 TAKE ICANN OUTSIDE OF THE PROCESS
22 GOVERNED BY ITS BYLAWS. WHAT THIS
23 MEANS IN THIS CASE, THEREFORE, IS
24 THAT ANY CLAIMS THAT DO NOT LIE IN
25 FRAUD OR WILLFUL INJURY ARE BARRED
26 BY THE COVENANT. THOSE THAT DO ARE
27 NOT."

28 WHAT ICANN IS SAYING HERE TODAY IS THAT THIS

1 COURT SHOULD TAKE DCA'S STATEMENTS ABOUT THE WAIVER,
2 THAT THE WAIVER WAS, YOU KNOW, SOMEHOW ENFORCEABLE,
3 TO MEAN THAT THE WAIVER SHOULD BE ENFORCEABLE IN THIS
4 CASE EVEN THOUGH JUDGE HALM HAS RULED THAT IT IS NOT,
5 AND EVEN THOUGH THE BLIX CASE THAT ICANN CITES TO IS
6 A CASE WHERE THE STATEMENT ABOUT THE ENFORCEABILITY
7 OF A -- AN AGREEMENT HAD NOTHING TO DO WITH THE
8 CLAIMS AT ISSUE.

9 AND ALSO DCA HASN'T ACTUALLY TAKEN THE
10 STATEMENT -- TAKEN THE POSITION THAT THE WAIVER
11 SHOULD BE ENFORCEABLE OR IS ENFORCEABLE. DCA WAS
12 MERELY CITING LANGUAGE FROM THE ICANN WAIVER. FROM
13 THE ICANN COVENANT.

14 THE COURT: SO I NOTE THAT IT'S NOW NOON.
15 IS THIS A GOOD TIME TO BREAK? I DON'T WANT TO
16 INTERRUPT YOU IF YOU'RE IN THE MIDDLE OF A POINT.

17 MS. COLON: THIS IS AS GOOD A TIME AS ANY,
18 YOUR HONOR.

19 THE COURT: OKAY. THAT'S FINE. SO WE'LL
20 TAKE OUR NOON RECESS AT THIS TIME. WE'LL RESUME THE
21 TRIAL OF THIS MATTER AT 1:30 TODAY. WE'RE OFF THE
22 RECORD. THANK YOU.

23

24 (AT 12:00 P.M. THE LUNCH RECESS WAS TAKEN.)

25

26

27

28

1 CASE NAME : DOTCONNECTAFRICA TRUST
2 VS. INTERNET CORPORATION
3 FOR ASSIGNED NAMES AND
4 NUMBERS, ET AL.
5 CASE NUMBER: BC607494
6 LOS ANGELES, CALIFORNIA WEDNESDAY, FEBRUARY 6,
7 2019
8 DEPARTMENT NO. 53 HON. ROBERT B. BROADBELT,
9 III, JUDGE
10 COURT REPORTER: LAURIE MILLER, CSR #6457
11 APPEARANCES: (AS HERETOFORE
12 MENTIONED.)
13 TIME: 1:40 P.M.
14

15 THE COURT: ALL RIGHT. WE'RE BACK ON THE
16 RECORD IN DOTCONNECTAFRICA TRUST VERSUS INTERNET
17 CORPORATION FOR ASSIGNED NAMES AND NUMBERS.

18 THE COURT NOTES THAT PLAINTIFF'S COUNSEL AND
19 DEFENDANT ICANN'S COUNSEL ARE AT THEIR PLACES AT
20 COUNSEL'S TABLE, AND IT IS NOW ABOUT 1:40 P.M. WE'RE
21 RESUMING OUR TRIAL ON PHASE I OF THE BIFURCATED
22 TRIAL.

23 AND WHEN WE TOOK OUR NOON BREAK, MS. COLON
24 WAS PRESENTING HER OPENING STATEMENT.

25 ARE YOU PREPARED TO CONTINUE WITH YOUR
26 OPENING STATEMENT, MS. COLON?

27 MS. COLON: YES, YOUR HONOR.

28 THE COURT: OKAY. YOU MAY PROCEED WHENEVER

1 YOU'RE READY.

2 MS. COLON: OKAY, YOUR HONOR. SO WHERE I
3 LEFT OFF WAS IN A DISCUSSION OF THE POLICY REASONS
4 BEHIND JUDICIAL ESTOPPEL.

5 AS YOU CAN SEE HERE ON THIS SLIDE, I HAVE
6 THE BURDEN TO PROVE JUDICIAL ESTOPPEL. WE ALREADY
7 ACKNOWLEDGED THAT. BUT THE DOCTRINE BEHIND JUDICIAL
8 ESTOPPEL IS TO PREVENT INCONSISTENT COURT
9 DETERMINATIONS, NOT JUST INCONSISTENT STATEMENTS.
10 IT'S ABOUT PREVENTING INCONSISTENT COURT
11 DETERMINATIONS, AND DCA WILL SHOW THAT THERE'S NO
12 RISK OF INCONSISTENT COURT DETERMINATIONS HERE FOR A
13 COUPLE OF REASONS.

14 FIRST, THE IRP WASN'T THE COURT
15 DETERMINATION OR THE JUDICIAL DETERMINATION OR A
16 QUASI-JUDICIAL DETERMINATION. AND, SECOND, THE TWO
17 CASES BEFORE THE IRP AND BEFORE THIS COURT ARE VERY
18 DIFFERENT.

19 FURTHERMORE, WITH REGARD TO THE ELEMENT OF
20 INCONSISTENT POSITIONS, THAT IS A VERY HIGH BURDEN.
21 THE COURTS HAVE SAID THAT THAT IS A RIGOROUS STANDARD
22 AND VERY HIGH THRESHOLD.

23 AS I'VE SAID, ICANN MUST PROVE EACH AND
24 EVERY ELEMENT OF JUDICIAL ESTOPPEL IN ORDER FOR IT TO
25 APPLY. IF IT FAILS TO PROVE ANY ONE OF THE ELEMENTS,
26 JUDICIAL ESTOPPEL SHOULD NOT APPLY.

27 SO RUNNING THROUGH THE ELEMENTS AGAIN VERY
28 QUICKLY, THE FIRST ELEMENT IS THAT THE SAME PARTY HAS

1 TAKEN TWO POSITIONS.

2 THE SECOND ELEMENT IS THAT THE POSITIONS
3 WERE TAKEN IN JUDICIAL OR QUASI-JUDICIAL
4 ADMINISTRATIVE PROCEEDINGS.

5 THE THIRD IS THAT THE PARTY WAS SUCCESSFUL
6 IN ASSERTING THE FIRST POSITION.

7 THE SECOND IS THAT THE TWO POSITIONS MUST BE
8 TOTALLY INCONSISTENT.

9 AND THE FINAL ELEMENT FOR JUDICIAL ESTOPPEL
10 IS THAT THE FIRST POSITION WAS NOT TAKEN AS A RESULT
11 OF IGNORANCE, FRAUD OR MISTAKE.

12 SO, AGAIN, THAT LAST ELEMENT GETS TO THE
13 PURPOSE OF JUDICIAL ESTOPPEL, WHICH IS TO PREVENT THE
14 PARTIES FROM ACTING IN BAD FAITH AND GAMING THE
15 SYSTEM.

16 I'D LIKE TO TAKE THE ELEMENT FIRST OF
17 WHETHER OR NOT THE IRP WAS A JUDICIAL OR
18 QUASI-JUDICIAL PROCEEDING.

19 THERE ARE A NUMBER OF REASONS WHY IT WAS NOT
20 EVEN A QUASI-JUDICIAL PROCEEDING.

21 FIRST, AS YOU'VE HEARD, THE PROCEEDING WAS
22 NON-BINDING. ICANN RETAINED FULL AUTHORITY TO ACCEPT
23 OR REJECT THE PANEL'S RULING. THERE WAS NO APPEAL TO
24 THE IRP. THERE WAS NO OVERSIGHT TO AN IRP PANEL'S
25 RECOMMENDATION. THERE WAS NO ABILITY TO CONFIRM THE
26 IRP'S DECISION IN COURT. IN FACT, DCA TRIED TO
27 CONFIRM THE DECISION IN THIS COURT THROUGH ITS FILING
28 OF THE FIRST AMENDED COMPLAINT. IT HAD A DECLARATORY

1 RELIEF CAUSE OF ACTION ASKING THE COURT TO CONFIRM
2 THE IRP AWARD, WHICH WAS DISMISSED UPON ICANN'S
3 MOTION FOR SUMMARY JUDGMENT BECAUSE JUDGE HALM FOUND
4 THAT THE WAIVER ACTUALLY BARRED THAT CAUSE OF ACTION.

5 FURTHERMORE, ICANN ITSELF ARGUED THAT THE
6 IRP WAS NOT AN ARBITRATION; THAT IT WAS MERELY A
7 CORPORATE ACCOUNTABILITY MECHANISM. ONE OF THE
8 REASONS WHY ICANN DOESN'T WANT TO TALK ABOUT CONTEXT
9 IN THIS FIRST PHASE OF TRIAL IS BECAUSE IT ACTUALLY
10 TOOK A LOT OF POSITIONS DURING THE IRP THAT ARE
11 CONTRARY TO WHAT IT'S GOING TO SAY IN THIS PHASE OF
12 TRIAL.

13 FINALLY, AS I'VE SAID BEFORE, THE IRP WAS
14 NOT QUASI-JUDICIAL BECAUSE IT WAS LIMITED TO
15 REVIEWING THE ACTION OR INACTION OF ICANN'S BOARD
16 PURSUANT TO ICANN'S BYLAWS AND ARTICLES OF
17 INCORPORATION.

18 THIS IS ANOTHER EXAMPLE FROM THE ICANN BOARD
19 RESOLUTIONS AFTER THE IRP ISSUED ITS FINAL
20 DECLARATION. HERE YOU SEE MORE LANGUAGE FROM THE
21 BOARD SAYING THAT IT'S NOT GOING -- BASICALLY, NOT
22 JUST GOING TO ACCEPT THE FINAL DECLARATION AS THE
23 ONLY GUIDANCE ON HOW TO CONTINUE PROCESSING DCA'S
24 APPLICATION.

25 IT SAYS, IN ADDITION TO THE DECLARATION, THE
26 BOARD MUST ALSO TAKE INTO ACCOUNT OTHER RELEVANT
27 INFORMATION, INCLUDING, BUT NOT LIMITED TO, THAT
28 ICANN RECEIVED AND ACCEPTED GAC CONSENSUS ADVICE THAT

1 DCA'S APPLICATION FOR .AFRICA SHOULD NOT PROCEED.
2 AGAIN, THAT IS THE VERY ADVICE THAT THE IRP PANEL
3 FOUND ICANN HAD WRONGFULLY ACCEPTED IN THE FIRST
4 PLACE.

5 FINALLY, THERE IS CASE LAW SUPPORTING THE
6 NOTION THAT A NON-BINDING PROCEEDING CANNOT BE A
7 QUASI-JUDICIAL PROCEEDING. HERE YOU HAVE THE CITE TO
8 THE NADA CASE, WHICH IS A FEDERAL COURT CASE CITED TO
9 BY ICANN IN THEIR TRIAL BRIEF. AND I'LL JUST READ A
10 PIECE OF THIS QUOTE TO THE COURT.

11 THE NADA COURT SAID (AS READ):

12 "BESSER CITES MANY OF THESE
13 OPINIONS AND ARGUES THAT THE DMB
14 PROCEEDING, LIKEWISE, IS A
15 QUASI-JUDICIAL PROCEEDING SUCH THAT
16 JUDICIAL ESTOPPEL MAY BE APPLIED.
17 THE COURT DISAGREES. IT LACKED THE
18 MOST IMPORTANT HALLMARK: THE
19 ABILITY TO MAKE A DECISION. THE
20 DRB HAD NO SUCH POWER. INSTEAD, IT
21 WAS LIMITED TO ISSUING A
22 NON-BINDING, ALBEIT WRITTEN
23 RECOMMENDATION THAT THE PARTIES
24 COULD ACCEPT OR REJECT. AND AFTER
25 CONSIDERING THAT FACT, THE COURT
26 DECLINED TO APPLY JUDICIAL
27 ESTOPPEL."

28 THAT'S EXACTLY THE CIRCUMSTANCES WE HAVE

1 HERE. THE IRP WAS A NON-BINDING PROCEEDING THAT
2 ISSUED A RECOMMENDATION, A WRITTEN RECOMMENDATION,
3 THAT ICANN WAS FREE TO ACCEPT OR REJECT.

4 FURTHERMORE -- AND THIS SORT OF GOES TO THE
5 ELEMENT OF DCA WAS SUCCESSFUL IN ITS POSITION, THE
6 IRP ITSELF ACTUALLY TOOK A POSITION AS TO WHETHER OR
7 NOT IT COULD BE THE SOLE FORUM, AND IT TOOK A
8 POSITION IN THIS CONTEXT. IT SAYS (AS READ):

9 "IF THE WAIVER OF JUDICIAL
10 REMEDIES ICANN OBTAINS FROM
11 APPLICANTS WAS ENFORCEABLE AND THE
12 IRP'S PROCESS IS NON-BINDING, AS
13 ICANN CONTENDS, THEN THAT PROCESS
14 LEAVES THE TLD APPLICANTS AND THE
15 INTERNET COMMUNITY WITH NO
16 COMPULSORY REMEDY OF ANY KIND.
17 THAT IS, TO PUT IT MILDLY, A HIGHLY
18 WATERED-DOWN NOTION OF
19 ACCOUNTABILITY. NOR IS SUCH A
20 PROCESS INDEPENDENT AS THE ULTIMATE
21 DECISIONMAKER, ICANN, IS ALSO A
22 PARTY TO THE DISPUTE AND DIRECTLY
23 INTERESTED IN THE OUTCOME, NOR IS
24 THE PROCESS NEUTRAL."

25 SO, BASICALLY, THE IRP PANEL IS SAYING HERE,
26 IF THIS PROCEEDING IS NOT BINDING, IT LACKS MANY OF
27 THE HALLMARKS OF A JUDICIAL PROCEEDING. IT'S NOT
28 INDEPENDENT. IT'S NOT NEUTRAL. IT'S NOT AN

1 ACCOUNTABILITY PROCEEDING.

2 AS TO THE NEXT ELEMENT, DCA'S POSITIONS ARE
3 NOT TOTALLY INCONSISTENT BECAUSE THE CONTEXT FOR THE
4 POSITIONS IS DIFFERENT. AGAIN, ICANN WANTS TO MOVE
5 AWAY FROM THE CONTEXT BECAUSE, FRANKLY, THE IMPORTANT
6 FACTS ARE ALL IN THE CONTEXT.

7 FIRST, THE IRP CLAIMS WERE LIMITED TO ICANN
8 BOARD ACTION AND INACTION AND WERE LIMITED TO REVIEW
9 PURSUANT TO THE ICANN BYLAWS AND ARTICLES.

10 IN THIS CASE, WE HAVE CLAIMS THAT RELATE TO
11 ICANN'S STAFF ACTION, THAT RELATE TO THIRD PARTY
12 VENDOR ACTION, LIKE THE ICC REVIEW OF DCA'S
13 APPLICATION, AND, OF COURSE, ALL OF THOSE ACTIONS ARE
14 TO BE REVIEWED IN THE CONTEXT OF CALIFORNIA LAW AND
15 STATUTE, NOT ICANN'S BYLAWS AND ARTICLES OF
16 INCORPORATION.

17 FURTHERMORE, THE IRP CLAIMS ONLY INVOLVED
18 FACTS THAT OCCURRED PRIOR TO 2015. AND THIS LAWSUIT
19 INVOLVES FACTS THAT OCCURRED AFTER THE IRP WAS
20 DECIDED.

21 SO DCA HAS ALWAYS MAINTAINED THAT ICANN
22 SHOULD NOT BE JUDGMENT PROOF, BUT THE STATEMENTS THAT
23 DCA MADE DURING THE IRP RELATED TO THE CLAIMS THAT
24 WERE AT ISSUE AT THAT POINT, NOT TO THE CLAIMS THAT
25 ARE AT ISSUE NOW.

26 FINALLY, YOU KNOW, ICANN HAS SUGGESTED IN
27 ITS OPENING THAT DCA ALWAYS SAID THAT THE IRP WAS THE
28 ONLY FORUM FOR IT, PERIOD, FULL STOP; THAT IT NEVER

1 PUT THAT STATEMENT INTO CONTEXT. BUT HERE YOU SEE AN
2 EXAMPLE OF DCA PUTTING THAT STATEMENT INTO CONTEXT.
3 IT IS ARGUING, BASICALLY, THAT THE IRP HAS TO BE
4 BINDING IN ORDER FOR IT NOT TO BE AN UNCONSCIONABLE
5 PROCEEDING.

6 NEXT, WE HAVE ANOTHER QUOTE FROM DCA DURING
7 THE IRP WHERE IT REFERENCES THE SOLE FORUM AS THE
8 IRP, BUT WHERE IT ALSO QUALIFIES THAT LANGUAGE BY
9 SAYING THAT IT IS THE SOLE FORUM IN WHICH DCA CAN
10 SEEK INDEPENDENT THIRD PARTY REVIEW OF THE ACTIONS OF
11 ICANN'S BOARD OF DIRECTORS.

12 SO DCA, THROUGHOUT THE IRP, WAS MAKING THIS
13 ARGUMENT THAT THE IRP HAD TO BE BINDING; THAT THE IRP
14 WAS LIMITED TO RULING ON ICANN'S BOARD OF DIRECTORS'
15 ACTIONS AND INACTIONS. IT MADE THESE ARGUMENTS
16 MULTIPLE TIMES THROUGHOUT THE IRP. SO TO THE EXTENT
17 THAT THERE IS LANGUAGE FROM DCA THAT DOESN'T INCLUDE
18 THIS SORT OF QUALIFYING LANGUAGE ABOUT THE IRP BEING
19 BINDING OR LIMITED TO PECULIAR ACTION OR INACTION OF
20 THE BOARD, IT HAS TO BE VIEWED WITHIN THE CONTEXT OF
21 ALL OF THE ARGUMENTS, ALL OF THE RELATED ARGUMENTS
22 THAT DCA WAS MAKING IN OTHER PLACES AT THE SAME TIME.

23 AS I'VE SAID BEFORE, DCA WAS NOT SUCCESSFUL
24 IN ASSERTING A POSITION REGARDING THE AVAILABILITY OF
25 THE IRP AS THE SOLE FORUM. HERE YOU HAVE LANGUAGE
26 FROM THE IRP FINAL DECLARATION STATING THAT, YOU
27 KNOW, THE IRP'S FINDING ABOUT THE WAIVER WAS AN
28 ASSUMPTION.

1 AND, AS I MENTIONED BEFORE, THAT ISSUE IS
2 NOT SOMETHING THAT THE IRP EVEN HAD JURISDICTION TO
3 RULE OR OPINE ON BECAUSE THE IRP WAS LIMITED TO
4 MAKING RECOMMENDATIONS ABOUT ICANN'S ACTION OR BOARD
5 INACTION.

6 FINALLY, THE IRP ITSELF STATED THAT A
7 NON-BINDING IRP COULD NOT BE THE ONLY REMEDY FOR DCA.
8 SO TO THE EXTENT THAT ICANN HAS SUGGESTED THAT
9 SOMEHOW THE PANEL WAS HARMED BY DCA'S BRINGING OF
10 THIS LAWSUIT OR TRICKED BY DCA'S BRINGING OF THIS
11 LAWSUIT, THAT'S SIMPLY NOT TRUE. THE PANEL ITSELF
12 BASICALLY SAID IF THIS ISN'T A BINDING PROCEEDING,
13 IT'S NOT THE ONLY PROCEEDING FOR DCA. HERE YOU HAVE
14 LANGUAGE FROM THE PANEL.

15 THE BINDING EFFECT OF THE PANEL'S DECISIONS
16 AND DECLARATIONS ARE REINFORCED BY TWO FACTORS. THE
17 EXCLUSIVE NATURE OF THE IRP WHEREBY THE NON-BINDING
18 ARGUMENT WOULD BE CLEARLY IN CONTRADICTION WITH IS
19 SUCH A FACTOR.

20 IN OTHER WORDS, IF THE IRP WAS NON-BINDING,
21 THAT WOULD CONTRADICT THE IRP AS AN EXCLUSIVE REMEDY.

22 FINALLY, DCA HAS NOT ACTED IN BAD FAITH. IT
23 WAS, AT WORST, MISTAKEN AND IGNORANT AS TO WHETHER
24 THE IRP WAS THE SOLE FORUM FOR ALL OF ITS CLAIMS,
25 INCLUDING FUTURE CLAIMS. YOU'LL HEAR TODAY FROM
26 MS. BEKELE AS TO WHY THAT WAS THE CASE, BUT ICANN HAS
27 NO EVIDENCE THAT DCA WAS AN EXPERT ON THE WAIVER OR
28 THE APPLICABILITY OF CALIFORNIA LAW TO THE WAIVER.

1 ICANN HAS NO EVIDENCE THAT DCA ASKED
2 CALIFORNIA COUNSEL TO OPINE ON THE APPLICABILITY OF
3 THE WAIVER TO FUTURE CLAIMS IT MIGHT HAVE.

4 DCA HIRED AN IRP LAWYER. AT THE TIME OF THE
5 IRP, THERE WAS ALSO NO JUDICIAL DECISION BY A
6 CALIFORNIA JUDGE REGARDING THE ENFORCEABILITY OR THE
7 SCOPE OF THE WAIVER.

8 THE BOTTOM LINE IS THAT ICANN FAILED TO
9 CONVINCED THIS COURT ON ITS MOTION FOR SUMMARY
10 JUDGMENT THAT THE WAIVER SHOULD APPLY TO ALL OF DCA'S
11 CLAIMS AND IS NOW ATTEMPTING TO USE JUDICIAL ESTOPPEL
12 AS AN EXTENSION OF THE WAIVER TO GET RID OF ALL OF
13 DCA'S CLAIMS AND PREVENT IT FROM HAVING ITS DAY IN
14 COURT.

15 ONE LAST TIME, DCA SUBMITS THAT ICANN CANNOT
16 PROVE ANY OF THE ELEMENTS OF JUDICIAL ESTOPPEL, LET
17 ALONE A SINGLE OF THE ELEMENTS OF JUDICIAL ESTOPPEL.
18 DCA DIDN'T TAKE INCONSISTENT POSITIONS IN THIS IRP
19 AND IN THIS LAWSUIT. THE IRP WAS NOT A JUDICIAL, OR
20 EVEN A QUASI-JUDICIAL FORUM, MOST IMPORTANTLY,
21 BECAUSE ICANN RETAINED THE AUTHORITY TO DECIDE
22 WHETHER OR NOT TO ACCEPT ANY OR ALL OF THE IRP'S
23 FINAL RULINGS. THE IRP DIDN'T RULE ON WHETHER IT WAS
24 THE SOLE FORUM FOR ANY OF DCA'S CLAIMS, SO DCA
25 COULDN'T HAVE BEEN CONSISTENT -- OR SUCCESSFUL ON
26 THAT POSITION.

27 AND, FINALLY, DCA ACTED IN GOOD FAITH. DCA
28 IS NOT TRYING TO GAME THE COURT HERE. IT BROUGHT A

1 COMPLETELY DIFFERENT ACTION BEFORE THE IRP, AND THIS
2 ACTION IS COMPLETELY DIFFERENT. AND TO THE EXTENT
3 THAT ICANN SUGGESTS THAT DCA SHOULD HAVE GONE TO A
4 SECOND IRP, WELL, YOUR HONOR, YOU'LL HEAR TODAY HOW
5 MUCH MONEY AND TIME WAS SPENT ON THE IRP, ONLY TO
6 FIND AT THE END THAT IT WASN'T EVEN A BINDING
7 RECOMMENDATION.

8 DCA RESPECTFULLY REQUESTS THAT THE COURT
9 DECLINE TO APPLY JUDICIAL ESTOPPEL FOR ALL OF THOSE
10 REASONS. THANK YOU.

11 THE COURT: THANK YOU, MS. COLON. THAT
12 COMPLETES THE PLAINTIFF'S OPENING STATEMENT.

13 SO AT THIS TIME THE COURT WILL GIVE THE
14 DEFENDANT, ICANN, THE OPPORTUNITY TO PRESENT ITS
15 CASE-IN-CHIEF ON THE BIFURCATED TRIAL ON THE ISSUE OF
16 DEFENDANT ICANN'S AFFIRMATIVE DEFENSE OF JUDICIAL
17 ESTOPPEL.

18 ALL RIGHT. MR. LEVEE, DO YOU WISH TO CALL
19 YOUR FIRST WITNESS?

20 MR. LEVEE: I DO, YOUR HONOR.

21 THE COURT: OKAY. THANK YOU.

22 MR. LEVEE: ICANN CALLS THE CEO OF DCA,
23 SOPHIA BEKELE.

24 THE COURT: OKAY. THANK YOU.

25 MR. LEVEE: NOW, YOUR HONOR, WE DID
26 SOMETHING IN FRONT OF JUDGE HALM, AND I DON'T KNOW IF
27 YOU WANT THE SAME. IN ADDITION TO PROVIDING AN
28 EXHIBIT BOOK FOR THE WITNESS, JUDGE HALM HAD ASKED US

1 TO PROVIDE SEPARATE EXHIBIT BOOKS FOR THE COURT THAT
2 HAVE THE EXHIBITS JUST FOR THE WITNESS AS OPPOSED TO
3 HAVING YOU LOOK AT THE OTHER EXHIBIT BINDERS. THE
4 RESULT IS YOU HAVE SOME OF THE EXHIBITS MORE THAN ONE
5 TIME, BUT THAT'S WHAT JUDGE HALM WANTED. SO WE ARE
6 PREPARED TO GIVE YOU THOSE EXHIBITS THAT JUST RELATE
7 TO THE WITNESS, OR YOU CAN USE YOUR GENERAL BOOKS.
8 IT'S YOUR CHOICE.

9 THE COURT: I APPRECIATE YOU GOING THROUGH
10 THAT TROUBLE. IT'S NOT NECESSARY THAT YOU PROVIDE ME
11 WITH EXHIBIT BINDERS THAT JUST HAVE THE EXHIBITS FOR
12 THE WITNESS.

13 MR. LEVEE: OKAY.

14 THE COURT: AS LONG AS I CAN FIND THEM IN
15 THE COMPLETE SET OF EXHIBIT BINDERS THAT YOU'VE
16 PROVIDED. BUT I APPRECIATE YOU GOING TO THAT
17 TROUBLE.

18 MR. LEVEE: OKAY. WE WILL PUT THE EXHIBITS
19 FOR THE WITNESS ON THE WITNESS STAND, WITH YOUR
20 PERMISSION.

21 THE COURT: THAT'S FINE.

22 MR. LEVEE: THANK YOU.

23 THE WITNESS: MAY I BE EXCUSED? MY
24 APOLOGIES. I HAVE TO USE THE RESTROOM.

25 THE COURT: OKAY. NO PROBLEM. WE'LL TAKE A
26 10-MINUTE RECESS AT THIS TIME. OFF THE RECORD.

27

28 (A RECESS WAS TAKEN.)

1 THE COURT: ALL RIGHT. WE'RE BACK ON THE
2 RECORD IN DOTCONNECTAFRICA TRUST VERSUS INTERNET
3 CORPORATION FOR ASSIGNED NAMES AND NUMBERS. AND THE
4 COURT NOTES THAT PLAINTIFF'S COUNSEL AND DEFENDANT'S
5 COUNSEL ARE AT THEIR PLACES AT COUNSEL TABLE, AND AT
6 THE LECTERN IS MR. LEVEE.

7 AND SO JUST FOR THE RECORD, COULD YOU GO
8 AHEAD AND CALL YOUR FIRST WITNESS, MR. LEVEE.

9 MR. LEVEE: BE HAPPY TO. ICANN CALLS AS ITS
10 FIRST WITNESS SOPHIA BEKELE, THE CEO OF PLAINTIFF,
11 DCA.

12 THE COURT: OKAY. THANK YOU. AND
13 MS. BEKELE, I NOTE YOU'RE SEATED IN THE WITNESS
14 STAND. I'M GOING TO ASK YOU TO STAND. PLEASE RAISE
15 YOUR RIGHT HAND TO BE SWORN BY THE CLERK.

16 THE CLERK: GOOD AFTERNOON, MA'AM. RAISE
17 YOUR RIGHT HAND, PLEASE.

18 DO YOU SOLEMNLY STATE THAT THE TESTIMONY
19 YOU'RE ABOUT TO GIVE IN THE CAUSE NOW PENDING BEFORE
20 THIS COURT SHALL BE THE TRUTH, THE WHOLE TRUTH, AND
21 NOTHING BUT THE TRUTH, SO HELP YOU GOD?

22 THE WITNESS: YES.

23 THE CLERK: THANK YOU, MA'AM. PLEASE BE
24 SEATED.

25 THANK YOU. AND IF WE MAY HAVE YOUR FULL
26 NAME, WITH SPELLING.

27 THE WITNESS: SOPHIA BEKELE. S-O-P-H-I-A,
28 B-, LIKE IN "BOY," E-K-E-L-E.

1 THE COURT: OKAY. THANK YOU. THE COURT
2 NOTES IT'S A LITTLE AFTER 2:05 P.M., AND, MR. LEVEE,
3 YOU MAY BEGIN YOUR DIRECT EXAMINATION OF THE WITNESS.

4 MR. LEVEE: THANK YOU, YOUR HONOR.

5

6 SOPHIA BEKELE,
7 CALLED AS A WITNESS BY THE DEFENSE,
8 WAS SWORN AND TESTIFIED AS FOLLOWS:

9

10 DIRECT EXAMINATION

11 BY MR. LEVEE:

12 Q AND GOOD AFTERNOON, MS. BEKELE. HOW ARE
13 YOU?

14 A THANK YOU. HOW ARE YOU?

15 Q YOU ARE THE PERSON WHO FOUNDED DCA; CORRECT?

16 A CORRECT.

17 Q AND YOU ARE, TODAY, THE PRESIDENT OF DCA?

18 A CEO.

19 Q AND YOU MOVED TO THE UNITED STATES WHEN YOU
20 WERE ABOUT 16; IS THAT RIGHT?

21 A CORRECT.

22 Q AND YOU'VE HAD A HOME IN NORTHERN CALIFORNIA
23 FOR ABOUT 20 YEARS OR SO, MAYBE A LITTLE BIT MORE?

24 A CORRECT.

25 Q YOU HAVE A BACHELOR'S DEGREE IN BUSINESS
26 ANALYST AND INFORMATION SYSTEMS?

27 A CORRECT.

28 Q AND A MASTER'S DEGREE IN BUSINESS

1 ADMINISTRATION AND MANAGEMENT OF INFORMATION SYSTEMS?

2 A CORRECT.

3 Q NOW, BEFORE FORMING DCA, YOU HAD WORKED FOR
4 MANY YEARS IN THE TECH INDUSTRY; CORRECT?

5 A CORRECT.

6 Q AND YOU WORKED FOR BANK OF AMERICA AS A
7 TECHNOLOGY AUDIT CONSULTANT; RIGHT?

8 A YES.

9 Q AND YOU'VE PERFORMED SIMILAR ROLES AT
10 SEVERAL OTHER ORGANIZATIONS, INCLUDING
11 PRICEWATERHOUSECOOPERS; CORRECT?

12 A CORRECT.

13 Q AND THEN YOU FOUNDED YOUR OWN COMPANY, CBS
14 INTERNATIONAL; CORRECT?

15 A CORRECT.

16 Q AND THAT WAS A CONSULTING COMPANY THAT
17 SPECIALIZED IN TECHNOLOGY AND BUSINESS CONSULTING AND
18 INTERNET SERVICES?

19 A CORRECT.

20 Q AND YOU ALSO LAUNCHED SBCNET, BIG S, LITTLE
21 B, BIG C, LITTLE N-E-T, WHICH SPECIALIZED IN SYSTEMS
22 AND TECHNOLOGY INTEGRATION AND SUPPORT SERVICES;
23 RIGHT?

24 A CORRECT.

25 Q AND YOU ADVISED SUCH CLIENTS AS NASDAQ;
26 RIGHT? STOCK EXCHANGE?

27 A NASDAQ?

28 Q YES?

1 A NO.

2 Q YOU DIDN'T -- OKAY. DID YOU ADVISE THE
3 FEDERAL RESERVE BANK?

4 A YES.

5 Q DID YOU ADVISE GENENTECH?

6 A CORRECT.

7 Q AND YOU'VE BEEN DEPOSED THREE TIMES IN THIS
8 CASE; RIGHT?

9 A YES.

10 Q I HAD THE PLEASURE OF TAKING YOUR DEPOSITION
11 EACH OF THOSE TIMES; RIGHT?

12 A CORRECT.

13 Q AND THEN YOU TESTIFIED IN PHASE I OF THIS
14 BIFURCATED PROCEEDING BEFORE THERE WAS A MISTRIAL,
15 WHICH WAS LAST FEBRUARY; RIGHT?

16 A CORRECT.

17 Q OKAY. SO LET'S DISCUSS A LITTLE BIT YOUR
18 BACKGROUND WITH ICANN. YOU'VE BEEN ACTIVELY INVOLVED
19 IN THE ICANN COMMUNITY SINCE 2005; RIGHT?

20 A CORRECT.

21 Q AND ICANN HAS SEVERAL CONSTITUENT
22 ORGANIZATIONS CREATED BY ITS BYLAWS; RIGHT?

23 A CORRECT.

24 Q SO THERE ARE SUPPORTING ORGANIZATIONS, AND
25 THERE ARE ALSO ADVISORY COMMITTEES; RIGHT?

26 A CORRECT.

27 Q AND ONE OF THOSE SUPPORTING ORGANIZATIONS IS
28 THE GNSO, OR GENERIC NAME SUPPORT ORGANIZATION;

1 RIGHT?

2 A CORRECT.

3 Q AND GNSO WAS THE ICANN ORGANIZATION THAT WAS
4 INVOLVED IN THE DECISION TO RECOMMEND TO ICANN THAT
5 ICANN EMBARK ON THIS NEW GTLD PROGRAM THAT THE
6 LAWYERS TALKED ABOUT IN THEIR OPENING STATEMENTS;
7 RIGHT?

8 A YES.

9 Q AND ONE OF THE RESULTS WAS THAT THE GNSO
10 RECOMMENDED THAT THERE BE A BROAD EXPANSION IN THE
11 NUMBER OF TOP-LEVEL DOMAINS?

12 A CORRECT.

13 Q YOU WERE A POLICY ADVISOR TO THE GNSO; YES?

14 A CORRECT.

15 Q AND WOULD IT BE FAIR TO SAY THAT YOU WERE
16 PRETTY ACTIVE IN THE GNSO'S WORK?

17 A YES.

18 Q AND YOU PARTICIPATED IN THE PHONE CALLS AND
19 THE MEETINGS THAT THE GNSO HAD?

20 A YES, I HAD.

21 Q AND ICANN, THE ORGANIZATION -- NOT THE
22 BOARD, NECESSARILY, BUT ICANN, THE ORGANIZATION --
23 HOLDS MEETINGS ALL OVER THE WORLD; RIGHT?

24 A CORRECT.

25 Q AND IT MEETS THREE OR FOUR TIMES A YEAR,
26 DEPENDING ON THE YEAR; IS THAT RIGHT?

27 A YES.

28 Q AND THE BOARD MEETS AT THOSE MEETINGS, BUT

1 THERE ARE LOTS OF OTHER PEOPLE MEETING AND DOING LOTS
2 OF OTHER THINGS; RIGHT?

3 A CORRECT.

4 Q AND SO THERE ARE A COUPLE OF THOUSAND PEOPLE
5 THAT SHOW UP TO THESE MEETINGS TYPICALLY; RIGHT?

6 A YEAH.

7 Q AND DURING THE YEARS PRIOR TO WHEN DCA
8 SUBMITTED ITS APPLICATION FOR .AFRICA -- WELL, LET ME
9 ESTABLISH WHAT YEAR THAT WAS.

10 YOU SUBMITTED YOUR APPLICATION TO ICANN IN
11 2012; RIGHT?

12 A YES.

13 Q OKAY.

14 SO PRIOR TO THE TIME YOU SUBMITTED YOUR
15 APPLICATION, WOULD IT BE FAIR TO SAY THAT YOU
16 ATTENDED MOST OF THESE MEETINGS ALL OVER THE WORLD
17 THAT ICANN CONDUCTED?

18 A OKAY.

19 Q ALL RIGHT. SO IN MARCH 2012, DCA SUBMITTED
20 ITS APPLICATION TO OPERATE A TOP-LEVEL DOMAIN IN
21 CONJUNCTION WITH THE NEW GTLD PROGRAM; RIGHT?

22 A YES.

23 Q AND THE TLD THAT YOU WANTED WAS DOT, LITTLE
24 PERIOD, AFRICA?

25 A CORRECT.

26 Q AND YOU UNDERSTOOD THAT THE APPLICATION
27 WOULD BE EVALUATED PURSUANT TO A DOCUMENT THAT ICANN
28 HAD DEVELOPED FOR THE NEW GTLD PROGRAM THAT WAS KNOWN

1 AS THE APPLICANT GUIDEBOOK?

2 A YES.

3 Q AND, IN FACT, YOU WERE A PARTICIPANT IN THE
4 DEVELOPMENT OF THE GUIDEBOOK?

5 A CORRECT.

6 Q SO PRIOR TO FINALIZING THE GUIDEBOOK, WAS IT
7 THE CASE THAT ICANN WOULD ACTUALLY PUBLISH, PUT ON
8 ITS WEBSITE, DRAFTS OF THE GUIDEBOOK?

9 A CORRECT.

10 Q OKAY. AND THERE WERE A LOT OF DRAFTS?

11 A YES.

12 Q OKAY. AND YOU PERSONALLY SUBMITTED COMMENTS
13 ON SOME OF THOSE DRAFTS IN CONJUNCTION WITH THE
14 DEVELOPMENT OF THE GUIDEBOOK?

15 A I COULD HAVE, YEAH.

16 Q OKAY. AND I LEFT A BOARD THAT CONTAINS A
17 PORTION OF MODULE 6 UP. IT'S IN THE JURY BOX. CAN
18 YOU READ IT FROM THERE?

19 A YES.

20 Q AND THAT CONTAINS THE COVENANT NOT TO SUE;
21 RIGHT?

22 A YES.

23 Q AND YOU SAW THAT LANGUAGE BEFORE YOU
24 SUBMITTED YOUR APPLICATION; RIGHT?

25 A CORRECT.

26 Q AND YOU ALSO SAW THAT LANGUAGE IN
27 CONJUNCTION WITH THE DEVELOPMENT OF THE GUIDEBOOK
28 ITSELF?

1 A YEAH. EVENTUALLY.

2 Q AND PEOPLE IN THE COMMITTEES AT ICANN,
3 DURING THE MEETINGS, THEY WOULD TALK ABOUT THIS
4 LANGUAGE; RIGHT?

5 A YES.

6 Q AND YOU UNDERSTOOD THAT THE PURPOSE OF THE
7 LANGUAGE WAS THAT ICANN WOULD NOT BE SUED IN COURT --
8 THAT THE APPLICANTS WOULD ACTUALLY -- STRIKE THAT SO
9 I CAN ASK A SINGLE SENTENCE -- SINGLE QUESTION.

10 YOU UNDERSTOOD THAT THE PURPOSE OF THE
11 COVENANT IN MODULE 6 WAS TO PREVENT APPLICANTS FROM
12 SUING ICANN IN COURT WITH RESPECT TO THEIR
13 APPLICATION?

14 A CORRECT.

15 Q OKAY. AND YOU UNDERSTOOD, WHEN YOU
16 SUBMITTED YOUR APPLICATION, THAT DCA WAS AGREEING
17 THAT IT WOULD BE BOUND BY THE TERMS OF MODULE 6 AND
18 THE REST OF THE WORDS OF THE GUIDEBOOK?

19 A CORRECT.

20 Q OKAY. AND JUST TO MAKE IT CLEAR, BEFORE YOU
21 HAD SUBMITTED YOUR APPLICATION, YOU HAD, IN FACT,
22 READ A DRAFT OF MODULE 6, INCLUDING THE COVENANT?

23 A AS PART OF THE GUIDEBOOK, YES.

24 Q YES. AND YOU UNDERSTOOD WHEN DCA SUBMITTED
25 ITS APPLICATION, IT WAS AGREEING TO THOSE RULES?

26 A TO ALL THE POINTS OF REFERENCE TO THE
27 GUIDEBOOK.

28 Q YES. OKAY. AND BACK IN 2012 AND 2013, YOU

1 UNDERSTOOD THAT THESE WORDS MEANT THAT DCA COULD NOT
2 SUE ICANN IN COURT WITH RESPECT TO ITS APPLICATION;
3 RIGHT?

4 A YES.

5 Q AND THAT WAS ACTUALLY -- I THINK YOU SAID IN
6 THE LAST TRIAL IT WAS A PRETTY COMMON UNDERSTANDING
7 WITHIN THE ICANN SOCIETIES, INCLUDING THE GNSO, THAT
8 MODULE 6 WAS GOING TO PREVENT APPLICANTS FROM SUING
9 ICANN IN ANY WAY RELATED TO THEIR APPLICATIONS?

10 A YES.

11 Q OKAY. AND YOU ALSO UNDERSTOOD THAT IN LIEU
12 OF SUING, THERE WERE ACCOUNTABILITY MECHANISMS THAT
13 HAD BEEN SET FORTH IN THE GUIDEBOOK AND IN THE ICANN
14 BYLAWS; RIGHT?

15 A SURE.

16 Q AND JUST TO SUMMARIZE WHAT THOSE MECHANISMS
17 WERE, ONE OF THEM WAS AN INDEPENDENT REVIEW PROCEDURE
18 THAT THE LAWYERS TALKED ABOUT IN THEIR OPENINGS
19 RIGHT?

20 A YES.

21 Q AND ANOTHER IS REQUEST FOR RECONSIDERATION;
22 RIGHT?

23 A YES.

24 Q AND ANOTHER IS SOMETHING CALLED COOPERATIVE
25 ENGAGEMENT IN WHICH THE LAWYER, MS. COLON, REFERRED
26 TO; RIGHT?

27 A YES.

28 Q AND ANOTHER IS THE OMBUDSMAN; RIGHT? ICANN

1 HAS AN OMBUDSMAN?

2 A YES.

3 Q AND YOU, AT VARIOUS TIMES, ON BEHALF OF YOUR
4 APPLICATION FOR .AFRICA, YOU INVOKED ALL FOUR OF
5 THOSE ACCOUNTABILITY MECHANISMS; CORRECT?

6 A CORRECT.

7 Q SO YOU FILED AN IRP; RIGHT?

8 A YES.

9 Q AND YOU FILED A RECONSIDERATION REQUEST?

10 A YES.

11 Q AND YOU CONTACTED THE OMBUDSMAN ON SOME
12 ISSUES; RIGHT?

13 A YES.

14 Q AND YOU ENGAGED IN THE COOPERATIVE
15 ENGAGEMENT PROCESS BEFORE YOU FILED THE APPLICATION?

16 A CORRECT.

17 Q OKAY.

18 COULD I ASK YOU -- SO WE'VE GOT BINDERS IN
19 FRONT OF YOU.

20 A RIGHT.

21 Q ONE OF THEM IS JUST YOUR DEPOSITION
22 TESTIMONY.

23 A OKAY.

24 Q SO THAT'S NOT THE BINDER I'M GOING TO FOCUS
25 ON.

26 INSTEAD I'M GOING TO ASK YOU TO LOOK FIRST
27 AT EXHIBIT 50.

28 A THE TRIAL BINDER?

1 Q IT'S IN YOUR BINDER.
2 A THE TRIAL BINDER; RIGHT?
3 Q THE TRIAL BINDER, YES. LET ME KNOW WHEN YOU
4 HAVE IT.
5 A I HAVE IT.
6 Q OKAY. THIS IS A LETTER YOU WROTE; RIGHT?
7 A OKAY.
8 THE COURT: LET'S MAKE SURE --
9 THE WITNESS: IT'S NOT HERE.
10 THE COURT: -- THE WITNESS HAS THE CORRECT
11 EXHIBIT.
12 MR. LEVEE: MAY I APPROACH, YOUR HONOR?
13 THE COURT: YOU MAY.
14 THE WITNESS: CAN YOU TELL ME WHAT PAGE OF
15 THE EXHIBIT?
16 Q BY MR. LEVEE: IT'S JUST A COUPLE OF PAGES.
17 OH, YOU'RE NOT AT THE RIGHT SPOT.
18 MAY I, YOUR HONOR?
19 THE COURT: YOU MAY.
20 Q BY MR. LEVEE: SO THESE LITTLE TABS ON THE
21 OUTSIDE ARE THE EXHIBIT TABS, AND THIS ONE WOULD BE
22 50 RIGHT HERE (INDICATING).
23 A THANK YOU.
24 Q SO MY QUESTION FIRST IS WHETHER YOU
25 RECOGNIZE YOUR SIGNATURE ON THE LAST PAGE.
26 A YEAH.
27 Q AND THIS IS A LETTER DATED FEBRUARY 21,
28 2013; CORRECT?

1 A UH-HUH. YES.

2 Q AND THIS IS A LETTER THAT DCA SENT AFTER IT
3 HAD SUBMITTED ITS APPLICATION TO ICANN; RIGHT?

4 A CORRECT.

5 Q AND BEFORE THE GAC HAD RULED THAT YOUR
6 APPLICATION WOULD NOT BE ACCEPTED OR THAT -- BEFORE
7 THE GAC HAD RECOMMENDED THAT YOUR APPLICATION BE
8 STOPPED?

9 A COULD BE. I DON'T EXACTLY REMEMBER WHEN THE
10 GAC STOPPED OUR APPLICATION.

11 Q DOES IT REFRESH YOUR RECOLLECTION TO KNOW
12 THAT THE GAC ISSUED ITS ADVICE ON YOUR APPLICATION IN
13 APRIL OF 2013?

14 A OKAY. SO THIS IS FEBRUARY.

15 Q IN ALL EVENTS, THIS LETTER WAS WRITTEN LONG
16 BEFORE YOU FILED YOUR IRP TOWARD THE END OF 2013?

17 A OKAY.

18 Q I NEED YOU TO ANSWER "YES."

19 A YES. YES.

20 Q VERY GOOD.

21 OKAY. SO THIS IS A LETTER THAT YOU SENT TO
22 SENATOR ROCKEFELLER AND CONGRESSMAN WALDEN OF THE
23 SENATE AND THE HOUSE; RIGHT?

24 A YES.

25 Q AND YOU ALSO COPIED A BUNCH OF PEOPLE, AND I
26 JUST WANT TO IDENTIFY A FEW OF THEM.

27 LOOK TO PAGE 8.

28 A I'M LOOKING.

1 Q YOU SEE THAT?

2 A YES, I DO.

3 Q SO YOU COPIED SENATOR LEAHY; RIGHT?

4 A YES.

5 Q AND A BUNCH -- AND MINORITY LEADER, THEN
6 MINORITY LEADER PELOSI; YES?

7 A YES.

8 Q AND THEN ON THE NEXT PAGE, YOU COPIED
9 SENATOR KERRY. AND THE THIRD PERSON YOU COPIED IS
10 LARRY STRICKLAND. DO YOU SEE WHO THAT IS?

11 A YES.

12 Q MR. STRICKLAND, HE WAS THE ASSISTANT
13 SECRETARY OF THE NTIA; RIGHT?

14 A RIGHT.

15 Q AND THAT WAS THE ORGANIZATION THAT
16 SUPERVISED ICANN; RIGHT?

17 A CORRECT.

18 Q OKAY.

19 AND THEN YOU ALSO COPIED -- I'M ON THE RIGHT
20 SIDE. DR. STEPHEN CROCKER. HE WAS THE CHAIRMAN OF
21 THE BOARD OF ICANN AT THE TIME; CORRECT?

22 A CORRECT.

23 Q AND YOU ALSO COPIED MR. FADI CHEHADE. HE
24 WAS, AT THE TIME, THE CEO OF ICANN?

25 A CORRECT.

26 Q OKAY. SO LET ME ASK YOU TO TAKE A LOOK AT
27 THE BOTTOM OF PAGE 2.

28 AND THERE'S WORDS THAT BEGIN, "WHY ARE WE

1 ESCALATING TO CONGRESS?"

2 DO YOU SEE THAT?

3 A WHAT PAGE IS THAT?

4 Q PAGE 2.

5 A OKAY. YES.

6 Q IT SAYS (AS READ):

7 "IF ANY ASPECT OF THE NEW GTLD
8 PROGRAM HAS BECOME PRONE TO
9 IRREGULARITIES FOR WHATEVER REASON,
10 OR IF AN APPLICANT HAS BEEN FOUND
11 OR SUSPECTED TO BE THE BENEFICIARY
12 OF AN ACT OR ACTS OF ILLEGALITY,
13 THERE'S NO MEANS TO DEMAND FOR
14 ACCOUNTABILITY WITH THE NEW GTLD
15 PROGRAM. THE PROGRAM HAS BEEN
16 DESIGNED IN SUCH A WAY THAT AN
17 APPLICANT PARTICIPATING IN THE
18 PROGRAM CANNOT SUE ICANN ON THE
19 BASIS OF ITS APPLICATION OR MATTERS
20 RELATING TO THE NEW GTLD PROGRAM,
21 THUS CONSTRICTING ANY POSSIBLE
22 AVENUES OF ANY LEGAL REDRESS FOR
23 ANY AGGRIEVED APPLICANT"; CORRECT?

24 A CORRECT.

25 Q AND THAT'S THE LETTER YOU WROTE TO CONGRESS
26 AND A BUNCH OF OTHER PEOPLE IN FEBRUARY OF 2013;
27 CORRECT?

28 A YES.

1 MR. LEVEE: YOUR HONOR, COULD I HAVE EXHIBIT
2 50 ADMITTED INTO EVIDENCE?

3 THE COURT: ANY OBJECTION?

4 MR. BROWN: NO, YOUR HONOR. WE DON'T
5 OBJECT.

6 THE COURT: I'M SORRY?

7 MR. BROWN: WE DON'T OBJECT.

8 THE COURT: OKAY. THANK YOU. EXHIBIT 50 IS
9 RECEIVED INTO EVIDENCE.

10

11 (JOINT EXHIBIT NO. 50 WAS RECEIVED IN EVIDENCE.)

12

13 Q BY MR. LEVEE: NOW, IN THE SPRING OF 2013,
14 YOU LEARNED THAT ICANN'S GAC, OR THE GOVERNMENTAL
15 ADVISORY COMMITTEE, HAD ISSUED ADVICE RECOMMENDING
16 ICANN NOT ALLOW DCA'S APPLICATION TO PROCEED;
17 CORRECT?

18 A CORRECT.

19 Q AND DCA ACTUALLY LEARNED IN JUNE OF 2013
20 THAT THE BOARD HAD DETERMINED THAT DCA'S APPLICATION
21 WOULD NOT PROCEED AS OF THAT TIME?

22 A CORRECT.

23 Q OKAY. AND AFTER YOU LEARNED THAT DCA'S
24 APPLICATION WOULD NOT PROCEED, DCA SUBMITTED A
25 RECONSIDERATION REQUEST TO THE ICANN BOARD; RIGHT?

26 A CORRECT.

27 Q AND WE'VE ALREADY ESTABLISHED THAT THAT'S
28 ONE OF THE ICANN ACCOUNTABILITY MECHANISMS; RIGHT?

1 A CORRECT.

2 Q AND THE BOARD DENIED DCA'S RECONSIDERATION
3 REQUEST; RIGHT?

4 A CORRECT.

5 Q AND AFTER THAT TIME, DCA INITIATED ITS
6 INDEPENDENT REVIEW FOR IRP IN OCTOBER OF 2013;
7 CORRECT?

8 A CORRECT.

9 Q OKAY. SO LET'S TALK A LITTLE BIT ABOUT THE
10 IRP.

11 SO IT LASTED FROM OCTOBER OF 2013 UNTIL
12 JUNE, JULY OF 2015; RIGHT?

13 A COULD BE, YES.

14 Q OKAY.

15 SO ABOUT 20 MONTHS, PLUS OR MINUS?

16 A ALL RIGHT. YOU ARE RIGHT.

17 Q AND WHEN YOU FILED IT, YOU ACTUALLY
18 SUBMITTED PAPERS TO THE INTERNATIONAL CENTER FOR
19 DISPUTE RESOLUTION, THE ICDR; RIGHT?

20 A CORRECT.

21 Q YOU UNDERSTAND THEY ARE THE INTERNATIONAL
22 ARM OF THE AMERICAN ARBITRATION ASSOCIATION?

23 A CORRECT.

24 Q ALL RIGHT. AND THE IRP WAS PRESIDED OVER BY
25 A THREE-MEMBER PANEL; RIGHT?

26 A CORRECT.

27 Q AND YOU NOMINATED ONE PANELIST; RIGHT?

28 A CORRECT.

1 Q AND DCA NOMINATED DR. CATHERINE KESSEDJIAN
2 TO BE ITS PANELIST; RIGHT?

3 A CORRECT.

4 Q AND DR. KESSEDJIAN -- I'M GOING TO READ THIS
5 LONG TITLE. IT'S ACTUALLY AN AUTOBIOGRAPHY. IF YOU
6 NEED IT, I CAN SHOW YOU THE EXHIBIT.

7 TITLE IS "DEPUTY DIRECTOR OF THE COLLEGE OF
8 PARIS AND PROFESSOR OF EUROPEAN BUSINESS LAW, PRIVATE
9 INTERNATIONAL LAW, INTERNATIONAL DISPUTE RESOLUTION,
10 AND INTERNATIONAL COMMERCIAL ARBITRATION."

11 DOES THAT SOUND ABOUT RIGHT?

12 A YEAH. IMPRESSIVE.

13 Q IT'S A MOUTHFUL. AND ICANN NOMINATED AS ITS
14 PANELIST THE HONORABLE RICHARD C. NEAL, WHO YOU
15 UNDERSTOOD WAS A RETIRED JUSTICE FROM THE CALIFORNIA
16 COURT OF APPEAL; RIGHT?

17 A CORRECT.

18 Q AND SEVERAL MONTHS AFTER WE NOMINATED
19 JUSTICE NEAL, HE PASSED AWAY; RIGHT?

20 A YES. UNFORTUNATELY, YES.

21 Q SO ICANN THEN NOMINATED RETIRED CALIFORNIA
22 SUPERIOR COURT JUDGE CAHILL TO BE ITS PANELIST;
23 CORRECT?

24 A CORRECT.

25 Q AND YOU ALSO UNDERSTOOD THAT THE ICDR
26 DECIDED TO APPOINT A THIRD PANELIST AS THE CHAIR;
27 RIGHT?

28 A CORRECT.

1 Q AND THAT WAS BABAK BARIN, B-A-R-I-N?
2 A I RECALL THE NAME, YES.
3 Q AND YOU UNDERSTOOD THAT HE WAS AN
4 EXPERIENCED CANADIAN ARBITRATOR?
5 A CORRECT.
6 Q SO THE PANEL AT THE END CONSISTED OF A
7 FRENCH LAW PROFESSOR WHO SPECIALIZED IN ALTERNATIVE
8 DISPUTE RESOLUTION, A RETIRED CALIFORNIA JUDGE, AND A
9 CANADIAN ARBITRATOR; RIGHT?
10 A CORRECT.
11 Q OKAY. NOW, DCA WAS REPRESENTED BY A LAW
12 FIRM IN THE IRP; RIGHT?
13 A CORRECT.
14 Q THAT LAW FIRM IS THE WEIL, GOTSHAL FIRM?
15 A YES.
16 Q AND THEY HAVE OFFICES ALL OVER THE WORLD;
17 RIGHT?
18 A I'M PRETTY SURE.
19 Q AND YOUR LEAD COUNSEL WAS ARIF ALI, A-L-I;
20 RIGHT?
21 A YES.
22 Q AND HE WAS -- WOULD IT BE FAIR TO SAY HE WAS
23 YOUR MAIN CONTACT AT WEIL, GOTSHAL, OR YOU WORKED
24 WITH A LOT OF LAWYERS?
25 A I HIRED HIM AND HE HAD THREE OTHER PEOPLE
26 WORKING WITH HIM, AND THEY WERE ALL MY MAIN CONTACTS
27 THERE.
28 Q OKAY. AND WEIL, GOTSHAL SENT LETTERS AND

1 PLEADINGS TO THE PANEL AT DCA; RIGHT?
2 A YES.
3 Q SO ONCE YOU HIRED THEM, THEY WERE THE
4 SPOKESPEOPLE; YOU DIDN'T SEND YOUR OWN LETTERS?
5 A CORRECT.
6 Q AND SOMETIMES YOU WOULD REVIEW DRAFTS OF
7 THOSE PLEADINGS; RIGHT?
8 A CORRECT.
9 Q AND IN MAY OF 2015, WE HAD A TWO-DAY HEARING
10 IN WASHINGTON DC; RIGHT?
11 A RIGHT.
12 Q THAT WAS ACTUALLY MY LAW FIRM'S OFFICE;
13 CORRECT?
14 A CORRECT.
15 Q WE HAD A BIG CONFERENCE ROOM; RIGHT?
16 A YES.
17 Q AND THE PANEL WAS SITTING AT TABLES IN THE
18 FRONT; RIGHT?
19 A CORRECT.
20 Q AND THERE WAS WITNESS BOX, MUCH LIKE YOU'RE
21 SITTING IN RIGHT NOW?
22 A YES. ACTUALLY, IT WAS A TABLE. CORRECT.
23 Q YOU'RE RIGHT. IT WAS TABLE. AND MR. ALI
24 AND HIS TEAM SAT AT ONE TABLE, AND I SAT WITH MY TEAM
25 AT A DIFFERENT TABLE?
26 A CORRECT.
27 Q FACING THE PANELISTS; RIGHT?
28 A CORRECT.

1 Q AND THE HEARING WAS TRANSCRIBED BY A COURT
2 REPORTER?

3 A YES. I BELIEVE SO.

4 Q AND ON THE LAST DAY OF THE HEARING, DO YOU
5 REMEMBER THAT THERE WAS SOME DISAGREEMENT THAT YOU
6 HAD WITH YOUR ATTORNEYS REGARDING THE RELIEF THAT DCA
7 WAS SEEKING FROM THE PANEL?

8 A CORRECT.

9 Q OKAY. AND THE DISAGREEMENT ACTUALLY
10 RESULTED IN THE PANEL HAVING TWO DIFFERENT REQUESTS
11 FOR RELIEF IN FRONT OF THEM AT THE TIME; RIGHT?

12 A I THINK SO, YES.

13 Q AND SO THE PANEL ASKED YOU AND YOUR LAWYERS
14 TO GO OUTSIDE THE HEARING ROOM AND PREPARE A
15 CONSOLIDATED REQUEST FOR RELIEF; RIGHT?

16 A CORRECT.

17 Q AND YOU DID THAT?

18 A YES.

19 Q OKAY. AND SO DCA THEN SUBMITTED TO THE
20 PANEL A NEW EXHIBIT ON THE LAST DAY THAT CONTAINED
21 YOUR FINAL REQUEST FOR RELIEF?

22 A YES.

23 Q OKAY. NOW, OTHER THAN THAT INCIDENT ON THE
24 FINAL DAY, CAN YOU RECALL ANY OTHER TIME THAT YOU
25 DISAGREED WITH SOMETHING THAT YOUR LAWYERS TOLD THE
26 PANEL?

27 A TOLD THE PANEL?

28 Q CORRECT.

1 A I DON'T REMEMBER.

2 Q OKAY. NOW, DURING THE IRP, THE PANEL ASKED
3 THE PARTIES TO SUBMIT BRIEFING ON A LOT OF ISSUES;
4 RIGHT?

5 A CORRECT.

6 Q THERE WERE A LOT OF LETTERS AND A LOT OF
7 BRIEFS; RIGHT?

8 A CORRECT.

9 Q AND ONE OF THOSE ISSUES WAS WHETHER THE
10 PANEL'S FINAL DECISION WOULD BE BINDING ON THE
11 PARTIES; RIGHT?

12 A YES.

13 Q AND DCA TOOK THE POSITION THAT THE PANEL
14 SHOULD ISSUE A RULING THAT IS -- THE DECISION WOULD
15 BE BINDING?

16 A CORRECT.

17 Q AND ICANN TOOK THE POSITION THAT THE PANEL'S
18 DECISION -- THAT THE PANEL SHOULD SAY THAT ITS
19 DECISION WAS NOT BINDING; RIGHT?

20 A YES.

21 Q OKAY. AND ICANN AND DCA PRESENTED THE PANEL
22 WITH MULTIPLE BRIEFS ON THAT TOPIC, WHETHER THE
23 DECLARATION WOULD BE BINDING; RIGHT?

24 A RIGHT.

25 Q SO WOULD YOU TAKE A LOOK AT EXHIBIT 15?
26 YOU'LL HAVE TO FLIP BACK IN YOUR BOOK.

27 A I AM THERE.

28 Q ARE YOU THERE?

1 A YES.

2 Q OKAY. SO THIS IS -- THE CAPTION PAGE SAYS
3 THAT THIS IS IN THE IRP, AND IT'S ENTITLED, "DCA'S
4 SUBMISSION ON PROCEDURAL ISSUES."

5 DO YOU SEE THAT RIGHT IN THE MIDDLE OF THAT
6 FIRST PAGE?

7 A YES.

8 Q OKAY. AND IT'S DATED MAY 5TH OF 2014;
9 RIGHT?

10 A CORRECT.

11 Q AND THOSE ARE YOUR LAWYERS, WEIL, GOTSHAL?

12 A YES.

13 Q BUT THIS IS A BRIEF THEY SUBMITTED ON BEHALF
14 OF DCA; RIGHT?

15 A RIGHT.

16 MR. LEVEE: WHILE I'M THINKING ABOUT IT,
17 YOUR HONOR, IF WE COULD MOVE FOR THE ADMISSION OF
18 EXHIBIT 15.

19 THE COURT: ANY OBJECTION?

20 MR. BROWN: NO OBJECTION, YOUR HONOR. THIS
21 IS A --

22 THE COURT: OKAY. THANK YOU. EXHIBIT 15 IS
23 RECEIVED INTO EVIDENCE.

24
25 (JOINT EXHIBIT NO. 15 WAS RECEIVED IN EVIDENCE.)

26

27 MR. LEVEE: OKAY.

28 Q BY MR. LEVEE: SO LET ME ASK YOU TO LOOK AT

1 PARAGRAPH 4, WHICH IS ON -- SO WE HAVE THIS UNIQUE
2 THING WHERE WE HAVE TWO DIFFERENT PAGE NUMBERS.

3 A OKAY.

4 Q I'M GOING TO ASK YOU TO LOOK AT WHAT WE'VE
5 PAGINATED JOINT TRIAL EXHIBIT 15, AND IT SAYS PAGE 6.

6 A YES. I'M THERE.

7 Q OKAY. AND PARAGRAPH 4 BEGINS (AS READ):

8 "UNDER CALIFORNIA LAW AND
9 APPLICABLE FEDERAL LAW, THIS IRP
10 QUALIFIES AS AN ARBITRATION."

11 I READ THAT CORRECTLY; RIGHT?

12 A YES.

13 Q IT HAS ALL THE CHARACTERISTICS THAT
14 CALIFORNIA COURTS LOOK TO IN ORDER TO DETERMINE
15 WHETHER A PROCEEDING IS AN ARBITRATION.

16 THIRD-PARTY DECISIONMAKER, DECISIONMAKER
17 SELECTED BY THE PARTIES, A MECHANISM FOR ASSURING THE
18 NEUTRALITY OF THE DECISIONMAKER, AN OPPORTUNITY FOR
19 BOTH PARTIES TO BE HEARD, AND A BINDING DECISION.

20 THAT'S WHAT DCA'S LAWYERS WROTE; RIGHT?

21 A CORRECT.

22 Q AND THE PANEL WOUND UP AGREEING WITH DCA
23 THAT IT WOULD ISSUE A BINDING DECISION?

24 A CORRECT.

25 Q OKAY.

26 NOW, IF YOU WOULD LOOK AT PAGE 14. SO JOINT
27 TRIAL EXHIBIT 15, PAGE 14. AND I WOULD ASK YOU TO
28 LOOK AT PARAGRAPH 22.

1 ARE YOU THERE?

2 A YES, I'M HERE.

3 Q OKAY. I'M GOING TO READ IT. (AS READ):

4 "IT IS ALSO CRITICAL TO
5 UNDERSTAND THAT ICANN CREATED THE
6 IRP AS AN ALTERNATIVE TO ALLOWING
7 DISPUTES TO BE RESOLVED BY COURTS."
8 DID I READ THAT CORRECTLY SO FAR?

9 A YES.

10 Q LET ME CONTINUE. (AS READ):

11 "BY SUBMITTING ITS APPLICATION
12 FOR A GTLD, DCA AGREED TO EIGHT
13 PAGES OF TERMS AND CONDITIONS,
14 INCLUDING A NEARLY PAGE-LONG STRING
15 OF WAIVERS AND RELEASES."

16 LET ME STOP THERE. FIRST OF ALL, DID I READ
17 THAT CORRECTLY?

18 A YES.

19 Q AND THE CONDITIONS AND THE RELEASES, THAT'S
20 INCLUDING WHAT I HAVE UP ON THE BOARD HERE, THE
21 COVENANT NOT TO SUE; RIGHT?

22 A CORRECT.

23 Q OKAY. LET ME CONTINUE. (AS READ):

24 "AMONG THOSE CONDITIONS WAS
25 THE WAIVER OF ALL OF ITS RIGHTS TO
26 CHALLENGE ICANN'S DECISION ON DCA'S
27 APPLICATION IN COURT. FOR DCA AND
28 OTHER GTLD APPLICANTS, THE IRP IS

1 THEIR ONLY RECOURSE. NO OTHER
2 LEGAL REMEDY IS AVAILABLE."
3 DID I READ THAT CORRECTLY?
4 A CORRECT.
5 Q AND THAT'S WHAT DCA TOLD THE PANEL AT THE
6 TIME; RIGHT?
7 A YES.
8 Q AND YOU DON'T SEE ANYTHING HERE TALKING
9 ABOUT WHETHER THE WAIVER IS ENFORCEABLE, DO YOU?
10 A NO.
11 Q OKAY. NOW, JUST FLIP TO EXHIBIT 16. IT'S
12 THE NEXT TAB.
13 THIS IS ANOTHER DOCUMENT THAT IS WRITTEN BY
14 WEIL, GOTSHAL.
15 A PAGE 16.
16 Q PAGE --
17 A OH, EXHIBIT. ALL RIGHT. I'M GETTING THERE.
18 Q ARE YOU WITH ME?
19 A I'M WITH YOU.
20 Q THIS IS DCA'S RESPONSE TO THE PANEL'S
21 QUESTIONS ON PROCEDURAL ISSUES.
22 DO YOU SEE THAT?
23 A CORRECT.
24 Q AND THE PANEL HAD THIS HABIT OF GETTING THE
25 PARTY'S BRIEF AND SENDING OUT A LOT OF QUESTIONS FOR
26 US TO ANSWER; RIGHT?
27 A CORRECT.
28 Q AND SO PERIODICALLY, EVEN THOUGH WE THOUGHT

1 WE WERE DONE BRIEFING THE ISSUE, THE PANEL WOULD SAY,
2 "I'VE GOT MORE QUESTIONS," AND THE PARTIES WOULD
3 SUBMIT MORE BRIEFS; RIGHT?

4 A CORRECT.

5 Q AND THIS IS ONE OF THOSE. IT WAS A BRIEF IN
6 RESPONSE TO OF THE PANEL'S QUESTIONS ON PROCEDURAL
7 ISSUES, RIGHT?

8 A YES.

9 Q DATED MAY 20 OF 2014?

10 A CORRECT.

11 MR. LEVEE: SO YOUR HONOR, LET ME ASK TO
12 HAVE EXHIBIT 16 ADMITTED.

13 THE COURT: ANY OBJECTION?

14 MR. BROWN: NO OBJECTION, YOUR HONOR.

15 THE COURT: EXHIBIT 16 IS RECEIVED INTO
16 EVIDENCE.

17

18 (JOINT EXHIBIT NO. 16 WAS RECEIVED IN EVIDENCE.)

19

20 Q BY MR. LEVEE: SO NOW LET'S TURN TO PAGE 4.
21 AGAIN, I'M LOOKING -- I WILL ALWAYS BE LOOKING TODAY
22 AT THE PAGE NUMBERS THAT ARE IN BOLD AT THE BOTTOM
23 WHERE IT SAYS JOINT TRIAL EXHIBIT 16, PAGE 4.

24 LET ME KNOW WHEN YOU'RE THERE.

25 A I'M THERE.

26 Q YOU SEE THE HEADING, PARAGRAPH C, AS
27 (AS READ):

28 "THE SOLE PROCESS THROUGH

1 WHICH DCA CAN PURSUE ITS CLAIMS
2 AGAINST ICANN, THE IRP MUST BE
3 CAPABLE OF PROVIDING A FINAL AND
4 BINDING DECISION IN THIS MATTER."
5 THAT'S WHAT DCA ARGUED TO THE PANEL; RIGHT?

6 A YES.

7 Q OKAY. AND WHAT IT DID WAS DCA ACTUALLY
8 QUOTED MODULE 6 IN THE GUIDEBOOK, AND THE LANGUAGE OF
9 THE COVENANT NOT TO SUE, RIGHT?

10 A CORRECT.

11 Q IN THAT PARAGRAPH?

12 A YES.

13 Q I'M SORRY?

14 A YES. YES.

15 Q OKAY. AND THEN IF YOU GO OVER TO THE TOP OF
16 PAGE 5, AFTER QUOTING THE LANGUAGE FROM THE COVENANT
17 NOT TO SUE, IT SAYS (AS READ):

18 "APPLICANTS ALSO FOREGO THE
19 RIGHT TO RECOVER ANY APPLICATION
20 FEES, MONEY INVESTED IN BUSINESS
21 INFRASTRUCTURE, OR OTHER START-UP
22 COSTS AND ANY AND ALL PROFITS THAT
23 APPLICANT MAY EXPECT TO REALIZE
24 FROM THE OPERATION OF A REGISTRY
25 FOR THE TLD."

26 THAT'S WHAT IT SAYS; RIGHT?

27 A YES.

28 Q AND THEN THE LAST SENTENCE OF THAT PARAGRAPH

1 SAYS (AS READ):

2 "IN EXCHANGE FOR WAIVING THESE
3 SIGNIFICANT LEGAL RIGHTS, SECTION 6
4 OF MODULE 6" -- THAT'S ANOTHER PART OF THE
5 GUIDEBOOK; RIGHT?

6 A YES.

7 Q SECTION 6 GRANTS APPLICANTS THE RIGHT TO
8 CHALLENGE A FINAL DECISION OF ICANN THROUGH THE
9 ACCOUNTABILITY MECHANISMS SET FORTH IN ICANN'S
10 BYLAWS, INCLUDING THE IRP; RIGHT?

11 A CORRECT.

12 Q AND YOU UNDERSTOOD, WHEN YOU WERE SENDING
13 YOUR LETTER TO CONGRESS AND WHEN THESE BRIEFS WERE
14 BEING WRITTEN, THAT THE COVENANT APPLIED NOT ONLY TO
15 SUING ICANN'S BOARD, BUT ALSO TO SUING ICANN'S
16 VENDORS OR ANYBODY ELSE ASSOCIATED WITH THE ACTUAL
17 PROCESSING OF DCA'S APPLICATION; RIGHT?

18 A AT THE TIME, YES.

19 Q YES. OKAY.

20 AND THEN CONTINUING ON PARAGRAPH 6 OF PAGE 5
21 OF EXHIBIT 16, IT READS (AS READ):

22 "AS A RESULT, THE IRP IS THE
23 SOLE FORUM TO WHICH AN APPLICANT
24 FOR A NEW GTLD CAN SEEK INDEPENDENT
25 THIRD PARTY REVIEW OF BOARD
26 ACTIONS"; RIGHT?

27 A CORRECT.

28 Q (AS READ):

1 "REMARKABLY, ICANN MAKES NO
2 RECIPROCAL WAIVERS AND, INSTEAD,
3 RETAINS ALL OF ITS RIGHTS AGAINST
4 APPLICANTS IN LAW AND EQUITY."
5 THAT'S WHAT DCA WROTE TO THE PANEL; RIGHT?

6 A YES.

7 Q OKAY. LET'S NOW TURN TO EXHIBIT 17. IT'S
8 THE NEXT DOCUMENT.

9 A I'M THERE.

10 Q OKAY. THIS IS A LETTER FROM WEIL, GOTSHAL
11 DATED MAY 29, 2014, TO THE MEMBERS OF THE PANEL;
12 RIGHT?

13 A YES.

14 Q WE CAN NOW SEE THAT THE MEMBERS OF THE PANEL
15 WERE, IN FACT, MR. BARIN, DR. KESSEDJIAN, AND JUSTICE
16 NEAL AT THE TIME; RIGHT?

17 A YES.

18 Q OKAY. AND THIS IS A LETTER THAT MS. WALTER,
19 MARGUERITE WALTER, WHO WAS WITH WEIL, GOTSHAL, SHE
20 WROTE TO THE PANEL; RIGHT?

21 A CORRECT.

22 Q AND SHE WAS ONE OF THE LAWYERS MR. ALI WAS
23 WORKING WITH; RIGHT?

24 A CORRECT.

25 Q OKAY.

26 NOW, IN THIS LETTER -- I WANT TO GET SOME
27 BACKGROUND FOR THE COURT.

28 YOU UNDERSTOOD THAT PRIOR TO THE IRP THAT

1 DCA HAD INITIATED, THERE HAD BEEN AN EARLIER IRP
2 AGAINST ICANN WITH RESPECT TO A COMPANY CALLED ICM;
3 RIGHT?

4 A CORRECT.

5 Q AND THAT IRP HAD OCCURRED A FEW YEARS
6 EARLIER; RIGHT?

7 A YES.

8 Q AND IT HAD OCCURRED UNDER A DIFFERENT SET OF
9 ICANN'S BYLAWS; RIGHT?

10 A CORRECT.

11 Q AND THERE WAS NO GUIDEBOOK BACK THEN BECAUSE
12 THEY -- THE APPLICATION THAT THEY HAD SUBMITTED WAS
13 LONG BEFORE THE NEW GTLD PROGRAM HAD BEEN ENACTED;
14 RIGHT?

15 A YES.

16 Q SO IN THAT CASE, THE PANEL HAD DETERMINED
17 THAT ITS DECLARATION, THE FINAL DECLARATION AT ISSUE
18 WOULD NOT BE BINDING ON ICANN; IS THAT CORRECT?

19 A THE ICANN CASE?

20 Q UH-HUH.

21 A I THINK SO, YES.

22 Q YES. SO IF YOU WOULD TURN TO PAGE -- TO
23 PAGE 2. AND I'M GOING TO START READING FROM THE LAST
24 PARAGRAPH, BEGINNING WITH "FURTHERMORE," ABOUT --
25 YOU SEE EITHER ON THE SCREEN -- YOU SEE
26 THAT?

27 A YEAH.

28 Q (AS READ):

1 "Furthermore, the waivers and
2 releases that ICM agreed to in its
3 2004 sponsored top-level domains,
4 STLD application did not provide
5 ICM with access to other courts,
6 unlike the waivers and releases DCA
7 was required to accept when it
8 submitted its application for a
9 new, generic top-level domain
10 application in 2012."

11 That's something DCA wrote; right?

12 A Yes.

13 Q And what you were saying was, hey, the ICM
14 people, when they applied, they didn't have to
15 release ICANN from -- they didn't have to sign a
16 piece of paper that released ICANN; right?

17 A Okay.

18 Q But we, DCA, we did have to sign a piece of
19 paper that released ICANN. We're not able to sue
20 ICANN?

21 A Right.

22 Q That's the point you were making; right?

23 Okay. Let me continue. (As read):

24 "The 2004 waivers" -- let me stop
25 there. The 2004 waivers, those were the waivers ICM
26 signed; right?

27 A Yeah. Looks like.

28 Q (As read):

1 -- "RELEASED ICANN ONLY FROM
2 LIABILITY FROM MISINTERPRETATION OF
3 THE INFORMATION SUBMITTED BY ICM IN
4 THE APPLICATION OR BY THIRD PARTIES
5 IN RELATION TO ICM'S APPLICATION.
6 IN CONTRAST, AS A CONDITION OF
7 APPLYING FOR A GTLD, DCA
8 UNILATERALLY SURRENDERED ALL OF ITS
9 RIGHTS TO CHALLENGE ICANN IN COURT
10 OR ANY OTHER FORUM OUTSIDE OF THE
11 ACCOUNTABILITY MECHANISMS IN
12 ICANN'S BYLAWS."
13 DID I READ THAT CORRECTLY?
14 A CORRECT.
15 Q LET ME CONTINUE. (AS READ):
16 "AS A RESULT, THE IRP IS
17 THE SOLE FORUM" -- I'M EMPHASIZING IT
18 BECAUSE IT'S BOLDED -- "IN WHICH DCA
19 CAN SEEK INDEPENDENT THIRD PARTY
20 REVIEW OF THE ACTIONS OF THE
21 ICANN'S BOARD OF DIRECTORS"; RIGHT?
22 A CORRECT.
23 Q (AS READ):
24 "IF THE PANEL WERE TO
25 DETERMINE THAT THIS IRP IS
26 NON-BINDING, DCA WOULD EFFECTIVELY
27 BE DEPRIVED OF ANY REMEDY."
28 DID I READ THAT CORRECTLY?

1 A READ IT CORRECTLY.

2 Q SO THE POINT YOU AND YOUR LAWYERS WERE
3 MAKING WAS WE SIGNED THIS RELEASE, AND IT'S GOT
4 REALLY STRONG LANGUAGE. WE CAN'T SUE ICANN, AND SO
5 YOU, PANEL, NEED TO DECLARE THAT YOUR DECISION IS
6 BINDING ON ICANN?

7 A VERY CORRECT.

8 Q YES. AND THE PANEL DID DECLARE THAT ITS
9 DECISION WOULD BE BINDING ON ICANN?

10 A YES.

11 Q OKAY.

12 LET'S TURN TO EXHIBIT 11. SO YOU HAVE TO GO
13 BACK A FEW PAGES --

14 MR. LEVEE: YOUR HONOR, I'M BEING TOLD I
15 FORGOT TO MOVE THE LAST EXHIBIT INTO EVIDENCE. SO IF
16 I COULD ASK THAT EXHIBIT 17 BE MOVED INTO EVIDENCE.

17 THE COURT: ANY OBJECTION?

18 MR. BROWN: THERE'S NOT, YOUR HONOR.

19 THE COURT: EXHIBIT 17 IS RECEIVED INTO
20 EVIDENCE.

21

22 (JOINT EXHIBIT NO. 17 WAS RECEIVED IN EVIDENCE.)

23

24 Q BY MR. LEVEE: NOW WE'RE ON EXHIBIT 11.
25 THIS IS, AGAIN, ON THE CAPTION OF THE IRP MATTER
26 SUBMITTED BY WELL, GOTSHAL. AND THIS IS CALLED,
27 "REQUEST FOR EMERGENCY ARBITRATOR AND INTERIM
28 MEASURES OF PROTECTION."

1 DO YOU SEE THAT?

2 A YES.

3 Q NOW, THE REQUEST WAS MADE BECAUSE ICANN WAS
4 SAYING THAT IT MIGHT GO AHEAD AND DELEGATE THE
5 .AFRICA TOP-LEVEL DOMAIN TO ZACR, YOUR COMPETITOR;
6 RIGHT?

7 A CORRECT.

8 Q AND SO DCA SAID, WE'RE GOING TO FILE AN
9 APPLICATION TO ASK THE PANEL TO ISSUE AN ORDER TO
10 ICANN SAYING DON'T DELEGATE IT TO ZACR UNTIL THE IRP
11 IS DONE; RIGHT?

12 A CORRECT.

13 Q AND, IN FACT, YOU FILED THAT REQUEST, AND
14 THE PANEL ISSUED AN ORDER SAYING TO ICANN, "DON'T
15 DELEGATE THE .AFRICA GTLD TO ZACR"; RIGHT?

16 A YES.

17 Q AND, IN FACT, ICANN DID NOT DELEGATE THE
18 GTLD TO ZACR AT THAT TIME AND ACTUALLY FOR SEVERAL
19 YEARS THEREAFTER; RIGHT?

20 A YES.

21 Q IN FACT, ICANN DIDN'T DELEGATE THE TLD TO
22 ZACR UNTIL JUDGE HALM HAD RULED AGAINST DCA'S
23 APPLICATION FOR PRELIMINARY INJUNCTION, AT WHICH
24 POINT ICANN WENT AHEAD AND ISSUED -- DELEGATED THE
25 TOP-LEVEL DOMAIN TO ZACR; RIGHT?

26 A YES.

27 Q OKAY. NOW, IF YOU WOULD LOOK AT PAGE 16.

28 A IS THAT THE SAME EXHIBIT?

1 THE COURT: SO BEFORE YOU INQUIRE ABOUT THE
2 CONTENTS OF THE DOCUMENT, I'M GOING TO REQUIRE THAT
3 IT BE ADMITTED INTO EVIDENCE, OTHER THAN
4 AUTHENTICATING IT.

5 MR. LEVEE: OH, YOUR HONOR, I'LL MOVE IT
6 INTO EVIDENCE NOW.

7 THE COURT: OKAY. ANY OBJECTION TO
8 RECEIVING EXHIBIT 11 INTO EVIDENCE?

9 MR. BROWN: NO, YOUR HONOR.

10 THE COURT: OKAY. THANK YOU. EXHIBIT 11 IS
11 RECEIVED INTO EVIDENCE.

12

13 (JOINT EXHIBIT NO. 11 WAS RECEIVED IN EVIDENCE.)

14

15 Q BY MR. LEVEE: SO I'VE ASKED YOU TO LOOK AT
16 PAGE 16, AND I'M JUST POINTING OUT, DO YOU SEE WHERE
17 IT SAYS IN THE MIDDLE OF THE PAGE (AS READ):

18 "THE INTERIM RELIEF IS
19 NECESSARY IN ORDER TO PROTECT DCA'S
20 PROCEDURAL RIGHTS."

21 DO YOU SEE THAT?

22 A YES.

23 Q OKAY.

24 SO, NOW, GO TO THE NEXT -- WELL, LET'S GO TO
25 THE BOTTOM OF PAGE 17. I'M GOING TO PICK UP IN THE
26 MIDDLE OF THE PARAGRAPH OF PARAGRAPH 29. (AS READ):

27 "THE IRP IS MEANT TO BE AN
28 EXPEDITED DISPUTE RESOLUTION

1 PROCESS."

2 LET ME STOP THERE.

3 IT ACTUALLY WASN'T VERY EXPEDITED, WAS IT?
4 TOOK 20 MONTHS.

5 A NO.

6 Q SO ICANN -- YOU UNDERSTAND THAT ICANN HOPES
7 THAT IRP WILL BE FASTER, BUT YOUR IRP WAS PRETTY
8 SLOW?

9 A I THINK MOST OF THE IRP'S, AS FAR AS I KNOW,
10 ARE A SIMILAR TIMELINE.

11 Q YES. THEY HAVE BEEN. IT TOOK A LONG TIME?

12 A YEAH. 20 MONTHS IS TOO MUCH.

13 Q AND THEY COST A LOT OF MONEY?

14 A YES.

15 Q OKAY. SO THE IRP -- I'M PICKING UP ON THE
16 THIRD LINE OF PARAGRAPH 29. (AS READ):

17 "THE IRP IS MEANT TO BE AN
18 EXPEDITED DISPUTE RESOLUTION
19 PROCESS. A SLIGHT DELAY IN
20 DELEGATION IS HARDLY AN UNDUE
21 BURDEN COMPARED TO THE ISSUES AT
22 STAKE. PRIMARILY, AMONG THOSE
23 ISSUES, ARE THE INTEGRITY OF THE
24 IRP PROCESS ICANN HAS PUT INTO
25 PLACE TO ENSURE ACCOUNTABILITY AND
26 TRANSPARENCY TO THE GLOBAL
27 COMMUNITY OF INTERNET STAKEHOLDERS
28 AND THE IRREPARABLE HARM IT WOULD

1 INFLICT ON DCA IF IT LOSES THE
2 CHANCE TO COMPETE FOR .AFRICA
3 WITHOUT EVEN BEING HEARD BY THE
4 PANEL. DCA HAS A RIGHT TO BE HEARD
5 IN A MEANINGFUL WAY, AND THE ONLY
6 PROCEEDING AVAILABLE TO REVIEW THE
7 ICANN BOARD'S DECISION"; RIGHT?

8 A CORRECT.

9 Q AND THAT'S WHAT DCA ARGUED TO THE PANEL;
10 CORRECT?

11 A YES.

12 Q AND THE PANEL ACCEPTED DCA'S POSITION AND
13 ISSUED A RULING TELLING ICANN, DON'T DELEGATE THE TLD
14 TO ZACR; RIGHT?

15 A AND ALSO THE PROCEDURAL RULING ALONG WITH
16 IT; RIGHT?

17 Q YES.

18 A YEAH.

19 Q I HAVEN'T COME TO ALL OF THAT. YOU'RE
20 ANTICIPATING IT.

21 A YES.

22 Q BUT THERE ARE A NUMBER OF PROCEDURAL ISSUES
23 THAT THE PARTIES WERE TALKING ABOUT AT THAT TIME, AND
24 THE PANEL ADOPTED DCA'S POSITION ON THOSE ISSUES?

25 A CORRECT.

26 Q OKAY. AND SO ICANN FOLLOWED THE DECISION BY
27 THE PANEL AND DID NOT DELEGATE .AFRICA TO ZACR;
28 RIGHT?

1 A YES. ONE.

2 Q AND ICANN ACTUALLY FOLLOWED ALL OF THE
3 RULINGS THAT THE PANEL MADE; RIGHT?

4 A DESPITE ITS OPPOSITION; CORRECT?

5 Q YOU'RE MAKING SOME OF MY POINTS FOR ME.
6 YOU'RE DOING A GREAT JOB.

7 A ALL RIGHT. SORRY ABOUT THAT.

8 THE COURT: I'M GOING TO ASK THE WITNESS
9 JUST TO FOCUS ON THE QUESTION THAT COUNSEL IS ASKING.

10 THE WITNESS: OKAY.

11 THE COURT: AND LET'S TRY TO AVOID ARGUING
12 WITH COUNSEL BECAUSE HE'S ASKING THE QUESTIONS FOR A
13 REASON, AND I'M SURE YOUR COUNSEL WILL BE ASKING
14 QUESTIONS FOR REASONS.

15 I'M GOING TO ASK YOU JUST TO FOCUS ON THE
16 QUESTION AND ANSWER IT AS DIRECTLY AS POSSIBLE.

17 THE WITNESS: OKAY, YOUR HONOR.

18 Q BY MR. LEVEE: YOU WERE HERE WHEN I GAVE MY
19 OPENING STATEMENT THIS MORNING?

20 A CORRECT.

21 Q AND I LISTED SEVEN THINGS THAT DCA ASKED THE
22 PANEL TO DO. SO DCA ASKED FOR DOCUMENTS TO BE
23 EXCHANGED; RIGHT?

24 A CORRECT.

25 Q AND THEY ASKED FOR ADDITIONAL BRIEFING;
26 RIGHT?

27 A YES.

28 Q AND IT ASKED FOR ITS COSTS AFTER THE IRP?

1 A YES.

2 Q AND THEY ASKED FOR ITS DECISION TO BE
3 BINDING?

4 A CORRECT.

5 Q AND THEY ASKED FOR THE INTERIM RELIEF THAT
6 WE JUST LOOKED AT; RIGHT?

7 A CORRECT.

8 Q AND THEY ASKED FOR LIVE WITNESSES TO BE AT A
9 HEARING THAT ICANN SAID COULDN'T HAPPEN; RIGHT?

10 A RIGHT.

11 Q AND I'M MISSING ONE, BUT IN EACH OF THOSE
12 CASES, ICANN DID WHAT THE PANEL RULED; RIGHT?

13 A YES.

14 Q AND IN EACH OF THOSE CASES, THE PANEL RULED
15 IN DCA'S FAVOR DESPITE ICANN'S OBJECTION?

16 A CORRECT.

17 Q OKAY. LET'S TALK ABOUT ONE OF THOSE.

18 THERE WAS A DISPUTE REGARDING THE SUBMISSION
19 OF ADDITIONAL PLEADINGS. I THINK THAT'S ACTUALLY THE
20 ONE I FORGOT.

21 DCA WANTED A BUNCH OF ADDITIONAL BRIEFS, AND
22 ICANN SAID, NO, WE'VE REALLY -- WE'VE SUBMITTED
23 ENOUGH BRIEFS; LET'S JUST GO TO THE END; RIGHT?

24 A I'M SURE.

25 Q OKAY. AND THERE WAS ALSO A DISPUTE, AS I
26 SAID, AS TO WHETHER THE HEARING WOULD INVOLVE LIVE
27 WITNESS TESTIMONY; RIGHT?

28 A CORRECT.

1 Q AND YOU UNDERSTOOD THAT ICANN WAS TAKING THE
2 POSITION THAT ITS BYLAWS ACTUALLY PROHIBITED LIVE
3 WITNESSES FROM TESTIFYING IN AN IRP; RIGHT?

4 A I DO NOT KNOW, NO.

5 Q OKAY. YOU DON'T REMEMBER THAT?

6 A I DON'T REMEMBER THAT.

7 Q OKAY. ICANN BROUGHT ITS WITNESSES TO THE
8 HEARING; RIGHT?

9 A YES.

10 Q AND TWO OF THE WITNESSES TESTIFIED; RIGHT?

11 A YES.

12 Q OKAY. LET'S TAKE A LOOK AT EXHIBIT 39. SEE
13 TOWARDS THE BOTTOM OF YOUR BINDER.

14 A EXHIBIT 29.

15 Q 39?

16 A 39.

17 Q AND LET'S JUST AUTHENTICATE THE DOCUMENT
18 BEFORE WE HAVE IT ADMITTED. THIS IS A LETTER FROM
19 MR. ALI; HIS SIGNATURE IS ON PAGE 4; RIGHT?

20 A OKAY.

21 Q OR, ACTUALLY, NOT THE SIGNATURE, BUT THERE'S
22 THE SIGNATURE. YOU SEE IT?

23 A YES.

24 Q OKAY. THIS IS A LETTER DATED APRIL 20,
25 2014, AND IT'S ADDRESSING -- IT'S RE PROCEDURAL
26 PROPOSALS.

27 YOU SEE THAT?

28 A YES.

1 MR. LEVEE: YOUR HONOR, LET ME MOVE INTO
2 EVIDENCE EXHIBIT 39.

3 THE COURT: ANY OBJECTION?

4 MR. BROWN: NO, YOUR HONOR.

5 THE COURT: EXHIBIT 39 IS RECEIVED INTO
6 EVIDENCE.

7

8 (JOINT EXHIBIT NO. 39 WAS RECEIVED IN EVIDENCE.)

9

10 Q BY MR. LEVEE: OKAY. LET'S LOOK AT THE
11 BOTTOM OF THE FIRST PAGE. AND YOU SEE WHERE MR. ALI
12 WRITES THE WORD "FIRST"?

13 A YES.

14 Q SO IT'S A NEW PARAGRAPH. (AS READ):

15 "FIRST, IT IS TELLING THAT
16 ICANN'S REPRESENTATIONS, AS TO THE
17 SCOPE OF THIS PROCEEDING, FOCUS
18 EXCLUSIVELY ON ICANN'S
19 SUPPLEMENTARY PROCEDURES. SO ICANN
20 HAD SPECIAL PROCEDURES THAT APPLY
21 TO THESE ICDR HEARINGS"; RIGHT?

22 A YES.

23 Q AND THEY ARE POSTED ON ICANN'S WEBSITE?

24 A CORRECT.

25 Q OKAY. (AS READ):

26 "AS THEIR TITLE INDICATES, THE
27 SUPPLEMENTARY PROCEDURES ONLY
28 SUPPLEMENT AND DO NOT REPLACE THE

1 ICDR RULES, WHICH, ALONG WITH THE
2 ASSOCIATED GUIDELINES, GOVERN THIS
3 PROCEEDING. THESE RULES ENSURE THE
4 RIGHT TO DCA'S RIGHT TO BE FULLY
5 HEARD AT THIS PROCEEDING. THAT
6 RIGHT INCLUDES THE ABILITY TO FULL
7 WRITTEN SUBMISSION ON THE MERITS OF
8 ITS CLAIMS, THE RIGHT TO THE
9 DOCUMENTS ON WHICH ICANN RELIES FOR
10 ITS DEFENSES, AND THE RIGHT TO TEST
11 ICANN'S WITNESSES."

12 DID I READ THAT CORRECTLY?

13 A YEAH.

14 Q OKAY.

15 LET ME SKIP TO THE NEXT PARAGRAPH.

16 (AS READ):

17 "THE PANEL SHOULD BE GUIDED
18 FIRST AND FOREMOST BY THE TEXT OF
19 THE ICDR RULES AND SUPPLEMENTARY
20 PROCEDURES AS OPPOSED TO ICANN'S
21 CURRENT SELF-SERVING GLOSS ON THOSE
22 RULES. THE SUPPLEMENTARY
23 PROCEDURES AND THE ICDR RULES,
24 MOREOVER, ULTIMATELY COMMIT THE
25 CONDUCT OF IRP ON THE DISCRETION OF
26 THE PANEL."

27 THAT'S WHAT YOUR LAWYERS WERE ARGUING;

28 RIGHT?

1 A RIGHT.

2 Q THE PANEL SHOULD GET TO DETERMINE WHAT THE
3 RULES ARE?

4 A OKAY.

5 Q OKAY. (AS READ):

6 "AND EXERCISING SUCH
7 DISCRETION, THE PANEL SHOULD BE
8 GUIDED BY THE CARDINAL PRINCIPLES
9 SET OUT IN THE ICDR ARBITRATION
10 RULES THAT EACH PARTY BE GIVEN A
11 FAIR AND FULL OPPORTUNITY TO BE
12 HEARD. A PRINCIPLE THAT MUST ALSO
13 BE VIEWED IN THE CONTEXT OF THE
14 FACT THAT THESE PROCEEDINGS WILL BE
15 THE FIRST AND LAST OPPORTUNITY THAT
16 DCA TRUST WILL HAVE TO HAVE ITS
17 RIGHTS DETERMINED BY AN INDEPENDENT
18 BODY"; RIGHT?

19 A CORRECT.

20 Q AND DCA WAS SAYING WE CAN'T SUE ICANN, SO
21 YOU SHOULD REALLY GIVE US AS MANY -- AS MUCH
22 PROCEDURE AS POSSIBLE; RIGHT?

23 A CORRECT.

24 Q OKAY. AND, AGAIN, WITH RESPECT TO THE
25 ISSUE -- THE DISPUTE ABOUT THE DOCUMENTS, THE DISPUTE
26 ABOUT THE HEARING AND THE DISPUTE ABOUT WHETHER
27 ADDITIONAL BRIEFS WILL BE FILED, THE PANEL AGREED
28 WITH DCA EVERY TIME?

1 A CORRECT.

2 Q OKAY. SO THE PANEL ACTUALLY ORDERED, OVER
3 ICANN'S OBJECTION, THAT THERE WOULD BE A LIVE HEARING
4 IN THE FIRST INSTANCE; RIGHT?

5 A YES.

6 Q AND THE PANEL ORDERED LIVE WITNESSES
7 TESTIFY?

8 A CORRECT.

9 Q SO LET'S TALK ABOUT THE HEARING.
10 YOU WERE THERE; RIGHT?

11 A YES.

12 Q IT WAS A TWO-DAY HEARING AT JONES DAY'S
13 OFFICE AT WASHINGTON, DC IN MAY OF 2015; RIGHT?

14 A CORRECT.

15 Q AND MR. ALI, YOUR LAWYER, GAVE AN OPENING
16 STATEMENT, AND I GAVE AN OPENING STATEMENT ON BEHALF
17 OF ICANN; RIGHT?

18 A YES.

19 Q SO LET'S LOOK AT EXHIBIT 35.

20 MR. LEVEE: YOUR HONOR, EXHIBIT 35 AND
21 EXHIBIT 36 ARE THE TRANSCRIPTS OF THE TWO-DAY IRP
22 HEARING. I THINK THERE'S NO DISPUTE AS TO
23 AUTHENTICITY. IT WOULD BE EASIER FOR ME TO MOVE THEM
24 INTO EVIDENCE AS COMBINATION EXHIBIT 35 IS THE
25 HEARING FROM FRIDAY, MAY 22ND, 2015, AND EXHIBIT 36
26 IS THE TRANSCRIPT OF THE HEARING HELD SATURDAY, MAY
27 23, 2015.

28 THE COURT: OKAY. ONE MOMENT, PLEASE.

1 MR. LEVEE: OKAY.

2 THE COURT: OKAY. SO ARE YOU MOVING IN
3 EVIDENCE EXHIBIT 35 AND 36?

4 MR. LEVEE: I AM, YOUR HONOR.

5 THE COURT: OKAY. ANY OBJECTION?

6 MR. BROWN: NOT EXCEPT TO THE EXTENT THAT
7 THERE'S -- WE DON'T OBJECT TO THEIR ADMISSIBILITY --
8 OR THEIR AUTHENTICITY. TO THE EXTENT THERE'S HEARSAY
9 EMBEDDED WITHIN IT, WE'D PRESERVE THE RIGHT TO -- WE
10 STIPULATE TO THEIR ADMISSION FOR NON-HEARSAY
11 PURPOSES. LET'S PUT IT THAT WAY. THERE COULD BE
12 HEARSAY. I DON'T KNOW WHAT THEY'RE GOING TO USE
13 EXACTLY IN THERE.

14 MR. LEVEE: MAY I RESPOND, YOUR HONOR?

15 THE COURT: YOU MAY.

16 MR. LEVEE: I'M GOING TO USE, ONLY IN MY
17 EXAMINATION TODAY, STATEMENTS BY DCA'S COUNSEL. SO I
18 THINK IN THIS CONNECTION THEY WOULD BE PARTY
19 ADMISSIONS IN ALL EVENTS.

20 THE COURT: SO THAT'S ALL YOU INTEND TO USE
21 IT FOR?

22 MR. LEVEE: THIS MORNING OR THIS AFTERNOON
23 CERTAINLY, YES. I DON'T HAVE ANY PLANS TO USE THE
24 TRANSCRIPT OTHERWISE, BUT IF WE DO REFERENCE IT, WE
25 CAN ADDRESS IT AT THE TIME.

26 THERE IS AN INTERCHANGE THAT I'M GOING TO
27 POINT TO BETWEEN ONE OF THE PANELISTS AND MR. ALI
28 WHERE HE ASKED -- THE PANELIST ASKS A QUESTION AND

1 MR. ALI GIVES AN ANSWER. I REFERENCED IT IN MY
2 OPENING STATEMENT.

3 THE COURT: ALL RIGHT. MR. BROWN, ANY
4 OBJECTION?

5 MR. BROWN: WE DON'T OBJECT TO THAT
6 QUESTION-AND-ANSWER EXCHANGE. I JUST RESERVE IT TO
7 THE EXTENT WE GET INTO SOME OTHER ISSUES THAT MIGHT
8 BE IN HERE; I JUST RESERVE ON THAT.

9 THE COURT: OKAY. SO THE COURT IS GOING TO
10 RECEIVE INTO EVIDENCE EXHIBITS 35 AND 36 SUBJECT TO
11 ANY OBJECTIONS TO SPECIFIC STATEMENTS IN THOSE
12 REPORTERS' TRANSCRIPTS IN EXHIBIT 35 AND 36; OKAY?

13 MR. BROWN: THAT'S FAIR ENOUGH.

14 THE COURT: OKAY. SO YOU RESERVE THE RIGHT?

15 MR. BROWN: YES.

16 THE COURT: PLAINTIFF RESERVES THE RIGHT TO
17 OBJECT TO ANY SPECIFIC TESTIMONY IN THOSE
18 TRANSCRIPTS.

19

20 (JOINT EXHIBIT NO. 35 AND 36
21 WERE RECEIVED IN EVIDENCE.)

22

23 MR. LEVEE: MAY I?

24 THE COURT: OKAY. MR. LEVEE, YOU MAY
25 CONTINUE.

26 MR. LEVEE: THANK YOU SO MUCH, YOUR HONOR.

27 Q BY MR. LEVEE: SO I'M ON EXHIBIT 35,
28 MS. BEKELE, AND I WOULD ASK YOU TO LOOK AT PAGE 22,

1 WHICH HAPPILY IN THIS INSTANCE, IS ALSO PAGE 22 OF
2 THE ACTUAL TRANSCRIPT.

3 AND IF YOU WANT TO BE COMFORTABLE THAT THIS
4 IS MR. ALI SPEAKING, YOU NEED TO GO BACK TO PAGE 19
5 AND SEE THAT MR. ALI STARTS SPEAKING ON LINE 19, AND
6 HE'S STILL SPEAKING ON PAGE 22, LINE 16, WHICH IS
7 WHAT I'M GOING TO ASK YOU TO LOOK AT.

8 A OKAY. NO PROBLEM.

9 Q OKAY. THIS IS WHAT MR. ALI SAYS.

10 (AS READ):

11 "NOW, WHAT I THINK SHOULD
12 INFORM YOUR DECISION ABOUT AN
13 OBJECTIVE STANDARD OF REVIEW, OR
14 WHAT WE MIGHT CALL A DE NOVO
15 STANDARD OF REVIEW, IS THE
16 FOLLOWING."

17 NOW, LET ME STOP THERE.

18 YOU RECALL THAT MR. ALI ARGUED FOR WHAT HE
19 CALLED A DE NOVO STANDARD OF REVIEW; IN OTHER WORDS,
20 THE PANEL LOOKING AT THE FACTS FRESH.

21 A IS THAT WHAT IT MEANS?

22 Q YES.

23 A OKAY. I DON'T REMEMBER BUT I SEE IT ON THE
24 TRANSCRIPT.

25 Q OKAY. DO YOU REMEMBER THAT ICANN ARGUED
26 THAT THERE SHOULD BE SOME DEFENSE TO THE BOARD'S
27 DECISION, AND THAT WOULD BE DIFFERENT THAN A DE NOVO
28 REVIEW?

1 A HONESTLY, IT'S TOO COMPLICATED.

2 Q OKAY.

3 THEN LET'S SEE WHAT MR. ALI SAYS. THIS
4 IS -- I'M PICKING UP ON WHAT WE MIGHT CALL A DE NOVO
5 STANDARD OF REVIEW -- IS THE FOLLOWING (AS READ):

6 "THIS IS THE ONLY OPPORTUNITY
7 THAT A CLAIMANT HAS FOR ICANN --
8 FOR INDEPENDENT AND IMPARTIAL
9 REVIEW OF ICANN'S CONDUCT. THE
10 ONLY OPPORTUNITY. AND WITHIN THE
11 CONTEXT OF THAT ONLY OPPORTUNITY,
12 THAT SOLE OPPORTUNITY, REALLY,
13 THERE SHOULD BE A DIFFERENTIAL
14 STANDARD OF REVIEW, DEFERENCE TO
15 THE REGULATOR WHOSE VERY CONDUCT IS
16 BEING QUESTIONED."

17 I THINK THAT'S WRONG, AND HE WAS ACTUALLY
18 REFERRING TO ICANN'S POSITION.

19 DID I READ THAT ACCURATELY?

20 A YEAH.

21 Q DO YOU REMEMBER IT IN ANY WAY DIFFERENT?

22 A REALLY, I DON'T.

23 Q OKAY. LET'S CONTINUE ON, PICKING UP ON LINE
24 11 OF PAGE 23. THIS IS STILL MR. ALI TALKING.

25 (AS READ):

26 "BUT WITHIN THE CONTEXT OF
27 THIS PROCESS, KEEPING IN MIND THE
28 LITIGATION WAIVER" -- STOP THERE.

1 THE LITIGATION WAIVER IS WHAT WE'VE BEEN
2 LOOKING AT ALL AFTERNOON; RIGHT?

3 A YES.

4 Q THE COVENANT NOT TO SUE.

5 THAT ALL APPLICANTS ARE REQUIRED TO SIGN A
6 VERY BROAD, VERY STRICT LITIGATION WAIVER THAT ICANN
7 CONSTANTLY INVOKES AND PROVIDES IT WITH PROTECTION
8 FROM THE PUBLIC COURTS.

9 WHAT HE WAS SAYING IS YOU CAN'T SUE ICANN;
10 RIGHT?

11 A CORRECT.

12 Q OKAY. (AS READ):

13 "AND WITHIN THE CONTEXT OF A
14 PROCEEDING THAT ICANN SAYS HAS A
15 VERY LIMITED PURPOSE, WE OF COURSE
16 CONTEST THAT THEY ASK YOU TO APPLY
17 A DIFFERENTIAL STANDARD OF REVIEW."

18 SO DOES THAT REFRESH YOUR RECOLLECTION THAT
19 ICANN WANTED TO APPLY A DIFFERENTIAL STANDARD AND DCA
20 WANTED TO APPLY A DE NOVO STANDARD?

21 A I'M READING AFTER YOU, BUT I STILL CAN'T
22 CLARIFY THE DIFFERENCE BETWEEN THE TWO.

23 Q OKAY. DO YOU RECALL WHAT THE PANEL SAID IN
24 ITS FINAL DECLARATION? WE'LL COME TO IT IN A MOMENT,
25 BUT DO YOU RECALL THE PANEL SAID IN ITS FINAL
26 DECLARATION THAT THERE WOULD BE -- THAT IT WAS USING
27 THE DE NOVO STANDARD OF REVIEW THAT DCA HAD ARGUED?

28 A IF THAT'S WHAT THE TRANSCRIPT SAYS, YES.

1 Q OKAY.

2 A BUT I DON'T REMEMBER ALL THESE DETAILS. IT
3 WAS A TWO-DAY HEARING, OR WAS IT?

4 Q OKAY. NOW, MR. ALI ALSO GAVE A CLOSING
5 ARGUMENT; RIGHT?

6 A SURE.

7 Q AND I ALSO GAVE A CLOSING ARGUMENT?

8 A YES.

9 Q AND IN HIS CLOSING ARGUMENT, LET'S -- NOW WE
10 HAVE TO TURN TO EXHIBIT 36. SO FLIP OVER TO THE NEXT
11 TAB.

12 A I'M THERE.

13 Q AND I WOULD ASK YOU TO TURN TO WHAT WE'VE
14 MARKED AS PAGE 12 OF EXHIBIT 36. AND IT'S ACTUALLY
15 TRANSCRIPT PAGE 49.

16 A PAGE 12?

17 Q YES.

18 A I'M THERE.

19 Q ACTUALLY, I THINK IT WOULD BE EASIER IF WE
20 LOOK AT PAGE 28.

21 MR. LEVEE: MY APOLOGIES, YOUR HONOR, AND
22 MS. BEKELE.

23 Q BY MR. LEVEE: SO IF YOU LOOK AT THE BOTTOM
24 OF PAGE 28 -- LET ME KNOW WHEN YOU'RE THERE.

25 THE COURT: SO JUST TO BE CLEAR, THIS IS
26 EXHIBIT 36 THAT IS BEFORE THE WITNESS, AND YOU WOULD
27 LIKE THE WITNESS TO LOOK AT PAGE 28 AS IT APPEARS AT
28 THE BOTTOM OF THE PAGE.

1 MR. LEVEE: YES.

2 THE COURT: SO IT SAYS JOINT TRIAL EXHIBIT
3 36, PAGE 28 AT THE BOTTOM OF THE PAGE.

4 MR. LEVEE: YES, YOUR HONOR.

5 THE COURT: OKAY. DO YOU HAVE THAT,
6 MS. BEKELE?

7 THE WITNESS: YES.

8 Q BY MR. LEVEE: AND THIS IS STILL MR. ALI
9 SPEAKING?

10 A YES.

11 Q AND HE SAID (AS READ):

12 "I, YESTERDAY, ADDRESSED THE
13 QUESTION OF THE STANDARD OF REVIEW,
14 SO I WON'T REPEAT MYSELF" --

15 A OKAY. I REALLY APOLOGIZE. I'M ON PAGE 26.

16 Q 28. DID I SAY 26?

17 A ALL RIGHT. I'M HERE NOW. SORRY.

18 Q YOU THERE?

19 A I'M THERE.

20 Q LET ME START OVER.

21 LINE 21, MR. ALI IS SPEAKING. (AS READ):

22 "I, YESTERDAY, ADDRESSED THE
23 QUESTION OF THE STANDARD OF REVIEW,
24 SO I WON'T REPEAT MYSELF, BUT OF
25 COURSE I LOOK FORWARD TO ANSWER ANY
26 QUESTIONS THAT YOU HAVE. I'LL
27 SIMPLY EMPHASIZE THAT -- PLEASE
28 THINK OF THE STANDARD OF REVIEW

1 WITHIN THE CONTEXT OF WHERE YOU
2 SIT, LITIGATION WAIVER, THE FACT
3 THAT THERE IS THIS INCESTUOUS
4 CIRCULAR SYSTEM OF CHECKS AND
5 BALANCES OR CONTROLS WITHIN ICANN,
6 AND, AT THE END OF THE DAY, YOU ARE
7 THE ONLY INDEPENDENT OBJECTIVE
8 REVIEWERS OF WHAT IT IS."

9 AND JUDGE CAHILL INTERRUPTS, AND HE SAYS,
10 "WHAT DO YOU MEAN BY LITIGATION?"

11 DO YOU SEE THAT?

12 A YES.

13 Q AND MR. ALI RESPONDS, "THE LITIGATION
14 WAIVER, SIR."

15 DO YOU SEE THAT?

16 A YES.

17 Q AND JUDGE CAHILL RESPONDS, "YES."

18 AND MR. ALI SAYS, "YES. AS YOU KNOW, AS
19 WHEN AN APPLICANT FILES AN APPLICATION, THEY'RE
20 REQUIRED --"

21 AND THEN JUDGE CAHILL SAYS, "THE WAIVER, THE
22 TRIAL?"

23 AND MR. ALI SAYS, "TO WAIVE ALL OF THEIR
24 RIGHTS WITH RESPECT TO TAKING ICANN TO ANY FORUM
25 OTHER THAN THE IRP."

26 DO YOU SEE THAT?

27 A YES.

28 Q DID I READ THAT CORRECTLY?

1 A CORRECT.

2 Q SO LET'S CONTINUE.

3 JUDGE CAHILL THEN SAYS, "I UNDERSTAND

4 WHAT --"

5 AND MR. ALI, YOUR LAWYER, SAYS, "SO I THINK

6 THAT THAT, TO ME, IS DISPOSITIVE."

7 AND JUDGE CAHILL SAYS, "WHAT YOU'RE TALKING

8 ABOUT IS WHEN YOU SAY, 'I'M NOT GOING TO COURT';

9 RIGHT?"

10 AND THIS IS MR. ALI'S RESPONSE: "YES. WE

11 CANNOT TAKE YOU TO COURT."

12 HE'S REFERRING TO DCA; RIGHT?

13 A YES.

14 Q (AS READ):

15 "WE CANNOT TAKE YOU TO

16 ARBITRATION. WE CAN'T TAKE YOU

17 ANYWHERE; WE CAN'T SUE YOU FOR

18 ANYTHING."

19 THAT WAS MR. ALI'S STATEMENT TO THE PANEL;

20 RIGHT?

21 A RIGHT.

22 Q AND WHEN HE SAID, "WE CAN'T SUE YOU FOR

23 ANYTHING," WHAT HE WAS SAYING WAS DCA CANNOT SUE

24 ICANN FOR ANYTHING; RIGHT?

25 A ACCORDING TO THAT, YES.

26 Q ACCORDING TO THE COVENANT NOT TO SUE?

27 A YES.

28 Q OKAY. LET'S TAKE A LOOK AT EXHIBIT 31. OH,

1 **WAIT. I SKIPPED SOMETHING. SORRY. EXHIBIT 33.**

2 **THIS IS THE --**

3 MR. LEVEE: YOUR HONOR, THIS IS THE FINAL
4 DECLARATION FROM THE PANEL. I CAN ASK THE WITNESS,
5 OBVIOUSLY, TO AUTHENTICATE IT, BUT I CAN'T IMAGINE
6 THERE'S ANY OBJECTION.

7 I'D MOVE IT INTO EVIDENCE.

8 MR. BROWN: THERE'S NO OBJECTION, YOUR
9 HONOR.

10 THE COURT: NO OBJECTION?

11 MR. BROWN: NO OBJECTION.

12 THE COURT: OKAY. THANK YOU. SO EXHIBIT 33
13 IS RECEIVED INTO EVIDENCE.

14 ON PAGE 1, IT SAYS, "FINAL DECLARATION."

15

16 (JOINT EXHIBIT NO. 33 WAS RECEIVED IN EVIDENCE.)

17

18 MR. LEVEE: OKAY.

19 **Q BY MR. LEVEE: AND YOU RECALL THAT THE PANEL**
20 **ISSUED THIS 63-PAGE FINAL DECLARATION; RIGHT?**

21 A CORRECT.

22 **Q THEY WERE VERY THOROUGH; RIGHT?**

23 A YES.

24 **Q AND THEY DID IT JUST WITHIN A COUPLE MONTHS**
25 **OF WHEN THE HEARING OCCURRED. THEY DID IT ON**
26 **JULY 9TH, 2015; RIGHT?**

27 A COULD YOU SAY THAT AGAIN?

28 **Q YEAH. I SAID THEY DID IT JUST A COUPLE OF**

1 MONTHS AFTER THE HEARING OCCURRED?

2 A YES. SURE.

3 Q OKAY. YOU CAN SEE ON THE LAST PAGE, PAGE
4 63, THE SIGNATURES OF PROFESSOR KESSEDJIAN AND JUDGE
5 CAHILL AND MR. BARIN; RIGHT?

6 A YES.

7 Q THOSE ARE THE THREE PANELISTS. AND WHAT I
8 WANTED TO ASK YOU TO DO IS TO LOOK AT EXHIBIT 33,
9 PAGE 22.

10 A ALL RIGHT.

11 Q AND IN PARTICULAR, WOULD YOU LOOK AT
12 PARAGRAPH 76?

13 A ALL RIGHT.

14 Q AND I'M GOING TO READ IT. (AS READ):

15 "THE PANEL THEREFORE CONCLUDES
16 THAT THE 'STANDARD OF REVIEW' -- AND
17 "STANDARD OF REVIEW" IS IN QUOTES -- "IN
18 THIS IRP IS A DE NOVO OBJECTIVE AND
19 INDEPENDENT ONE WHICH DOES NOT
20 REQUIRE ANY PRESUMPTION OF
21 CORRECTNESS."

22 DO YOU SEE THAT?

23 A RIGHT.

24 Q DOES THIS REFRESH YOUR RECOLLECTION THAT THE
25 PANEL AGREED WITH DCA?

26 A IT CORRESPONDS WITH WHAT YOU SAID EARLIER.

27 Q YES. SO THE PARTIES DISAGREED ON WHAT THE
28 SCOPE OF REVIEW WOULD BE BY THE PANEL?

1 A RIGHT.

2 Q AND THE PANEL ADOPTED DCA'S POSITION?

3 A CORRECT.

4 Q OKAY. NOW WE CAN TURN TO EXHIBIT 31.

5 A 30?

6 Q 31.

7 A 31.

8 Q THIS IS A LETTER FROM MR. ALI DATED JULY 1,
9 2015, TO THE PANEL; RIGHT?

10 A CORRECT.

11 Q AND IT WAS ADDRESSING -- THE PANEL HAD NOT
12 YET ISSUED ITS FINAL DECISION, AND IT WAS ADDRESSING
13 A QUESTION THAT THE PANEL HAD ASKED THE PARTIES
14 REGARDING THE PAYMENT OF COSTS AND HOW THE PANEL
15 SHOULD DEAL WITH THAT; RIGHT?

16 A YES.

17 Q OKAY.

18 MR. LEVEE: YOUR HONOR, I WOULD MOVE EXHIBIT
19 31 INTO EVIDENCE.

20 THE COURT: ANY OBJECTION?

21 MR. BROWN: NO OBJECTION, YOUR HONOR.

22 THE COURT: EXHIBIT 31 IS RECEIVED INTO
23 EVIDENCE.

24

25 (JOINT EXHIBIT NO. 31 WAS RECEIVED IN EVIDENCE.)

26

27 Q BY MR. LEVEE: AND IF YOU WOULD TAKE A LOOK
28 AT PAGE 3.

1 A OF THIS SAME EXHIBIT, 31?

2 Q STILL SAME EXHIBIT, EXHIBIT 31, PAGE 3.

3 A OKAY.

4 Q THERE'S A PARAGRAPH THAT BEGINS, "DCA IS A
5 CHARITABLE TRUST."

6 DO YOU SEE THAT?

7 A YES.

8 Q I'M GOING TO READ THE LAST SENTENCE OF THAT
9 PARAGRAPH. (AS READ):

10 "IN DCA'S RESPECTFUL
11 SUBMISSION, ICANN'S POSITION
12 THROUGHOUT THESE PROCEEDINGS ARE
13 INCONSISTENT WITH ICANN'S
14 OBLIGATIONS OF TRANSPARENCY AND THE
15 OVERALL OBJECTIVES OF THE IRP
16 PROCESS, WHICH IS THE ONLY
17 ACCOUNTABILITY MECHANISM AVAILABLE
18 TO PARTIES SUCH AS DCA."

19 THAT'S WHAT MR. ALI WROTE; RIGHT?

20 A YES.

21 Q AND IN THE FINAL DECISION BY THE PANEL,
22 WHICH WE CAN GO BACK TO IF YOU NEED, THE PANEL
23 AWARDED DCA ALL OF ITS COSTS; RIGHT?

24 A CORRECT.

25 Q AND LET'S GO BACK TO EXHIBIT 33 SO WE CAN
26 TAKE A LOOK AT EXACTLY WHAT THOSE COSTS WERE.

27 SO IF YOU LOOK AT EXHIBIT 33, AND I WOULD
28 ASK YOU TO LOOK AT PAGE 62, IT'S THE PENULTIMATE

1 PAGE.
2 A OKAY.
3 Q LOOK AT PARAGRAPH 150.
4 A RIGHT.
5 Q IT SAYS THE PANEL (AS READ):
6 "THE I.R.C. PANEL DECLARES DCA
7 TRUST TO BE THE PREVAILING PARTY,
8 AND THIS IRP FURTHER DECLARES THAT
9 ICANN IS TO BEAR, PURSUANT TO
10 ARTICLE 4, SECTION 3, PARAGRAPH 18
11 OF THE BYLAWS" -- SO FORTH AND SO
12 ON -- "THE TOTALITY OF THE COSTS OF
13 THE IRP AND THE TOTALITY OF THE
14 COSTS OF THE IRP PROVIDERS AS
15 FOLLOWS."
16 IT SAYS (AS READ):
17 "A. THE FEES AND EXPENSES OF
18 THE PANELISTS."
19 SO THOSE WERE THE THREE PANELISTS THAT WE
20 REFERENCED ALREADY, INCLUDING JUSTICE NEAL, WHO
21 PASSED; RIGHT?
22 A RIGHT.
23 Q (AS READ):
24 "AND B, THE FEES AND EXPENSES
25 OF THE ADMINISTRATOR."
26 THE ICDR; RIGHT?
27 A RIGHT.
28 Q (AS READ):

1 "THE EXPENSES OF THE EMERGENCY
2 PANELIST."

3 WE HAD TO GET AN EMERGENCY PANELIST BECAUSE,
4 AT THE TIME, THERE WASN'T ACTUALLY A PANEL IN PLACE
5 WHEN YOU FILED YOUR APPLICATION FOR EMERGENCY RELIEF;
6 RIGHT?

7 A RIGHT.

8 Q SO WE HAD AN EMERGENCY PANELIST.

9 D IS THE FEES AND EXPENSES OF THE REPORTER
10 ASSOCIATED WITH THE HEARING IN MAY; RIGHT?

11 A CORRECT.

12 Q AND E IS THE ADMINISTRATIVE FEES -- OR IT
13 SAYS (AS READ):

14 "AS A RESULT OF THE ABOVE, THE
15 ADMINISTRATIVE FEES OF THE ICDR ARE
16 THE FOLLOWING: THE US, \$4,600, AND
17 THE PANELISTS' COMPENSATION AND
18 EXPENSES, TOTALING \$403,467.08
19 SHALL BE BORNE ENTIRELY BY ICANN;
20 THEREFORE, ICANN SHALL REIMBURSE
21 DCA TRUST THE SUM OF \$198,000";
22 RIGHT?

23 A CORRECT.

24 Q AND THAT THE REASON THAT THE SUM WAS
25 \$198,000 IS THAT DCA HAD PAID HALF TO THAT POINT AND
26 ICANN HAD PAID HALF TO THAT POINT; RIGHT?

27 A YES.

28 Q SO ICANN REIMBURSED DCA FOR THE HALF THAT

1 DCA PAID; RIGHT?

2 A RIGHT.

3 Q OKAY. AND YOU GOT THAT BY CHECK OR WIRE
4 TRANSFER A WEEK OR TWO AFTER THE PANELISTS HAD RULED?

5 A SOMETHING LIKE THAT, YEAH.

6 Q OKAY. NOW, WE'VE ALREADY DISCUSSED A LOT OF
7 THE FEATURES OF THE IRP, AND ONE THING WE DIDN'T GET
8 INTO WERE THE EXCHANGE OF DOCUMENTS.

9 THERE WERE A LOT OF DOCUMENTS EXCHANGED;
10 RIGHT?

11 A RIGHT.

12 Q AND DCA HAD SUBMITTED REQUESTS FOR DOCUMENTS
13 FROM ICANN, AND ICANN ACTUALLY TOOK THE POSITION THAT
14 AN IRP. DOESN'T PERMIT DOCUMENT REQUESTS; RIGHT?

15 A YES. MAYBE. I DON'T KNOW.

16 Q AND THE PANEL ORDERED ICANN TO PRODUCE
17 DOCUMENTS, AND IT DID; RIGHT?

18 A YES.

19 Q OKAY. AND DCA ALSO PRODUCED SOME DOCUMENTS
20 TO ICANN; RIGHT?

21 A MANY.

22 Q AND THE PARTIES ACTUALLY SUBMITTED IN
23 ADVANCE OF THE HEARING WITNESS STATEMENTS; RIGHT?

24 A CORRECT.

25 Q AND THOSE WERE SIGNED UNDER OATH?

26 A UH-HUH.

27 Q YOU SUBMITTED, IF MEMORY SERVES, A VERY LONG
28 WITNESS STATEMENT; RIGHT?

1 A YES.

2 Q AND, IN ADDITION, HEATHER DRYDEN SUBMITTED A
3 WITNESS STATEMENT?

4 A CORRECT.

5 Q AND SHE HAD BEEN A CHAIR OF THE GAC,
6 GOVERNMENTAL ADVISORY COMMITTEE, WHEN THE GAC ISSUED
7 ITS CONSENSUS ADVICE AGAINST DCA'S APPLICATION;
8 RIGHT?

9 A YES.

10 Q AND SHE WORKED FOR THE GOVERNMENT OF CANADA?

11 A YES. I THINK SO.

12 Q AND ICANN ALSO SUBMITTED A DECLARATION FROM
13 CHARINE CHALLENGON. HE WAS A BOARD MEMBER OF ICANN
14 AT THE TIME?

15 A YES.

16 Q AND HE'S STILL AN ICANN BOARD MEMBER; RIGHT?

17 A I'M NOT --

18 Q YOU DON'T KNOW? OKAY.

19 AND WHEN THE PANEL ORDERED THE WITNESSES TO
20 APPEAR, YOU APPEAR AND MR. CHALLENGON APPEARED AND
21 MS. DRYDEN APPEARED; CORRECT?

22 A CORRECT.

23 Q AND THEY WERE SWORN IN UNDER PENALTY OF
24 PERJURY JUST LIKE THE CLERK SWORE YOU IN ABOUT AN
25 HOUR AND 15 MINUTES AGO; RIGHT?

26 A I THINK SO. I'M NOT SURE.

27 Q AND YOU RECALL THAT THE PANEL ASKED A LOT OF
28 QUESTIONS?

1 A YES.

2 Q AND I ALSO WAS PERMITTED TO ASK YOU AND MY
3 WITNESSES SOME QUESTIONS; RIGHT?

4 A YES.

5 Q AND YOUR LAWYER ASKED QUESTIONS OF THE
6 WITNESSES AS WELL, MR. ALI?

7 A YES. THAT WAS THROUGH THE PANEL; RIGHT? I
8 DON'T REMEMBER.

9 Q NO. ACTUALLY, I WAS ABLE TO ASK YOU
10 QUESTIONS DIRECTLY. YOU DON'T RECALL THAT?

11 A NO. I DON'T REMEMBER.

12 Q OKAY.

13 A OKAY. SHOULD BE ON THE TRANSCRIPT OR
14 SOMETHING.

15 Q OKAY. AND AS WE ALREADY POINTED OUT,
16 MR. ALI AND I BOTH MADE OPENING STATEMENTS AND
17 CLOSING ARGUMENTS; RIGHT?

18 A YES.

19 Q NOW, WHEN ICANN PRODUCED DOCUMENTS AND WHEN
20 DCA PRODUCED DOCUMENTS, WE ASKED THE PANEL FOR A
21 PROTECTIVE ORDER.

22 DO YOU KNOW WHAT THAT MEANS?

23 A A WHAT?

24 Q A PROTECTIVE ORDER.

25 A OKAY.

26 Q DO YOU REMEMBER THAT?

27 A HUH-UH.

28 Q SO DO YOU KNOW THAT SOME OF THE DOCUMENTS

1 THAT WERE SUBMITTED TO THE PANEL AND TO THE PARTIES
2 CONTAINED CONFIDENTIAL INFORMATION?

3 A NO.

4 Q DO YOU REMEMBER THAT THE GAC WAS ASKED TO
5 SUBMIT SOME DOCUMENTS AND THEY DID SO?

6 A YOU MEAN THE E-MAILS?

7 Q YES. THE E-MAILS?

8 A YES. E-MAIL.

9 Q DO YOU REMEMBER THAT THE GAC SAID WE DON'T
10 REALLY WANT TO GIVE YOU THESE DOCUMENTS, BUT IF
11 THERE'S A CONFIDENTIALITY ORDER IN PLACE SO THAT
12 PEOPLE CAN'T SEE THEM, WE'LL TURN THEM OVER TO THE
13 PANEL?

14 A I REALLY DON'T REMEMBER.

15 Q OKAY. AND SO DO YOU KNOW -- MS. COLON'S
16 OPENING STATEMENT SAID THAT ICANN REDACTED THE
17 PANEL'S FINAL DECLARATION.

18 DID YOU HEAR HER SAY THAT?

19 A YES.

20 Q DO YOU KNOW WHAT WAS REDACTED?

21 A ALL THE DISCOVERY PAPERS, THE DISCOVERY
22 DISCUSSIONS, THE FINDINGS OUTSIDE OF THE GAC ISSUES.

23 Q ALL OF THE DISCOVERY?

24 A WELL, I CAN'T SAY. I WOULD SAY, IN MY OWN
25 OPINION, I WOULD SAY A LOT OF THE WRONGDOINGS WERE
26 COVERED. THAT'S MY OPINION.

27 Q SO YOU'RE SAYING THAT ICANN -- I JUST WANT
28 TO MAKE SURE I GOT THIS RIGHT.

1 A RIGHT.

2 Q **THAT ICANN REDACTED THE PANEL'S FINDINGS ON**
3 **ICANN'S CONDUCT THAT THE PANEL FOUND TO BE WRONG?**

4 A WHAT -- I WOULD REPHRASE IT -- IF YOU'RE
5 ASKING ME -- IS, THERE WAS A POSITION OF DCA THAT
6 CAME OUT AS A RESULT OF THE DISCOVERY, AND THEN THE
7 PANELS WERE PRESENTING ON THE FINAL DECLARATION BOTH
8 POSITIONS, MEANING DCA ASSERTED THIS; ICANN ASSERTED
9 THIS. SO THOSE THINGS THAT WERE DISCOVERED, PART OF
10 THE DISCOVERY, WERE ALL REDACTED.

11 Q **AND DO YOU KNOW WHY IT WAS REDACTED?**

12 A I WOULD THINK BECAUSE IT WAS SENSITIVE
13 INFORMATION YOU DIDN'T WANT THE PUBLIC TO KNOW.

14 Q **OKAY. AND DID YOU KNOW WHETHER THAT**
15 **INFORMATION HAD BEEN SUBMITTED TO THE PARTIES UNDER A**
16 **CONFIDENTIALITY STATEMENT?**

17 A I DON'T. I DON'T REMEMBER.

18 Q **OKAY. AND ONCE ICANN POSTED THE FINAL**
19 **DECLARATION, DO YOU RECALL WHETHER ICANN, A FEW DAYS**
20 **LATER, POSTED A REVISED DECLARATION UNREDACTING MOST**
21 **OF THE INFORMATION THAT HAD BEEN ORIGINALLY REDACTED?**

22 A YEAH. SO THAT MEANS IT CANNOT BE SUBMITTED
23 AS CONFIDENTIAL.

24 Q **I COULD NOT HEAR YOUR ANSWER.**

25 A I'M SAYING YOU PREVIOUSLY SAID THOSE
26 POSITIONS MAY HAVE BEEN CONFIDENTIAL. AND IF ICANN
27 HAS GONE AND UNREDACTED IT, THEN IT COULD NOT HAVE
28 BEEN CONFIDENTIAL.

1 SO I BELIEVE ORIGINALLY IT SHOULD NOT HAVE
2 BEEN REDACTED TO BEGIN WITH. THAT'S ALL I'M SAYING.

3 Q SO YOU DON'T KNOW, DO YOU, WHETHER ICANN
4 CONTACTED PEOPLE TO SAY, HEY, THIS INFORMATION WAS
5 PROVIDED TO US UNDER SEAL, UNDER CONFIDENTIALITY.
6 WE'D LIKE TO UNREDACT IT?

7 A THAT'S YOUR INTERNAL COMMUNICATION WITH YOUR
8 PEOPLE. I WOULD NOT KNOW. I WAS NOT ASKED THAT
9 QUESTION.

10 Q OKAY.

11 A I WAS NOT A PARTICIPANT TO THAT.

12 Q OKAY. AND DID YOU PROVIDE A COPY OF THE
13 UNREDACTED DECISION TO ANYONE?

14 A IT WAS POSTED ON OUR WEBSITE.

15 Q SO YOU POSTED THE UNREDACTED DECISION ON
16 YOUR WEBSITE; RIGHT?

17 A YEAH.

18 Q AND WHEN DID YOU DO THAT? YOU DID IT PRETTY
19 MUCH THE DAY OR THE DAY AFTER THE RULING CAME DOWN?

20 A YEAH. SURE.

21 Q AND DO YOU KNOW WHETHER DOING SO VIOLATED
22 THE PROTECTIVE ORDER THAT THE PANEL HAD ISSUED?

23 MR. BROWN: OBJECTION.

24 THE WITNESS: NO.

25 MR. BROWN: RELEVANCE. IRRELEVANT TO
26 JUDICIAL ESTOPPEL.

27 THE COURT: OVERRULED. YOU CAN ANSWER.

28 THE WITNESS: THE POINT IS I REMEMBER YOU

1 EVEN E-MAILING ME, RIGHT, SAYING YOU DID.

2 THE COURT: I'M SORRY. I'M GOING TO ASK
3 MR. LEVEE TO ASK HIS QUESTION AGAIN JUST TO BE SURE
4 WHAT THE QUESTION IS.

5 THE WITNESS: OKAY.

6 Q BY MR. LEVEE: DO YOU KNOW WHETHER YOUR
7 DECISION TO POST THE UNREDACTED COPY OF THE PANEL'S
8 FINAL DECLARATION VIOLATED THE PROTECTIVE ORDER THAT
9 THE PANEL HAD ISSUED?

10 A NO.

11 Q NO, YOU DON'T KNOW OR?

12 A NO. DON'T KNOW IF THE PANEL HAS ISSUED A
13 PROTECTIVE ORDER OVER THE FINAL DECLARATION.

14 Q OKAY. MR. ALI HAD RESIGNED FROM
15 REPRESENTING YOU THE DAY THE PANEL ISSUED ITS ORDER;
16 RIGHT?

17 A COULD BE. I DON'T REMEMBER EXACTLY WHEN HE
18 HAD PROPOSED TO MOVE TO ANOTHER FIRM.

19 THE COURT: MR. LEVEE, IT'S ABOUT 3: --
20 LITTLE AFTER 3:20 P.M. WOULD THIS BE A GOOD TIME TO
21 TAKE OUR AFTERNOON BREAK?

22 MR. LEVEE: ACTUALLY, IT'S A PERFECT TIME.

23 THE COURT: OKAY. WE'LL TAKE OUR AFTERNOON
24 BREAK FOR 15 MINUTES AT THIS TIME.

25

26 (A RECESS WAS TAKEN.)

27

28 THE COURT: WE'RE BACK ON THE RECORD IN

1 DOTCONNECTAFRICA TRUST VERSUS INTERNET CORPORATION
2 FOR ASSIGNED NAMES AND NUMBERS. AND THE COURT NOTES
3 THAT PLAINTIFF'S COUNSEL AND DEFENDANT ICANN'S
4 COUNSEL ARE AT THEIR PLACES AT COUNSEL TABLE, AND
5 MR. LEVEE IS AT THE LECTERN. AND THE WITNESS,
6 MS. BEKELE, IS AT THE WITNESS STAND. AND IT IS NOW A
7 LITTLE AFTER -- IT'S ALMOST 3:40 P.M.

8 WE'RE RESUMING MR. LEVEE'S DIRECT
9 EXAMINATION OF THE WITNESS.

10 ARE YOU READY TO PROCEED?

11 MR. LEVEE: I AM, YOUR HONOR.

12 THE COURT: YOU MAY CONTINUE.

13 MR. LEVEE: THANK YOU. YOUR HONOR, MAY I
14 APPROACH THE WITNESS? I HAVE AN ADDITIONAL EXHIBIT.

15 THE COURT: YOU MAY.

16 Q BY MR. LEVEE: MS. BEKELE, I'M GOING TO HAND
17 TO YOU JOINT TRIAL EXHIBIT 21, WHICH I DID NOT PUT IN
18 YOUR BINDER, BUT WE'LL LEAVE IT HERE FOR THE TIME
19 BEING.

20 DO YOU -- FIRST OF ALL, DO YOU RECOGNIZE THE
21 CAPTION THAT'S THE IRP CAPTION?

22 A YES.

23 Q AND IF YOU'D LOOK AT THE THIRD PAGE, YOU SEE
24 THE SIGNATURE OF MR. BARIN, THE PRESIDENT OF THE
25 PANEL ON BEHALF OF THE PANEL?

26 A CORRECT.

27 Q LOOK BACK ON THE FIRST PAGE. YOU REMEMBER
28 THAT THE PANEL ISSUED A NUMBER OF PROCEDURAL ORDERS?

1 A YES.

2 Q OKAY. THIS IS PROCEDURAL ORDER NUMBER 4.

3 MR. LEVEE: AND, YOUR HONOR, IT IS A JOINT
4 EXHIBIT. LET ME MOVE IT INTO EVIDENCE BEFORE I GO
5 THROUGH IT.

6 THE COURT: ANY OBJECTION?

7 MR. BROWN: NO, YOUR HONOR.

8 THE COURT: EXHIBIT 21 IS RECEIVED INTO
9 EVIDENCE.

10

11 (JOINT EXHIBIT NO. 21 WAS RECEIVED IN EVIDENCE.)

12

13 Q BY MR. LEVEE: LET ME ASK YOU TO LOOK AT
14 PROCEDURAL ORDER NUMBER 4 AND, IN PARTICULAR,
15 PARAGRAPH 2 AT THE BOTTOM OF THE FIRST PAGE. ARE YOU
16 WITH ME?

17 A YES.

18 Q IT SAYS THE PARTIES HAVE, AFTER NEGOTIATION
19 AMONG THEMSELVES, AGREED TO THE FOLLOWING
20 CONFIDENTIALITY STIPULATION, WHICH THE PANEL
21 REPRODUCES FOR COMPLETENESS.

22 SO TURN THE PAGE. I'M GOING TO READ WHERE
23 IT SAYS "PARAGRAPH 1." (AS READ):

24 "DOCUMENTS EXCHANGED BY THE
25 PARTIES MAY NOT BE USED FOR MY
26 PURPOSE OTHER THAN PARTICIPATING IN
27 THE IRP. DOCUMENTS EXCHANGED BY
28 THE PARTIES MAY NOT BE PUBLICLY

1 POSTED OR DISCLOSED IN ANY MANNER."
2 DO YOU SEE THAT?
3 A YES.
4 Q (AS READ):
5 "REFERENCE TO SUCH DOCUMENTS
6 OR INFORMATION FROM SUCH DOCUMENTS
7 IN THE PARTIES' WRITTEN SUBMISSIONS
8 MUST BE REDACTED PRIOR TO PUBLIC
9 POSTING."
10 DO YOU SEE THAT?
11 A YES.
12 Q SO THIS IS WHAT I WAS REFERRING TO BEFORE.
13 DID YOU UNDERSTAND THAT THE PARTIES HAD AN
14 OBLIGATION TO FOLLOW THE ORDER THAT THE PANEL ISSUED,
15 PROCEDURAL ORDER NUMBER 4?
16 A YEAH. I WOULD THINK SO.
17 Q AND YOU UNDERSTAND THAT REFERENCE TO
18 DOCUMENTS OR INFORMATION FROM DOCUMENTS THAT WERE
19 EXCHANGED COULD NOT BE POSTED WITHOUT REDACTION?
20 THAT'S WHAT IT SAYS; RIGHT?
21 A RIGHT.
22 Q AND THEN IT GOES ON (AS READ):
23 "THE ABOVE AGREEMENT, HOWEVER,
24 DOES NOT IN ANY WAY HINDER THE
25 PANEL'S ABILITY IN THIS IRP TO
26 REFER TO OR CITE ANY DOCUMENT AND
27 INFORMATION IT FINDS RELEVANT
28 AND/OR NECESSARY FOR ITS

1 DETERMINATION AND DECLARATION. THE
2 PARTIES THEMSELVES WILL ENSURE THAT
3 ANY CONFIDENTIAL INFORMATION OR
4 DOCUMENT REFERRED TO OR CITED BY
5 THE PANEL IN ITS DETERMINATIONS AND
6 DECLARATIONS ARE APPROPRIATELY
7 REDACTED WHERE NECESSARY."

8 DO YOU SEE THAT?

9 A YEAH.

10 Q AND, SO, ICANN, WHEN IT POSTED THE IRP
11 DECLARATION, REDACTED THE INFORMATION THAT HAD BEEN
12 EXCHANGED PURSUANT TO PROCEDURAL ORDER 4; RIGHT?

13 A I DON'T KNOW WHAT YOU DID. IF YOU WANT ME
14 TO --

15 Q BUT YOU DID NOT DO SO -- YOU DID NOT REDACT
16 ANY INFORMATION WHEN YOU PUT THE IRP PANEL'S
17 DECLARATION ON YOUR WEBSITE?

18 A I WAS NOT TOLD TO REDACT ANYTHING. AND THE
19 EXCHANGE OF DOCUMENTS MAY MEAN ENTIRELY DIFFERENT
20 FROM THE PANEL DECLARATION, WHICH, IN MY OPINION,
21 SHOULD BE TRANSPARENT, AND OUR LAWYERS DID NOT
22 INSTRUCT US -- I'M JUST RESPONDING.

23 THE COURT: OKAY. THANK YOU. I THINK
24 YOU'VE ANSWERED THE QUESTION. SO THE QUESTION
25 ACTUALLY CALLED FOR A YES-OR-NO ANSWER.

26 THE WITNESS: OH, OKAY.

27 THE COURT: SO, MR. LEVEE, YOU MAY CONTINUE.

28 MR. LEVEE: THANK YOU, YOUR HONOR. I'M

1 GOING TO MOVE TO A DIFFERENT TOPIC. I THINK WE'VE
2 COVERED THAT.

3 Q BY MR. LEVEE: I'M GOING TO ASK, MS. BEKELE,
4 FOR US TO JUST GET SOME EXHIBITS INTO EVIDENCE SO YOU
5 CAN ANSWER A FEW MORE QUESTIONS.

6 WOULD YOU LOOK AT JOINT TRIAL EXHIBIT NUMBER
7 23?

8 A ALL RIGHT. I'M THERE.

9 Q OKAY. THIS IS DCA'S MEMORIAL ON THE MERITS.
10 ANOTHER WAY OF SAYING THIS WAS YOUR MAIN BRIEF;
11 RIGHT?

12 A CORRECT.

13 Q AND THIS WAS SUBMITTED BY WEIL, GOTSHAL ON
14 NOVEMBER 3, 2014; RIGHT?

15 A YES.

16 MR. LEVEE: OKAY. YOUR HONOR, COULD I MOVE
17 THIS EXHIBIT 23 INTO EVIDENCE?

18 THE COURT: ANY OBJECTION?

19 MR. BROWN: YOUR HONOR, THERE'S NO
20 OBJECTION.

21 THE COURT: THANK YOU. EXHIBIT 23 IS
22 RECEIVED INTO EVIDENCE.

23
24 (JOINT EXHIBIT NO. 23 WAS RECEIVED IN EVIDENCE.)

25
26 Q BY MR. LEVEE: NOW LET'S LOOK AT EXHIBIT 24.
27 THIS IS THE WITNESS STATEMENT THAT YOU
28 PREPARED IN CONJUNCTION WITH THE IRP; CORRECT?

1 A YES.

2 Q AND IF YOU LOOK ON PAGE 57, CAN YOU SEE THAT
3 YOU SIGNED IT, AND YOU WERE AFFIRMING THAT THE
4 FOREGOING WAS TRUE AND CORRECT TO THE BEST OF YOUR
5 KNOWLEDGE?

6 A CORRECT.

7 Q AND THIS WAS A STATEMENT THAT WAS PROVIDED
8 TO THE PANEL, THE IRP PANEL; RIGHT?

9 A YES.

10 MR. LEVEE: YOUR HONOR, I MOVE THE ADMISSION
11 OF EXHIBIT 24.

12 THE COURT: ANY OBJECTION?

13 MR. BROWN: NO, YOUR HONOR.

14 THE COURT: THANK YOU. EXHIBIT 24 IS
15 RECEIVED INTO EVIDENCE.

16

17 (JOINT EXHIBIT NO. 24 WAS RECEIVED IN EVIDENCE.)

18

19 Q BY MR. LEVEE: AND THEN ONE MORE. THIS WILL
20 BE THE EASIEST ONE WE DO ALL DAY. EXHIBIT 37. THIS
21 IS A COPY OF PLAINTIFF'S FIRST AMENDED COMPLAINT
22 ACTUALLY FILED IN FEDERAL COURT DURING THE TIME
23 PERIOD THAT WE WERE IN FEDERAL COURT; RIGHT?

24 A YES. IT LOOKS LIKE, YES.

25 MR. LEVEE: YOUR HONOR, I'D MOVE THE
26 ADMISSION OF JOINT TRIAL EXHIBIT 37.

27 THE COURT: ANY OBJECTION?

28 MR. BROWN: NO, YOUR HONOR.

1 THE COURT: EXHIBIT 37 IS RECEIVED INTO
2 EVIDENCE.

3
4 (JOINT EXHIBIT NO. 37 WAS RECEIVED IN EVIDENCE.)
5

6 Q BY MR. LEVEE: OKAY. SO I'M GOING TO USE
7 THESE DOCUMENTS TO ASK YOU A FEW QUESTIONS, AND I
8 WANT TO TALK ABOUT THE LAWSUIT, AND I WANT TO TALK
9 ABOUT THE CLAIMS THAT YOU ASSERT IN THE IRP. THAT'S
10 THE PREDICATE.

11 FIRST, LET ME ASK YOU SOMETHING. THAT'S AN
12 ENTITY CALLED THE AUC. WHAT'S THE AUC?

13 A AFRICAN UNION COMMISSION.

14 Q OKAY. AUC.

15 AND THE AFRICAN UNION COMMISSION, IT'S A --
16 LET'S NOT BE CONTROVERSIAL ABOUT IT -- IT'S AN
17 ORGANIZATION THAT EXISTS WITH RESPECT TO THE
18 CONTINENT OF AFRICA; RIGHT?

19 A YES.

20 Q OKAY.

21 AND IT SUPPORTED THE APPLICATION OF ZACR,
22 YOUR COMPETITOR; RIGHT?

23 A YES.

24 Q OKAY. AND, IN YOUR VIEW, THE DECISION BY
25 THE AUC TO SUPPORT ZACR, THAT WAS INAPPROPRIATE?

26 A CORRECT.

27 Q OKAY. AND YOU MADE A NUMBER OF ALLEGATIONS
28 IN THE IRP AND ALSO IN THE FIRST AMENDED COMPLAINT

1 REGARDING THE CONDUCT OF THE AUC; RIGHT?

2 A RIGHT.

3 Q OKAY. AND YOU ALLEGE IN THE FIRST AMENDED
4 COMPLAINT THAT THE AUC TRIED TO RESERVE .AFRICA FOR
5 ITSELF. SO LET'S LOOK AT THAT. I'M LOOKING AT JOINT
6 EXHIBIT 37 AND, IN PARTICULAR, PARAGRAPH 26.

7 A PAGE 26?

8 Q NO. PARAGRAPH 26. MY APOLOGIES. PAGE 6.
9 LET ME KNOW WHEN YOU'RE THERE.

10 A I'M THERE.

11 Q OKAY. PARAGRAPH 26 SAYS THAT THE AUC ITSELF
12 ATTEMPTED IN 2011, IN DAKAR, SENEGAL, TO OBTAIN THE
13 RIGHTS TO .AFRICA REQUESTING FROM ICANN TO INCLUDE
14 .AFRICA FROM THE LIST OF TOP-LEVEL RESERVED NAMES.
15 LET'S STOP THERE.

16 RESERVED NAMES, THAT WILL BE A NAME THAT
17 ICANN ACTUALLY RESERVES AND DOESN'T ALLOW PEOPLE TO
18 APPLY FOR; RIGHT?

19 A CORRECT.

20 Q AND THE ALLEGATION YOU'RE MAKING HERE IN THE
21 COMPLAINT IS THAT THE AUC TRIED TO RESERVE THE NAME
22 .AFRICA FOR ITSELF; RIGHT?

23 A CORRECT.

24 Q AND THE -- THEN IN PARAGRAPH 27, YOU SAY
25 (AS READ):

26 "WHEN ICANN DENIED THE AUC'S
27 REQUEST TO RESERVE .AFRICA, THE AUC
28 AND ZACR CONSPIRED TO IMPROPERLY

1 OBTAIN THE RIGHTS TO .AFRICA
2 THROUGH A THIRD-PARTY COMPANY,
3 ZACR, FOR THEIR OWN BENEFIT, IN
4 VIOLATION OF THE NEW GTLD PROGRAM
5 GUIDELINES."

6 SO THAT'S AN ALLEGATION IN THE FIRST AMENDED
7 COMPLAINT; RIGHT?

8 A CORRECT.

9 Q OKAY. AND THAT'S ALSO A MATTER THAT WE
10 DISCUSSED EXTENSIVELY AT THE IRP; RIGHT?

11 A YES.

12 Q OKAY. AND THERE WAS TESTIMONY BY YOU IN THE
13 IRP ABOUT THE AUC'S EFFORT TO RESERVE .AFRICA FOR
14 ITSELF; RIGHT?

15 A SAY THAT AGAIN. I'M SORRY.

16 Q THERE WAS TESTIMONY BY YOU IN THE IRP --

17 A UH-HUH.

18 Q -- THAT IT WAS INAPPROPRIATE FOR THE AUC TO
19 TRY TO RESERVE THE NAME .AFRICA?

20 A WHEN YOU SAY IRP, ARE YOU TALKING ABOUT THE
21 LAST DAY OF THE HEARING?

22 Q THE HEARING?

23 A I DON'T REMEMBER, BUT IT WAS PART OF IT.

24 Q BUT YOU DO REMEMBER THAT THE ISSUE OF THE
25 AUC'S REQUEST TO RESERVE .AFRICA WAS AN ISSUE IN THE
26 IRP?

27 A YES.

28 Q OKAY. AND YOU MADE THE EXACT ALLEGATION IN

1 THE IRP THAT THE AUC SHOULD NOT HAVE TRIED TO REQUEST
2 .AFRICA AND THAT ICANN SHOULD NOT HAVE -- YOU FELT
3 ICANN WAS FACILITATING THE AUC AND ZACR CONSPIRING TO
4 GET THE NAME; RIGHT?

5 A YOU CAN SAY THAT.

6 Q OKAY. SO STAYING WITH THE COMPLAINT, LET'S
7 TAKE A LOOK AT PARAGRAPH 74. IT'S ON PAGE 17. SO
8 JOINT TRIAL EXHIBIT 37, PAGE 17.

9 ARE YOU THERE?

10 A YES.

11 Q OKAY.

12 NOW, YOU SEE WHERE IT SAYS, "SECOND CAUSE OF
13 ACTION, INTENTIONAL MISREPRESENTATION"?

14 A UH-HUH.

15 Q YES?

16 A YES. YES.

17 Q YOU UNDERSTAND THAT THIS IS ONE OF THE
18 CAUSES OF ACTION THAT IS STILL ALIVE AFTER
19 JUDGE HALM'S SUMMARY JUDGMENT RULING; RIGHT?

20 A IF I DON'T HAVE TO READ THROUGH IT.

21 Q YOU'RE WELCOME TO READ THROUGH IT IF YOU'D
22 LIKE.

23 YOU UNDERSTAND JUDGE HALM DISMISSED SOME OF
24 YOUR CAUSES OF ACTION IN YOUR FIRST AMENDED
25 COMPLAINT?

26 A YEAH.

27 Q AND HE LEFT IN THE CAUSES OF ACTION OF
28 FRAUD?

1 A YES.

2 Q DO YOU UNDERSTAND INTENTIONAL
3 MISREPRESENTATION IS STILL ONE OF THE CAUSES OF
4 ACTION STILL IN THE COMPLAINT?

5 A COULD BE, YES.

6 Q LET'S LOOK AT 74A. IT'S ACTUALLY 74.
7 (AS READ):

8 "ICANN MADE THE FOLLOWING
9 INTENTIONAL MISREPRESENTATIONS ON
10 ITS WEBSITE AND IN THE GUIDEBOOK TO
11 PLAINTIFF OR PLAINTIFF'S AGENTS OR
12 REPRESENTATIVE AND ON WHICH
13 PLAINTIFF RELIED TO ITS DETRIMENT."

14 AND THEN YOU LIST IN A THAT (AS READ):

15 "ICANN REPRESENTED THAT
16 PLAINTIFF'S APPLICATION FOR .AFRICA
17 WOULD BE REVIEWED IN ACCORDANCE
18 WITH ICANN'S ARTICLES OF
19 INCORPORATION IN THE GUIDEBOOK, AND
20 ICANN WILL BE FAIR AND
21 TRANSPARENT."

22 THAT'S SUBPARAGRAPH A; RIGHT?

23 A YES.

24 Q AND THEN IN B, THAT (AS READ):

25 "ICANN REPRESENTED THAT IT HAD
26 IN PLACE AN ACCOUNTABILITY
27 MECHANISM INCLUDING AN INDEPENDENT
28 REVIEW PANEL TO ENSURE THE

1 PLAINTIFF WOULD BE PROVIDED PROPER
2 DUE PROCESS"; RIGHT?
3 A RIGHT.
4 Q AND, C, THAT (AS READ):
5 "ICANN REPRESENTED THAT IT
6 WOULD PARTICIPATE IN GOOD FAITH
7 WITH ANY APPLICANT WHO DESIRED TO
8 INITIATE AN IRP PROCESS IN ORDER TO
9 ENSURE APPLICANTS RECEIVED PROPER
10 DUE PROCESS"; RIGHT?

11 A YES.

12 Q AND THEN D (AS READ):
13 "ICANN REPRESENTED THAT ALL
14 APPLICANTS FOR THE .AFRICA GTLD
15 WOULD BE SUBJECT TO THE SAME
16 AGREEMENT, RULES AND PROCEDURES";
17 RIGHT?

18 A YES.

19 Q SO THESE ARE THE ALLEGATIONS THAT DCA MAKES
20 IN SUPPORT OF ITS INTENTIONAL MISREPRESENTATION CAUSE
21 OF ACTION; RIGHT?

22 A LOOKS LIKE.

23 Q AND ALL OF THOSE ISSUES ARE MATTERS THAT WE
24 DISCUSSED AT SOME LENGTH DURING THE IRP; RIGHT?

25 MR. BROWN: OBJECTION. COMPOUND.

26 THE WITNESS: I DON'T KNOW.

27 THE COURT: OVERRULED.

28 Q BY MR. LEVEE: YOU DON'T REMEMBER?

1 A NO.

2 Q SO I'M GOING TO READ TO YOU YOUR TRIAL
3 TRANSCRIPT. YOUR HONOR, IF YOU WANT, WE CAN TURN TO
4 IT. I'M GOING TO TURN TO YOUR TRIAL TRANSCRIPT.

5 THE COURT: WHERE?

6 MR. LEVEE: IT'S IN THAT SAME FIRST BOOK,
7 YOUR HONOR, NOT A DIFFERENT BOOK. WELL, IT'S THE
8 ONE. IT'S EXHIBIT -- HOLD ON. THE TRIAL TRANSCRIPT
9 IS NOT AN EXHIBIT. IT IS --

10 MS. COLON: ARE WE LODGING IT NOW OR --

11 MR. LEVEE: I WASN'T INTENDING TO LODGE IT.
12 ACTUALLY, I JUST WANTED TO READ FROM IT.

13 THE COURT: WHEN YOU REFER TO "TRIAL
14 TRANSCRIPT," YOU'RE REFERRING TO THE TRIAL IN THE
15 PHASE I OF THE BIFURCATED TRIAL THAT WAS HELD BEFORE
16 JUDGE HALM --

17 MR. LEVEE: I AM.

18 THE COURT: -- IN 2018?

19 MR. LEVEE: I AM.

20 THE COURT: OKAY. SO IT'S AT THE BEGINNING
21 OF YOUR BINDER.

22 MR. LEVEE: MAY I APPROACH, YOUR HONOR?

23 THE COURT: YOU MAY. I JUST WANT YOU TO
24 IDENTIFY SPECIFICALLY WHAT DAY AND WHAT THE
25 TRANSCRIPT IS.

26 MR. LEVEE: I WILL DO THAT, YOUR HONOR.

27 OKAY. SO, YOUR HONOR, I'M LOOKING AT THE
28 FEBRUARY 28, 2018, TRIAL TRANSCRIPT. I WASN'T

1 INTENDING TO LODGE IT, BUT I'M HAPPY FOR EVERYBODY TO
2 LOOK AT IT.

3 THE COURT: YOU'VE JUST LODGED THAT
4 TRANSCRIPT WITH THE COURT?

5 MR. LEVEE: YES.

6 THE COURT: OKAY. THANK YOU.

7 MS. COLON OR MR. BROWN, DO YOU HAVE A COPY
8 OF THAT?

9 MS. COLON: WE'RE GETTING IT RIGHT NOW.

10 MR. BROWN: WE'RE PULLING IT. IT'S IN A BOX
11 BACK THERE SO GIVE US A FEW SECONDS.

12 THE COURT: OKAY. LET ME KNOW WHEN YOU'RE
13 READY TO PROCEED.

14 MR. BROWN: FIRST DAY?

15 MR. LEVEE: FIRST DAY.

16 MR. BROWN: I GOT IT.

17 MR. LEVEE: OKAY.

18 THE COURT: SO IS THERE AN EXCERPT OF THE
19 REPORTER'S TRANSCRIPT OF PROCEEDINGS FOR FEBRUARY 28,
20 2018, IN THIS CASE THAT YOU WISH TO READ INTO THE
21 RECORD OR QUESTION THE WITNESS ABOUT?

22 MR. LEVEE: I'LL READ IT IN THE RECORD, YOUR
23 HONOR.

24 THE COURT: OKAY. WHAT ARE THE PAGES?

25 MR. LEVEE: I'M ON PAGE 139 AND A PAGE OR
26 TWO AFTER THAT.

27 THE COURT: SO PAGE 139 STARTING AT WHAT
28 PAGE -- WHAT LINE?

1 MR. LEVEE: LINE 18.

2 THE COURT: THROUGH WHAT PAGE AND LINE
3 NUMBER?

4 MR. LEVEE: 141, LINE 24.

5 THE COURT: OKAY. I'LL GIVE PLAINTIFF'S
6 COUNSEL AN OPPORTUNITY TO REVIEW THAT AND --

7 MR. BROWN: OKAY. SO LINE 18 TO --

8 MS. COLON: 141, LINE 24.

9 MR. BROWN: OKAY. GO AHEAD.

10 MR. LEVEE: OKAY.

11 Q BY MR. LEVEE: MS. BEKELE, DO YOU WANT TO
12 FOLLOW ALONG WITH US HERE? DO YOU SEE WHERE WE ARE?
13 I'M ON PAGE 139. ARE YOU THERE?

14 A YES.

15 Q SO ON LINE 18, I READ PARAGRAPH 74 OF THE
16 COMPLAINT.

17 YOU SEE WHERE I START OUT DOING THAT?

18 A OKAY. IT SAYS "WITH THE ONE"?

19 Q IT STARTS OUT BY SAYING, "ICANN MADE THE
20 FOLLOWING INTENTIONAL MISREPRESENTATIONS."

21 DO YOU SEE THAT?

22 A YES.

23 Q AND NOW I'M ON PAGE 140, AND I ASKED YOU IF
24 I READ IT CORRECTLY, AND YOU SAID CORRECT.

25 AND SO -- AND THEN THE QUESTION ON LINE 17
26 ON PAGE 140 --

27 THE COURT: SO LET'S JUST BE CLEAR WHAT PAGE
28 AND LINE NUMBER YOU'RE GOING TO READ FROM NOW.

1 MR. LEVEE: MY APOLOGIES. I'M READING FROM
2 PAGE 140, LINE 17.

3 THE WITNESS: THE NEXT PAGE?

4 MR. LEVEE: YES.

5 THE COURT: THROUGH PAGE 141, LINE 24?

6 MR. LEVEE: YES. I GUESS I'LL READ THE
7 WHOLE THING, YOUR HONOR.

8 THE COURT: OKAY. THANK YOU.

9 ANY OBJECTION?

10 MR. BROWN: NO, EXCEPT TO THE EXTENT THAT
11 IT'S A LITTLE BIT CONFUSING IN TERMS OF WHEN IT SAYS,
12 "AND SO THE THRUST OF THIS PARAGRAPH IS"; I DON'T
13 THINK IN THE TRIAL TRANSCRIPT, HE READ ALL OF 74. IT
14 LOOKS LIKE JUST 74A. I JUST WANT TO BE CLEAR THAT
15 THE REFERENCE -- THE PARAGRAPH IS ONLY A PARTIAL
16 REFERENCE TO PARAGRAPH 74.

17 THE COURT: OKAY. MR. LEVEE, WHY DON'T YOU
18 READ THE ENTIRE EXCERPT STARTING AT PAGE 139,
19 LINE 18, THROUGH 141, LINE 24, THEN?

20 MR. LEVEE: HAPPY TO DO IT THEN.

21 MR. BROWN: YOUR HONOR, IF WE CAN GO BACK TO
22 PARAGRAPH 12, I THINK THAT WOULD CLARIFY HE'S READING
23 JUST 74A.

24 THE COURT: LINE 12?

25 MR. BROWN: LINE 12.

26 THE COURT: YOU'RE REQUESTING THAT THE
27 EXCERPT BE READ STARTING AT PAGE 139, LINE 12 --

28 MR. BROWN: YES, YOUR HONOR.

1 THE COURT: -- THROUGH 141, LINE 24?

2 ANY OBJECTION TO THAT, MR. BROWN?

3 MR. BROWN: NO. I THINK WITH THAT
4 CLARIFICATION, THAT'S FINE.

5 THE COURT: MR. LEVEE, ANY OBJECTION?

6 MR. LEVEE: THAT'S FINE BY ME, YOUR HONOR.

7 THE COURT: OKAY. SO, MR. LEVEE, YOU'RE
8 GOING TO READ FROM THE TRIAL TRANSCRIPT IN THIS CASE,
9 PREVIOUS TRIAL ON PHASE I OF THE BIFURCATED TRIAL,
10 THE REPORTER'S TRANSCRIPT OF PROCEEDINGS OF
11 FEBRUARY 28, 2018, STARTING AT PAGE 139, LINE 18,
12 THROUGH PAGE 141, LINE 24.

13 MR. BROWN: ACTUALLY, I'M SORRY. THE
14 INITIAL CITE WAS LINE 12. THAT'S WHY I ASKED FOR
15 THOSE ADDITIONAL LINES.

16 THE COURT: I'M SORRY. STARTING PAGE 139,
17 LINE 12, THROUGH 141, LINE 24. OKAY. YOU MAY
18 PROCEED, MR. LEVEE.

19 MR. LEVEE: THANK YOU, YOUR HONOR.

20 (AS READ):

21 QUESTION: "LAST COUPLE OF
22 PARAGRAPHS AND WE ARE DONE. LET'S
23 TAKE A LOOK AT PARAGRAPH 74 OF THE
24 COMPLAINT. IN PARTICULAR, 74A.
25 THIS IS IN YOUR SECOND CAUSE OF
26 ACTION FOR INTENTIONAL
27 MISREPRESENTATION. WE ARE STILL ON
28 EXHIBIT 49, PAGE 17.

1 ARE YOU THERE?"
2 ANSWER: "YES."
3 QUESTION: "OKAY. PAGE 74, IT
4 STARTS OUT BY SAYING,
5 'ICANN MADE THE FOLLOWING
6 INTENTIONAL MISREPRESENTATIONS ON
7 ITS WEBSITE OR IN THE GUIDEBOOKS:
8 "A'" -- WHICH IS IN PARENS -- "' IS
9 ICANN REPRESENTED TO PLAINTIFF THAT
10 PLAINTIFF'S APPLICATION FOR .AFRICA
11 WOULD BE REVIEWED IN ACCORDANCE
12 WITH ICANN'S ARTICLES OF
13 INCORPORATION AND THE NEW GTLD
14 APPLICANT GUIDEBOOK, ALL OF WHICH
15 PROMISED A FAIR AND TRANSPARENT BID
16 PROCESS, FAIR COMPETITION, AND
17 NON-INTERFERENCE WITH AN
18 APPLICANT'S APPLICATION BY A
19 COMPETITOR OR A THIRD PARTY.'"'
20 RIGHT?"
21 ANSWER: "YES."
22 QUESTION: "I READ THAT CORRECTLY;
23 RIGHT?"
24 ANSWER: "CORRECT."
25 QUESTION: "AND SO THE THRUST OF
26 THIS PARAGRAPH IS THAT DCA" -- I'M
27 SORRY -- "THAT ICANN DEFRAUDED DCA
28 BECAUSE ICANN DID NOT ACT IN

1 ACCORDANCE WITH ITS ARTICLES OF
2 INCORPORATION AND WITH THE
3 GUIDEBOOK; RIGHT?"
4 ANSWER: "CORRECT."
5 QUESTION: "THAT'S EXACTLY THE
6 ISSUE THAT YOU RAISED IN THE IRP;
7 RIGHT? THAT ICANN DID NOT FOLLOW
8 THE ARTICLES OF THE GUIDEBOOK AND
9 ALSO THE BYLAWS?"
10 ANSWER: "YEAH."
11 QUESTION: "YES, INDEED. IN
12 PARAGRAPH 75A, SO YOU NEED TO TURN
13 THE PAGE, YOU SAY, 'ICANN HAD NO
14 INTENTION OF FOLLOWING ITS BYLAWS,
15 ARTICLES OF INCORPORATION OR THE
16 RULES OUTLINED IN THE GTLD
17 APPLICANT GUIDEBOOK.'
18 DO YOU SEE THAT?"
19 ANSWER: "YES."
20 QUESTION: "AND SO -- AND THEN IN
21 PARAGRAPH B, THAT 'ICANN HAD NO
22 INTENTION OF EVER PARTICIPATING IN
23 THE IRP PROCESS IN GOOD FAITH AND
24 AT ALL TIMES BELIEVED IT WOULD DO
25 WHATEVER IT WANTED'; RIGHT?"
26 ANSWER: "CORRECT."
27 QUESTION: "AND THESE ARE ALL
28 ISSUES YOU RAISED DURING THE IRP;

1 RIGHT?"

2 ANSWER: "YEAH."

3 MR. LEVEE: THAT'S ALL I WANTED TO READ,
4 YOUR HONOR.

5 THE WITNESS: ARE WE DONE WITH THIS PAGE?

6 MR. LEVEE: OKAY. LET ME JUST FIND MY
7 PLACE.

8 Q BY MR. LEVEE: WE WERE DISCUSSING EXHIBIT
9 37, WHICH IS THE COMPLAINT. LET'S TAKE A LOOK AT
10 PARAGRAPH 84 OF THE COMPLAINT.

11 THE COURT: THIS IS EXHIBIT 37.

12 MR. LEVEE: YES, IT IS. THANK YOU, YOUR
13 HONOR.

14 Q BY MR. LEVEE: LET ME KNOW WHEN YOU'RE
15 THERE.

16 A PAGE?

17 Q 21.

18 A ALL RIGHT.

19 Q OKAY. ON PAGE 21 IS THE FOURTH CAUSE OF
20 ACTION.

21 DO YOU SEE THAT?

22 A YES.

23 Q AND THAT'S THE CAUSE OF ACTION FOR FRAUD AND
24 CONSPIRACY TO COMMIT FRAUD; RIGHT?

25 A CORRECT.

26 Q AND YOU UNDERSTAND THAT THAT'S A CAUSE OF
27 ACTION THAT SURVIVED JUDGE HALM'S SUMMARY JUDGMENT
28 RULING, SO IT'S STILL IN THE CASE TODAY; RIGHT?

1 A OKAY.

2 Q OKAY, OR YOU DON'T KNOW?

3 A WELL, I GUESS IT IS.

4 Q OKAY.

5 A IT'S BEEN ONE YEAR, MR. LEVEE, SO --

6 Q OKAY. AND LET'S READ PARAGRAPH 84 (AS
7 READ):

8 "ICANN CONSPIRED WITH THE AUC
9 AND ITS PROXY COMPANY ZACR TO
10 DEFRAUD PLAINTIFF AND
11 DEFENDANTS" -- LET ME START OVER AND READ IT
12 RIGHT.

13 (AS READ):

14 "ICANN CONSPIRED WITH THE AUC
15 AND ITS PROXY COMPETITOR, ZACR, TO
16 DEFRAUD PLAINTIFF, AND DEFENDANTS
17 DID IN FACT COMMIT FRAUD BY
18 ASSISTING EACH OTHER IN IMPROPERLY
19 DENYING PLAINTIFF'S ALLEGATION."
20 DID I READ THAT CORRECTLY?

21 A YES.

22 Q AND AGAIN YOU MADE THE SAME ALLEGATIONS IN
23 THE IRP; RIGHT?

24 A WAS SUBMITTED AS PART OF MY BRIEF, YES.

25 Q YES. NOW LET'S TAKE A LOOK AT PARAGRAPH 85.
26 IT READS (AS READ):

27 "PLAINTIFF HAD COMPLAINED TO
28 ICANN THAT ITS COMPETITOR ZACR HAD

1 SUBMITTED A FRAUDULENT APPLICATION
2 BUT THE -- ICANN DID NOT TAKE ANY
3 ACTION AGAINST ZACR. PLAINTIFF
4 BELIEVES THAT BY NOT TAKING ANY
5 ACTION TO INVESTIGATE, THE OBVIOUS
6 DEFICIENCIES IN ZACR'S APPLICATION
7 AS DESCRIBED HEREIN, DEFENDANTS,
8 WERE COMPLICIT IN THIS ACT OF
9 ACCEPTING AND APPROVING A
10 FRAUDULENT APPLICATION."

11 DID I READ THAT CORRECTLY?

12 A CORRECT.

13 Q **AND YOU MADE THE SAME ALLEGATIONS IN THE**
14 **IRP; RIGHT?**

15 A YEAH.

16 Q **PARDON?**

17 A YES.

18 Q **OKAY. NOW LET'S LOOK AT PAGE 87 -- I'M**
19 **SORRY. PARAGRAPHS 87, 88 AND 89. I'M NOT GOING TO**
20 **READ THEM. I'M GOING TO SUMMARIZE. IT SAYS THAT THE**
21 **PLAINTIFF BELIEVES THAT ICANN ALLOWED AUC AND ZACR TO**
22 **VIOLATE THE RULES AND PROCEDURES FOR ACQUIRING THE**
23 **RIGHTS TO A NEW GTLD.**

24 **AND PARAGRAPH 88 SAYS ICANN IMPROPERLY**
25 **ALLOWED ZACR'S APPLICATION BECAUSE THERE'S NO**
26 **PROVISION IN THE GUIDEBOOK THAT ALLOWS A THIRD PARTY**
27 **ORGANIZATION LIKE THE AUC TO HAVE ALL RIGHTS TO A TLD**
28 **AND OTHER RIGHTS OVER REGISTERED DATABASES. LET ME**

1 STOP THERE.

2 YOU UNDERSTOOD THAT THERE WAS AN AGREEMENT
3 BETWEEN THE AUC AND ZACR, AND THAT AGREEMENT HAD SOME
4 ISSUES REGARDING INTELLECTUAL PROPERTY RIGHTS?

5 A CORRECT.

6 Q AND YOU ALLEGE IN THE PARAGRAPH I JUST READ,
7 88, THAT THOSE PROPERTY RIGHTS ARE FRAUDULENT; RIGHT?

8 A YES.

9 Q OKAY. AND THEN IN PARAGRAPH 89, IT SAYS
10 (AS READ):

11 "PLAINTIFF IS INFORMED AND
12 BELIEVES THAT ICANN ALLOWED THE AUC
13 TO UNILATERALLY APPOINT ITS PROXY
14 APPLICANT AS THE CHOSEN REGISTRY
15 OPERATOR FOR .AFRICA IN
16 CONTRAVENTION OF THE NEW GTLD
17 GUIDELINES AND ICANN'S AGREEMENT
18 WITH PLAINTIFF."

19 AND, AGAIN, YOU MADE THE SAME ALLEGATIONS IN
20 THE IRP; RIGHT?

21 A YES.

22 Q LET'S TAKE A LOOK THEN AT PARAGRAPH 43,
23 WHICH IS ON PAGE 9.

24 A PAGE 9, EXHIBIT 37?

25 Q YES. STILL ON EXHIBIT 37. SO WE'RE STILL
26 ON THE FIRST AMENDED COMPLAINT, AND PARAGRAPH 43 YOU
27 ALLEGE (AS READ):

28 "THE AUC BECAME A MEMBER OF

1 THE GAC IN JUNE 2012, APPARENTLY ON
2 THE ADVICE OF ICANN. HOWEVER, ITS
3 STATUS AS A VOTING MEMBER IS
4 IMPROPER BECAUSE UNLIKE THE
5 EUROPEAN UNION, IT HAS NO
6 REGULATORY OVER ITS MEMBER STATES."

7 LET ME JUST STOP. WHAT YOU'RE SAYING IS YOU
8 DON'T THINK IT WAS APPROPRIATE FOR THE AUC TO BECOME
9 A MEMBER OF THE GAC; RIGHT? THAT'S YOUR ALLEGATION?

10 A NO. UNLESS YOU WANT ME TO EXPLAIN.

11 Q SO, IS IT YOUR ALLEGATION THAT IT SHOULDN'T
12 BE A VOTING MEMBER OF THE GAC?

13 A IT'S -- MAY I READ IT?

14 Q PLEASE DO.

15 A HOWEVER, IT'S STATUS AS VOTING MEMBER IS
16 IMPROPER. YES, ACCORDING TO THE VOTING MEMBER
17 PROCEDURE OF THE GAC, YES.

18 Q OKAY. AND YOU MADE THE EXACT SAME
19 ALLEGATIONS IN THE IRP; RIGHT?

20 A YES.

21 Q AND IN PARAGRAPH 44 OF THE FIRST AMENDED
22 COMPLAINT -- I'M NOW ON PAGE 10 (AS READ):

23 "HAVING ENCOURAGED THE AUC'S
24 MEMBERSHIP, ICANN THEN ALLOWED THE
25 GAC TO BE USED AS A VEHICLE FOR THE
26 ISSUANCE OF ADVICE AGAINST DCA'S
27 APPLICATION BY DCA'S ONLY
28 COMPETITOR FOR .AFRICA, THE AUC

1 THROUGH ZACR, EFFECTIVELY ENSURING
2 THAT THE RIGHTS TO .AFRICA WOULD BE
3 DELEGATED TO THE AUC'S CHOSEN
4 PROXY, ZACR."
5 AND THEN IT GOES ON TO SAY THAT (AS READ):

6 "ICANN ALLOWED THE GAC TO
7 ISSUE CONSENSUS ADVICE THAT DCA'S
8 APPLICATION SHOULD NOT PROCEED DUE
9 TO ISSUES WITH THE REGIONAL
10 ENDORSEMENTS."

11 THAT'S THE ALLEGATION YOU MAKE IN THE
12 COMPLAINT; RIGHT?

13 A RIGHT.

14 Q AND INDEED THAT WAS A FOCAL POINT OF THE
15 DISCUSSION IN THE IRP; RIGHT?

16 A YES.

17 Q LOOKING AT PARAGRAPH 30 -- SORRY TO GO
18 BACKWARDS -- PARAGRAPH 30 ON PAGE 7. IT SAYS
19 (AS READ):

20 "IN EXCHANGE FOR AUC'S
21 ENDORSEMENT, ZACR SIGNED A CONTRACT
22 WITH AUC ALLOWING AUC TO 'RETAIN
23 ALL RIGHTS RELATING TO DOTAFRICA
24 GTLD, IN CONTRAVENTION OF THE GTLD
25 GUIDEBOOK. THE AUC ALSO HAD OTHER
26 MOTIVES FOR FAVORING ZACR. THE
27 MEMBERS OF THE AUC COMMITTEE FORMED
28 TO CHOOSE WHO TO ENDORSE FOR THE

1 .AFRICA GTLD WERE INDIVIDUALS WHO
2 WERE ALSO MEMBERS OF VARIOUS
3 ORGANIZATIONS AFFILIATED WITH
4 ZACR."

5 DO YOU SEE THAT?

6 A YES.

7 Q AND THAT'S ANOTHER ALLEGATION THAT YOU MADE
8 TO THE IRP PANEL; CORRECT?

9 A YES.

10 Q OKAY. LAST, MAYBE, TWO. IN PARAGRAPH 31 OF
11 YOUR COMPLAINT, SO NOW I'M ON PAGE -- I'M SORRY.
12 YES. PARAGRAPH 31 ON PAGE 7.

13 THE COURT: THIS IS STILL EXHIBIT 37;
14 CORRECT?

15 MR. LEVEE: YES, IT IS, YOUR HONOR. THANK
16 YOU FOR REMINDING ME.

17 Q BY MR. LEVEE: PARAGRAPH 31 SAYS (AS READ):

18 "ZACR REPRESENTED THAT IT WAS

19 APPLYING FOR THE .AFRICA GTLD ON

20 BEHALF OF THE AFRICAN

21 'COMMUNITY'" -- AND THE WORD "COMMUNITY" IS

22 IN QUOTES -- "HOWEVER, IT FAILED TO SUBMIT

23 THE REQUIRED TYPE OF APPLICATION

24 FOR ORGANIZATIONS APPLYING ON

25 BEHALF OF THE COMMUNITY, WHICH IS A

26 TERM OF DESIGNATION AND A

27 DIFFERENTIATION FOR GTLDS;

28 NEVERTHELESS, ICANN PROCESSED

1 ZACR'S STANDARD APPLICATION."

2 A STANDARD APPLICATION DOES NOT REQUIRE AN
3 APPLICANT TO SHOW THAT IT REPRESENTS A COMMUNITY.
4 I'LL SAVE THE COURT ALL THE -- I WON'T ASK YOU --
5 LET'S PUT IT THAT WAY -- TO EXPLAIN THE DIFFERENCES
6 BETWEEN COMMUNITY APPLICATION AND STANDARD
7 APPLICATION, BUT THEY ARE DIFFERENT; RIGHT?

8 A CORRECT.

9 Q AND YOU WERE -- YOU'RE ALLEGING IN THE
10 COMPLAINT THAT ZACR SHOULD HAVE SUBMITTED AN
11 APPLICATION FOR A SO-CALLED COMMUNITY TLD; RIGHT?

12 A CORRECT.

13 Q AND INSTEAD ZACR SUBMITTED AN APPLICATION
14 FOR A STANDARD GTLD, NOT A COMMUNITY GTLD; RIGHT?

15 A TRUE.

16 Q AND THIS IS A TOPIC WE DISCUSSED AT SOME
17 LENGTH DURING THE IRP; RIGHT?

18 A YES.

19 Q NOW, AFTER THE IRP PANEL ISSUED THEIR FINAL
20 DECLARATION, THE DCA APPLICATION WAS SENT BACK TO
21 PROCESSING GEOGRAPHICAL NAMES REVIEW PART OF THE
22 PROCESS; RIGHT?

23 A CORRECT.

24 Q AND ONCE THAT HAPPENED, DCA RECEIVED
25 SOMETHING CALLED, "CLARIFYING QUESTIONS RELATED TO
26 THE GEOGRAPHIC NAMES REVIEW"; RIGHT?

27 A YES.

28 Q CLARIFYING QUESTIONS ARE QUESTIONS THAT THE

1 VENDOR, THE ICC, HAD OF DCA RELATING TO ITS EFFORTS
2 TO GET PAST THE REQUIREMENT OF THE SUPPORT OF 60
3 PERCENT OF THE COUNTRIES OF AFRICA; RIGHT?

4 A YES.

5 Q AND DCA ELECTED NOT TO SUBMIT TO ICANN
6 ANYTHING NEW. INSTEAD IT SAID WE HAVE -- WE'VE
7 ALREADY GIVEN YOU LETTERS, AND THOSE LETTERS ARE
8 SUFFICIENT; RIGHT?

9 A YES.

10 Q AND THEN ICANN ISSUED WHAT IT CALLED AN
11 INITIAL EVALUATION REPORT, AND IT NOTIFIED DCA THAT
12 ITS APPLICATION DID NOT PASS THE GEOGRAPHIC NAMES
13 REVIEW; RIGHT?

14 A YES.

15 Q AND SO ICANN SAID, WELL, WE CAN ACTUALLY
16 GIVE YOU A LITTLE BIT MORE TIME. WE'RE GOING TO PUT
17 YOU INTO SOMETHING CALLED, "EXTENDED EVALUATION";
18 RIGHT?

19 A RIGHT.

20 Q AN EXTENDED EVALUATION GAVE YOU SEVERAL MORE
21 MONTHS TO TRY TO PASS THE GEOGRAPHIC NAMES
22 REQUIREMENT; RIGHT?

23 A YES.

24 Q AND ICANN THEN SENT DCA A SECOND SET OF
25 CLARIFYING QUESTIONS THAT TOLD DCA THAT THE LETTERS
26 IT HAD SUBMITTED WERE INSUFFICIENT UNDER THE
27 GUIDEBOOK; RIGHT?

28 A RIGHT.

1 Q AND INSTEAD OF SUBMITTING NEW LETTERS OF
2 SUPPORT, DCA SAID, WE'RE NOT GIVING YOU ANYTHING NEW.
3 OUR PREVIOUS LETTERS ARE GOOD ENOUGH, THE LETTERS WE
4 GAVE TO ICANN WITH OUR APPLICATION; RIGHT?

5 A YES.

6 Q OKAY. AND, SO, AT THAT POINT DCA
7 COMMUNICATED TO -- I'M SORRY. ICANN COMMUNICATED TO
8 DCA THAT ITS APPLICATION WOULD NOT PROCEED BECAUSE
9 DCA HAD NOT PASSED THE GEOGRAPHIC NAMES REVIEW;
10 RIGHT?

11 A RIGHT.

12 Q NOW, YOU UNDERSTAND THAT PARTIES CAN FILE
13 REQUESTS FOR RECONSIDERATION OF THESE KINDS OF
14 DECISIONS; RIGHT?

15 A NO.

16 Q YOU DO NOT UNDERSTAND THAT?

17 A NO.

18 MR. LEVEE: I GUESS I'M GOING TO HAVE TO
19 READ FROM THE LAST TRIAL TRANSCRIPT AGAIN, YOUR
20 HONOR.

21 Q BY MR. LEVEE: LET ME ASK IT THIS WAY: DO
22 YOU UNDERSTAND THAT A PARTY CAN FILE A REQUEST FOR
23 RECONSIDERATION OF BOARD AND STAFF ACTIONS?

24 A YES.

25 Q OKAY. AND SO IN 2013 WHEN ICANN'S BOARD
26 ACCEPTED THE GAC'S ADVICE THAT DCA'S APPLICATION
27 SHOULD NOT PROCEED, THE FIRST THING DCA DID WAS FILE
28 A REQUEST FOR RECONSIDERATION; RIGHT?

1 A RIGHT.

2 Q OKAY. BUT AFTER YOU WERE TOLD IN EARLY 2016
3 THAT YOUR LETTERS DID NOT PASS -- I'M SORRY, LATE
4 2015, THAT YOUR LETTERS DID NOT PASS THE GEOGRAPHIC
5 NAMES REVIEW, YOU DID NOT FILE A REQUEST FOR
6 RECONSIDERATION AT THAT TIME; CORRECT?

7 A WE DIDN'T SEE THE POINT. YEAH.

8 Q BUT THE ANSWER TO MY QUESTION IS YOU DID NOT
9 FILE OR SUBMIT A REQUEST FOR RECONSIDERATION;
10 CORRECT?

11 A NO. I DID NOT EVEN THINK ABOUT IT.

12 Q AND DO YOU KNOW WHETHER, UNDER THE TERMS OF
13 THE GUIDEBOOK AND THE BYLAWS, IF DCA HAD SUBMITTED A
14 REQUEST FOR RECONSIDERATION AND ITS REQUEST HAD BEEN
15 DENIED, WHETHER DCA WOULD HAVE BEEN ABLE TO PURSUE A
16 SECOND IRP?

17 A NO.

18 Q IN -- WHETHER OR NOT DCA COULD SUBMIT A
19 SECOND IRP, DCA DID NOT DO SO?

20 A I DID NOT KNOW I COULD SUBMIT A SECOND IRP.

21 Q OKAY. AND INSTEAD ON JANUARY 20 OF 2016,
22 DCA FILED THIS LAWSUIT; RIGHT?

23 A RIGHT.

24 MR. LEVEE: YOUR HONOR, I ACTUALLY AM DONE
25 WITH MY QUESTIONS; HOWEVER, I HAVE A NUMBER OF
26 EXHIBITS THAT I WOULD LIKE TO MOVE INTO EVIDENCE.
27 THESE ARE ALL ON THE JOINT EXHIBIT LIST, BUT -- AND I
28 CAN TAKE THEM SEQUENTIALLY IF THAT'S --

1 THE COURT: WHY DON'T YOU DO THAT. IF YOU'D
2 JUST STATE WHAT THE EXHIBITS ARE AND IF YOU CAN STATE
3 THEM IN SEQUENTIAL ORDER.

4 MR. LEVEE: OKAY. SO EXHIBIT 4 IS ICANN'S
5 BYLAWS. THESE WERE THE BYLAWS DATED APRIL OF 2013,
6 SO THEY WERE THE BYLAWS APPLICABLE TO THE CLAIMS IN
7 THE CASE, NOT ANY SUBSEQUENT VERSION.

8 THE COURT: HOW MANY EXHIBITS DO YOU INTEND
9 TO MOVE INTO EVIDENCE AT THIS TIME.

10 MR. LEVEE: LOOKS LIKE I HAVE 15, YOUR
11 HONOR.

12 THE COURT: OKAY. WHY DON'T YOU JUST STATE
13 WHAT THEY ARE AND -- BY EXHIBIT NUMBER AND JUST A
14 BRIEF DESCRIPTION OF WHAT THE DOCUMENT IS, AND THEN
15 I'LL ASK PLAINTIFF'S COUNSEL IF THERE ARE ANY
16 OBJECTIONS.

17 MR. LEVEE: THANK YOU, YOUR HONOR.

18 IN ADDITION TO EXHIBIT 4, THE BYLAWS THAT
19 WERE APPLICABLE AT THE TIME, EXHIBIT 6 IS THE AMENDED
20 NOTICE OF THE INDEPENDENT REVIEW PROCESS THAT DCA
21 SUBMITTED TO THE IRP PANEL.

22 EXHIBIT 18 IS THE IRP PANEL'S DECLARATION ON
23 IRP PROCEDURE. SO IT'S AN ORDER THAT THE IRP PANEL
24 ISSUED.

25 EXHIBIT 19 IS THE IRP PANEL'S PROCEDURAL
26 ORDER NUMBER 3. WE LOOKED AT NUMBER 4 BEFORE, AND
27 YOU ADMITTED THAT INTO EVIDENCE. EXHIBIT 19 IS
28 NUMBER 3.

1 EXHIBIT 20 IS A SEPTEMBER 2014 E-MAIL
2 EXCHANGE BETWEEN COUNSEL FOR DCA, COUNSEL FOR ICANN
3 AND THE IRP PANEL. THERE WERE A NUMBER OF E-MAILS.

4 EXHIBIT 21 -- ACTUALLY, I ALREADY GOT THAT
5 INTO EVIDENCE.

6 EXHIBIT 27 IS A LETTER FROM DCA IN RESPONSE
7 TO ICANN'S REQUEST TO -- FOR A REHEARING ON A
8 PARTICULAR ISSUE.

9 EXHIBIT 28 IS THE IRP PANEL'S PROCEDURAL
10 ORDER NUMBER 8.

11 EXHIBIT 29 IS THE CLAIMANT'S FINAL REQUEST
12 FOR RELIEF THAT YOU MAY RECALL MS. BEKELE SAYING
13 THERE WAS SOME QUESTION AS TO WHAT RELIEF DCA WAS
14 ASKING FOR. THIS IS THE FINAL REQUEST, EXHIBIT 29.

15 EXHIBIT 30 IS A LETTER FROM DCA TO THE
16 PANEL, THE IRP PANEL, RESPONDING TO A LETTER THAT
17 ICANN HAD WRITTEN TO THE PANEL.

18 EXHIBIT 32 IS THE -- IS A PANEL DECLARATION;
19 IT'S ACTUALLY THE THIRD PANEL DECLARATION OF IRP
20 PROCEDURE. IT'S A PROCEDURAL RULING IN APRIL OF
21 2015.

22 EXHIBIT 38 IS A LETTER FROM DCA TO THE
23 MEMBERS OF THE PANEL DATED APRIL 17, 2014.

24 EXHIBIT 39 WAS ANOTHER LETTER FROM DCA TO
25 THE PANEL DATED APRIL 20, 2014.

26 MS. BURKE: 39 HAS BEEN ADMITTED.

27 MR. LEVEE: MY APOLOGIES. 39 HAS BEEN
28 ADMITTED.

1 EXHIBIT 40 IS A LETTER, ANOTHER LETTER FROM
2 DCA TO THE PANEL REGARDING DOCUMENT PRODUCTION, AND
3 THAT'S DATED SEPTEMBER 18, 2014.

4 EXHIBIT 41 IS THE JULY 16, 2015, RESOLUTION
5 OF THE ICANN BOARD REGARDING THE IRP PANEL'S FINAL
6 DECLARATION.

7 AND THAT'S IT.

8 THE COURT: OKAY. THANK YOU.

9 ANY OBJECTION TO THE COURT'S RECEIVING ANY
10 OF THOSE EXHIBITS INTO EVIDENCE.

11 MR. BROWN: YOUR HONOR, THE ONLY ONE THAT WE
12 HAVE ANY ISSUE WITH IS 20, THE E-MAILS, WITHOUT
13 HAVING A CHANCE TO GO THROUGH THEM RIGHT NOW. WE
14 DON'T HAVE ANY OBJECTION FOR THE ADMISSION FOR
15 NON-HEARSAY PURPOSES BUT TO THE EXTENT THAT THERE
16 COULD BE A USE OF ANYTHING IN THAT E-MAIL EXCHANGE
17 THAT WOULD CONSTITUTE HEARSAY, WE JUST RESERVE ON
18 THAT ISSUE. BUT OTHERWISE WE HAVE NO OBJECTION TO
19 THE REST OF THE EXHIBITS.

20 THE COURT: OKAY.

21 MR. LEVEE: YOUR HONOR, I DON'T HAVE AN
22 OBJECTION ON THE HEARSAY SIDE, BUT I'LL JUST SIMPLY
23 NOTE THESE ARE EXCHANGES WITH THE PANEL THAT ARE
24 PARTY ADMISSIONS ON BOTH SIDES, SO I DON'T KNOW HOW A
25 HEARSAY OBJECTION COULD APPLY.

26 MR. BROWN: YOUR HONOR, THAT MAY WELL BE
27 RIGHT. I JUST HAVEN'T HAD A CHANCE TO FLIP THROUGH
28 THAT ONE SPECIFICALLY AND SEE WHAT MIGHT BE USED

1 THERE.

2 THE COURT: OKAY. THE COURT RECEIVES INTO
3 EVIDENCE EXHIBIT 4, 6, 18, 19, 27, 28, 29, 30, 32,
4 38, 40, AND 41.

5

6 (JOINT EXHIBIT NOS. 4, 6, 18,
7 19, 27, 28, 29, 30, 32, 38, 40
8 & 41 WERE RECEIVED IN EVIDENCE.)

9

10 THE COURT: AND AS TO EXHIBIT 20, THE COURT
11 RECEIVES EXHIBIT 20 INTO EVIDENCE, BUT PLAINTIFF MAY
12 RESERVE THE RIGHT TO RAISE OBJECTION AT A LATER TIME,
13 SO IT'S SUBJECT TO PLAINTIFF'S RIGHT TO RAISE
14 EVIDENTIARY OBJECTIONS AT A LATE TIME, BUT AT THIS
15 TIME THE COURT IS ORDERING EXHIBIT 20 RECEIVED IN
16 EVIDENCE.

17

18 (JOINT EXHIBIT NO. 20 WAS RECEIVED IN EVIDENCE.)

19

20 THE COURT: IT IS NOW ABOUT 4:25 P.M.
21 SO, MR. LEVEE, DOES THAT COMPLETE YOUR
22 DIRECT-EXAMINATION OF THIS WITNESS?

23

MR. LEVEE: IT DOES, YOUR HONOR.

24

THE COURT: OKAY. THANK YOU.

25

26 AND, MS. COLON OR MR. BROWN, DO YOU HAVE ANY
CROSS-EXAMINATION FOR THE WITNESS?

27

MR. BROWN: YES, YOUR HONOR, WE DO. I

28

EXPECT IT TO BE FAIRLY LENGTHY, SO I THINK IT MAKES

1 SENSE AS OF THIS TIME THAT WE PICK THAT UP FIRST
2 THING IN THE MORNING.

3 THE COURT: WHAT -- YEAH. THAT'S NO
4 PROBLEM. WHAT'S THE -- WHAT'S YOUR TIME ESTIMATE?

5 MR. BROWN: I WOULD EXPECT PROBABLY A
6 SIMILAR AMOUNT OF TIME THAT WE HAD TODAY. PROBABLY A
7 COUPLE OF HOURS. TWO HOURS GIVE OR TAKE.

8 THE COURT: APPROXIMATELY TWO HOURS. OKAY.

9 SO WE'RE GOING TO ADJOURN THE TRIAL AT THIS
10 TIME. WE WILL RESUME THE TRIAL TOMORROW, FEBRUARY 7,
11 AT 10:00 A.M.; OKAY?

12 MR. BROWN: THANK YOU, YOUR HONOR.

13 THE COURT: THANK YOU, EVERYONE.

14 MR. LEVEE: THANK YOU.

15 MS. BURKE: THANK YOU, YOUR HONOR.

16 MR. LEVEE: YOUR HONOR, JUST TO ALERT YOU,
17 MR. BROWN AND I HAVE SPOKEN. THERE IS A CHANCE --
18 AND WE HAVE PREVIEWED THIS BEFORE -- WE'RE GOING TO
19 BLEED OVER A LITTLE BIT INTO FRIDAY MORNING. WE'RE
20 DOING OUR BEST. WE'LL HAVE A BETTER ESTIMATE FOR
21 YOU. I HAD ALERTED YOU, OR ONE OF US HAD ALERTED YOU
22 TO THIS AT THE FINAL STATUS CONFERENCE.

23 I JUST WANTED TO LET YOU KNOW I'M FAIRLY
24 CONFIDENT WE WOULD ONLY TAKE A SHORT TIME ON FRIDAY
25 MORNING, AND WE WILL TRY TO FINISH TOMORROW, BUT
26 THERE'S TWO MORE WITNESSES AFTER MS. BEKELE.

27 THE COURT: OKAY. I APPRECIATE THAT. I
28 HAVE A SHORT DAY ON FRIDAY, BUT WE'LL -- LET'S SEE IF

1 YOU CAN COMPLETE PRESENTATION OF EVIDENCE TOMORROW,
2 AND WE CAN ADDRESS THAT ISSUE AT THE END OF THE DAY
3 TOMORROW.

4 OKAY.

5 MR. BROWN: THANK YOU, YOUR HONOR.

6 THE COURT: THANK YOU FOR RAISING THAT.

7 MR. LEVEE: THANK YOU.

8 THE COURT: AND WE'RE ADJOURNED UNTIL
9 TOMORROW AT 10:00 A.M., AND WE'RE NOW OFF THE RECORD.

10 MR. BROWN: THANK YOU, YOUR HONOR.

11 MS. COLON: THANK YOU, YOUR HONOR.

12 MR. LEVEE: THANK YOU, YOUR HONOR.

13

14 (AT 4:26 P.M. THE PROCEEDING WAS ADJOURNED
15 UNTIL FEBRUARY 7, 2019, AT 10:30 A.M.)

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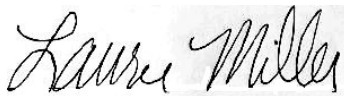
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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
DEPARTMENT NO. 53 HON. ROBERT B. BROADBELT, III, JUDGE
DOTCONNECTAFRICA TRUST,)
PLAINTIFF(S),)
VS.) CASE NO. BC607494
INTERNET CORPORATION FOR ASSIGNED)
NAMES AND NUMBERS, ET AL.,)
DEFENDANT(S).)
_____)

I, LAURIE MILLER, CSR #6457, OFFICIAL REPORTER
PRO TEMPORE OF THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY
CERTIFY THAT THE FOREGOING PAGES, PAGES 1 THROUGH 173,
COMPRISE A FULL, TRUE AND CORRECT TRANSCRIPT OF THE
PROCEEDINGS AND TESTIMONY TAKEN IN THE MATTER OF THE
ABOVE-ENTITLED CAUSE ON FEBRUARY 6, 2019.
DATED THIS 12TH DAY OF FEBRUARY, 2019.


_____, CSR #6457
LAURIE MILLER, COURT REPORTER

| | | | |
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| <p>"</p> <hr/> <p>"IS 155:8</p> <hr/> <p>#</p> <hr/> <p>#6457 4:10 60:10</p> <hr/> <p>\$</p> <hr/> <p>\$185,000 53:3</p> <p>\$198,000 130:21,25</p> <p>\$4,600 130:16</p> <p>\$403,467.08 130:18</p> <hr/> <p>1</p> <hr/> <p>1 15:16 18:14 44:24 125:14 127:8 139:23</p> <p>1,900 24:3 53:4</p> <p>1,930 24:1</p> <p>10 32:13 161:22</p> <p>10-MINUTE 71:26</p> <p>10:00 172:11 173:9</p> <p>10:30 173:15</p> <p>10:32 4:13</p> <p>10:55 17:28</p> <p>11 104:12,24 106:8, 10,13 119:24</p> <p>11:40 47:2</p> <p>12 121:14,16 153:22, 24,25,27 154:14,17</p> <p>12:00 59:24</p> <p>13 35:6</p> <p>139 151:25,27 152:13 153:18,27 154:11,16</p> <p>14 35:25 94:26,27</p> <p>140 152:23,26 153:2</p> | <p>141 152:4,8 153:5,19 154:1,12,17</p> <p>14TH 55:8,10</p> <p>15 7:2 32:13 39:16 92:25 93:18,22,25 94:5,27 132:25 137:24 168:10</p> <p>150 36:24 37:22,26 129:3</p> <p>16 21:7 27:26 36:17 73:20 96:11,15 97:12,15,18,23 99:21 105:27 106:16 118:6 170:4</p> <p>17 15:10 100:7 104:16,19,22 106:25 147:7,8 152:25 153:2 154:28 169:23</p> <p>170 22:5</p> <p>18 14:12 37:13,14 129:10 152:1,7,15 153:19 154:11 168:22 170:3 171:3, 6</p> <p>19 7:14 118:4,5 168:25,27 171:3,7</p> <p>1998 19:20</p> <p>1:30 59:21</p> <p>1:40 60:13,20</p> <p>1ST 54:5</p> <hr/> <p>2</p> <hr/> <p>2 23:8 25:28 57:11 84:27 85:4 101:23 139:15</p> <p>20 21:9 73:23 87:15 97:9 107:4,12 111:24 167:21 169:1,25 170:12 171:10,11,15,18</p> | <p>2004 102:3,24,25</p> <p>2005 45:13 75:19</p> <p>2007 22:21 23:1 52:17</p> <p>2008 52:10</p> <p>2010 51:22</p> <p>2011 52:12 145:12</p> <p>2012 23:27 26:5 53:2 77:11,19 79:28 102:10 161:1</p> <p>2013 26:16,23,26 27:17 53:26 54:5,9, 10,11,12 79:28 82:28 83:13,16 85:26 86:13,19 87:6, 11 166:25 168:5</p> <p>2014 31:20 55:8 93:8 97:9 100:11 111:25 142:14 169:1,23,25 170:3</p> <p>2015 27:17,18,19,26 28:2 55:15 66:18 87:12 90:9 115:13, 25,27 125:26 127:9 167:4 169:21 170:4</p> <p>2016 7:14,16 167:2, 21</p> <p>2017 8:15</p> <p>2018 150:18,28 151:20 154:11</p> <p>2019 4:7 9:12 15:10 60:7 173:15</p> <p>21 39:16 82:27 122:21 138:17 139:8,11 157:17,19 169:4</p> <p>22 94:28 117:28 118:1,6 126:9</p> <p>22ND 115:25</p> <p>23 115:27 119:24 142:7,17,21,24</p> | <p>24 142:26 143:11,14, 17 152:4,8 153:5,19 154:1,12,17</p> <p>24TH 54:12</p> <p>26 7:16 43:16 122:15, 16 145:6,7,8,11</p> <p>27 145:24 169:6 171:3,7</p> <p>28 121:20,24,27 122:3,16 150:28 151:19 154:11 169:9 171:3,7</p> <p>29 100:11 106:26 107:16 111:14 169:11,14 171:3,7</p> <p>2:05 73:2</p> <hr/> <p>3</p> <hr/> <p>3 36:7 37:24 127:28 128:2 129:10 137:19 142:14 168:26,28</p> <p>30 40:15 127:5 162:17,18 169:15 171:3,7</p> <p>31 124:28 127:4,6,7, 19,22,25 128:1,2 163:10,12,17</p> <p>32 40:17 169:18 171:3,7</p> <p>33 36:16 125:1,12,16 126:8 128:25,27</p> <p>331 26:1</p> <p>35 17:21 33:25 115:19,20,24 116:3 117:10,12,20,27</p> <p>36 33:25 115:21,25 116:3 117:10,12,20 121:10,14,26 122:3</p> <p>37 7:28 8:22 143:20, 26 144:1,4 145:6</p> |
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